

**COPS AND COPS AND ROBBERS:  
LOOKING AT THE THIRD PILLAR FROM A  
LIBERAL INTERGOVERNMENTAL  
PERSPECTIVE**

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# **COPS AND COPS AND ROBBERS: LOOKING AT THE THIRD PILLAR FROM A LIBERAL INTERGOVERNMENTAL PERSPECTIVE**

## **I. INTRODUCTION**

For decades, scholars have been attempting to build a theoretical framework that can explain and predict the developments of European integration. Among the most enduring have been the neo-functionalists whose longevity is, in part, due to the intimate relationship between the growth of this theoretical school and the European Community (EC)<sup>1</sup> itself. However, neo-functionalism has certain theoretical weaknesses which even the functionalists themselves admitted, among them is the very interdependence of the theory with the specific example of the EC.

In recent years, liberal institutionalism and liberal intergovernmentalism<sup>2</sup> have attempted to build on neo-functionalism and “fill in the blanks,” addressing the criticisms leveled at neo-functionalism. This theory builds on regime theory and places a greater emphasis on institutions than realism, although less than neo-functionalism. These attempts have, in my opinion, been largely successful in creating a general framework able to explain the grand steps of integration.

When the Treaty on European Union was signed in Maastricht on February 7, 1992, the Common Foreign and Security Policy (CFSP) and Cooperation in Justice and Home Affairs (JHA) were, for the first time, placed within the framework of the European institutions. However, these two “pillars” were immediately dubbed intergovernmental as compared with the “communitarized” First Pillar, creating a theoretical divide between these matters. While many innovative theories have been

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<sup>1</sup> I use the term European Community to refer to that which pre-dated the Maastricht Treaty on European Union (TEU) and which subsequently became the First Pillar of the TEU.

<sup>2</sup> I use these terms interchangeably, although there is a slight distinction. Institutionalism places a greater emphasis on the role of institutions. However, Moravcsik 1994 still considers the intergovernmental exchanges to take place within an institutional regime; I would argue that his approach is more intergovernmental when arriving at systems of cooperation and institutional when dealing with established cooperative structures.

put forward to explain the dynamics of the First Pillar, the Second and Third Pillars have largely been discussed in realist terms.<sup>3</sup>

I would argue that this has been an oversight on the part of scholars. Drawing a sharp distinction between the First Pillar and the other two has not only slowed down theoretical study of these domains, but does not do justice to the process of European integration, which is able to embrace seemingly contradictory tendencies within the same framework<sup>4</sup>. In addition, realism and neo-realism are too rigid in their views of states as unitary actors. There is also the question of whether realism is the appropriate framework; it should not be assumed that pure intergovernmentalism is the best way of handling each policy area simply because both JHA and the CFSP deal with matters of sovereignty.<sup>5</sup>

In this paper, I will look at the Third Pillar - focusing on police cooperation - from a liberal intergovernmental point-of-view. Starting from the assumption that this theoretical framework is sufficient to account for formal integration in the First Pillar, I will argue that liberal intergovernmental theory, in contrast to realism, can weave the Maastricht Treaty into the overall pattern of European integration. Liberal intergovernmentalism not only explains Community developments, it can also be used to explain why the Treaty on European Union couched the Second and Third Pillars as it did.

If, as Moravcsik claims (1994:30), liberal intergovernmentalism is offered as a *general* theory to be applied to European integration, then Justice and Home Affairs should not be an exception to the rule. Bulmer also emphasizes that any analytical approach should be able to account for all three pillars of the Maastricht construction, and not just the First Pillar. (1994) If a theory is coherent, it should not need to make reference to ad hoc considerations to remain plausible. (Johnston 1994:27-28). In fact,

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<sup>3</sup> Charles Krupnik (1996) applies neo-realist and neo-liberal theories to the Common Foreign and Security Policy, finding liberal institutionalism to be more satisfactory than neo-realism in explaining both the activity and the inactivity in this domain following the TEU.

<sup>4</sup> Weiler presents the elegant metaphor of a trinity as a more accurate description of the EU structure: one and three at the same time. (1993)

<sup>5</sup> Duff explains the inappropriateness of transposing the same intergovernmental structure from the CFSP to JHA. Justice and Home Affairs is about making internal laws, while the Common Foreign and Security Policy is more about broad policy orientations. (1997)

the constant addition of ad hoc conditions is one of the criticisms leveled at neo-functionalism by Moravcsik himself (1994).

In the brief space allotted here, I will attempt to situate Justice and Home Affairs in the theoretical framework of liberal intergovernmentalism. Discussions of this field are complicated by the need to consider non-European Union (EU) entities. For example, although it is not an EU organization, Schengen cannot be neglected when discussing Justice and Home Affairs<sup>6</sup>; the Commission has been an observer in Schengen since the beginning, a position which allows an EC institution to express its views in a non-EC organization (Cruz 1993).

The first section will recapitulate the theoretical framework drawing largely on Moravcsik (1994, 1995)<sup>7</sup>. The second section will look at cooperation in Justice and Home Affairs from a liberal intergovernmental perspective, analyzing both decisions and non-decisions. The third section will evaluate the usefulness of the theory in this field. Finally I will summarize my conclusions.

## II. LIBERAL INTERGOVERNMENTALISM<sup>8</sup>

The first tenet of liberal intergovernmentalism is the two-stage process for decision-making between member states. In the first stage, national preferences are defined by domestic pressures. Moravcsik defines these pressures as imposed by economic interdependence. (1994) This assessment is valid for most of the policies which fall under the First Pillar, but is inadequate to explain cooperation in Justice and Home Affairs. While economic considerations dominate events in the European Union, which began its existence as the European Economic Community, subsequent developments have imposed further conditions on the EU member states. Where economic interests are weak, geo-political and ideological impulses gain importance.

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<sup>6</sup> This is especially true since the British Labour victory on May 1, 1997. It seems the "Amsterdam Treaty" may include provisions drawing Schengen into the EU framework and allowing opt-outs for those who do not wish to participate. (*Financial Times* 7 May 1997)

<sup>7</sup> Others have used this as well. See Krupnick 1996, Johnston 1994, Kohler-Koch 1996, Bulmer 1994, inter alia.

<sup>8</sup> The role of this point is not to criticize liberal intergovernmentalism, but to examine whether this theory can satisfactorily explain developments in the field of Justice and Home Affairs and whether such explanations can draw the Third Pillar conceptually closer to studies of the First Pillar. However, I feel it is important to point out where I believe the theory needs further fleshing out.

(Moravcsik 1995) In the Third Pillar, it is largely non-economic players who influence national preferences.

Once preferences are formed, governments jockey for position. Relative strengths and weakness are defined by options for exit and the ability to use issue linkage skillfully. (Moravcsik 1994, 1995) In discussing the reasons for cooperation, Moravcsik relies heavily on institutionalism. Regimes reduce transaction costs and increase efficiency. Common institutions allow national governments to exchange information and share experiences; offering both expertise and trust-building. Moravcsik explains delegation or pooling of sovereignty as ways to reduce uncertainty and a mechanism for achieving linkages. (1994, 1995)

The two-level game also frees national governments from the pressures of national and subnational interest groups<sup>9</sup>. Moravcsik claims that a major reason for the delegation or pooling of sovereignty is precisely to increase government autonomy in the face of domestic interests. (1995)

While there is much to be said for Moravcsik's liberal intergovernmentalism, it is wrong to attach too little importance to the institutions themselves. I prefer the term liberal institutionalism because institutions do matter.<sup>10</sup> Although national governments are the primary players in the Third Pillar, the institutions still play a role. The Commission helps set the agenda, especially in those portions of JHA which actually fall under the First Pillar. And it should not be forgotten that the Commission President sits among the Heads of State and Government as an equal player. Conversations that take place in Brussels through institutionalized channels are shaped by institutional constraints.<sup>11</sup>

Moravcsik himself answers criticisms about the neglect of institutions by stating that liberal intergovernmentalism assumes that the European institutions have an influence on policy, especially in daily matters where the member governments have

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<sup>9</sup> I use the term "interest group" to refer to any group or association that naturally has common interests and which has influence on policy formation, regardless of whether there is a formal lobbying effort.

<sup>10</sup> Here I agree with Lindberg (1994) that there is not much need to create an absolute distinction between liberal intergovernmentalism and liberal institutionalism.

<sup>11</sup> Lindberg (1994) makes this point succinctly.

chosen to delegate power to Brussels (1995). This approach does not give much weight to the influence of institutions in Justice and Home Affairs which only grants significant access to the Council of Ministers, the supposed champion of the nation-state. However, he fails to consider the consequences of his statement that the greatest constraint on supranational autonomy comes from the willingness of national governments to delegate power and therefore does not take into account the role assumed by supranational institutions after delegation.

### **III. LOOKING AT THE THIRD PILLAR**

There is a long history of intergovernmental cooperation between EC member states in questions of Justice and Home Affairs<sup>12</sup>. The first major initiative was the TREVI Group on police cooperation established in Rome in 1976. This group has grown in size and diversified its activities from its initial focus on terrorism. Other groups have come and gone along the way, many of them having been absorbed by the European Union when the Maastricht Treaty came into effect<sup>13</sup>.

But this field has not been marked by untroubled and speedy progress. This is, in part, due to the competition between various authorities to define the appropriate framework and partnerships for action in each instance as well as clarifying the basic notion of internal security. (Bigo 1996) In fact, little has been accomplished concretely within the EU framework.

One of the few successes of Third Pillar cooperation is the adoption of the Dublin Convention which determines the member state responsible for considering an asylum application. Even Schengen, considered the laboratory for European integration in Justice and Home Affairs, suffers from a certain sclerosis: for example, the issue of hot pursuit, put in the Agreements because of the realization that criminals do not stop at borders, has been complicated by signatory states' reluctance to allow a major infringement on their sovereignty (Fode 1991).

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<sup>12</sup> It is beyond the scope of this paper to present an exhaustive list of all the fora for cooperation in policing and related areas. However, there is much literature on this subject. The reader is referred to Cruz (1993), among others.

<sup>13</sup> The direct transposition of certain pre-Maastricht bodies is obvious, the most glaring case being the K.4 Committee which is more or less identical in all but name to the powerful Coordinators Group.

Despite the absorption into the common institutional framework, cooperation in Justice and Home Affairs has not been fully communitarized, although it has been brought significantly closer to the Community structure. Raoux and Terrenoire emphasize that cooperation is meant to be carried out as mutual information and consultation between member states, who have a stronger power of initiative in this policy domain than the Commission itself. Furthermore, all actions are agreed on the basis of unanimity. (1992:132-3)

### **The Formation of National Preferences**

In an age when travel is becoming easier and information and communication technologies faster, more sophisticated, and widely available, criminal elements are often more efficient than law enforcement specialists. (*European Voice* 23-29 January 1997) To this end, a high-level group created by the Dublin European Council is slated to present a report on the fight against organized crime to the Amsterdam Summit. (*Agence Europe* 11 April, 25 April 1997)

Unlike the police, criminals are driven by economic concerns for profitability and the continued viability of their enterprises, both strong incentives to be on the cutting edge. Police, on the other hand, have no such motivations and are constrained by the bureaucracies which control their modernization. This factor is important, especially at a time when nation-states are becoming more vulnerable because of relaxed controls on the movement of people.

However, even the opening of borders and the need to compensate for fewer controls on movement was born of purer economic reasons. The Schengen idea came from the demands of truck drivers during a protest in 1985. The drivers were angry about the long delays at borders which affected their delivery schedules. (Cruz 1993) France and Germany signed the Sarrebruck Accord providing for the gradual suppression of controls at their common borders almost immediately afterward and then contacted the Benelux countries whose internal border controls had been suppressed two decades earlier.



Justice and Home Affairs is one case where, I believe the concept of spillover comes into play<sup>14</sup>. Although economic interdependence itself does not create the need to cooperate in policing the Union, its byproduct is an open market equally available to criminals.<sup>1516</sup> As stated by Birch, “political procrastination and posturing” on the implementation of effective external border controls create “advantages for the thoughtful criminal” (1992). Crime, especially organized crime and drug trafficking, is largely based on economic motives. Fernhout argues that Third Pillar objectives “are rooted in the objectives of the internal market.” He doubts whether the single market could be completed without the Third Pillar<sup>17</sup>. (1996:389)

From this point-of-view, the growth of cooperation in Justice and Home Affairs reflects Milward’s argument that European integration is just a tactic to reinforce the consensus of security and prosperity on which the European nation-state was rebuilt after the Second World War. (Milward 1992) H. Wallace extends the rescue concept to all governing structures, stating that “no one set of political authorities can command sufficient political and economic resources to project policy authoritatively across all the main areas of public policy.” (1996:15) It is also an example of what may be called “intergovernmental spillover”; forward movement is necessary to protect earlier intergovernmental decisions. (Keohane and Hoffman 1991)

Regardless of why European nation-states see cooperation as the best way to preserve internal security, opinions vary on how to achieve this goal. Without discrediting functional needs for police cooperation, Heberton and Thomas also see European-level JHA negotiations as reflecting medium- and long-range strategic goals

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<sup>14</sup> For a skeptical view of increased cross-border crime, see Chapter 6 of Heberton and Thomas (1995).

<sup>15</sup> Schutte argues that the Schengen Accords were not made necessary by the opening of national borders. Instead, he states that the provisions included in Schengen simply reflect the preoccupations of the negotiating states, reflecting their particular problems and the areas where they have the most difficulty fighting crime. (1991) His prediction that had Italy and Spain been involved, stolen art objects and terrorism would have, respectively, been added to the list was supported when terrorism was listed in Article K.1.9; stolen art objects could be included under “other serious forms of international crime.” The intensity of preferences helps explain why there are two EU drug agencies: the Europol Drugs Unit and the EC Drugs Observatory while there is no operational European police force.

<sup>16</sup> Donner argues that the lowering of borders and the weakening of national abilities to cope with crime, migration, and law enforcement are coincidental and not causally linked.

<sup>17</sup> Donner disputes this claim, saying that single market goals may never “prove to be a sufficient and fertile basis for integration in the area of Justice and Home Affairs.” (1996:401)

about the shape and scope of future cooperation. (1995) Competition between various national visions of how to go about police cooperation slows down the process. (Bigo 1996) Schengen, originally seen as a laboratory for wider cooperation has, at times, been seen as an impediment, especially by countries like the UK which have preferred to remain outside.

Reasons for favoring one model of cooperation over another are multiple. Some professionals see the Third Pillar structure as clearly strengthening the nation-state, not superseding it with a supranational organization. Roger Birch, chairman of ACPO's international committee argues that the Maastricht approach to police cooperation is welcome because it focuses on intelligence and practical cooperation, not on creating a top-heavy "legally fog-bound" supranational detective agency. (1992:121)

In some cases, a country may be more interested in assuring that it is not marginalized by the cooperative structure; coalition-building concerns may actually override issues of substance. (Bigo 1996) A member state's federalist or nationalist ambitions may be instrumental in determining what level of cooperation is viewed as acceptable. Shifts in national positions over time will effect the framework of cooperation.<sup>18</sup>

Within member states, various governmental agencies and institutions have their own vision of Justice and Home Affairs developments. Different interests battle to form the national position<sup>19</sup>. (Bigo 1996, H. Wallace 1996) Shifts in domestic power relationships can lead to shifts in the national position. The specific arguments behind relative positions fall outside the scope of this paper. Power struggles between law enforcement agencies can have a further retarding effect on the application of cooperative measures. Even at the national level, competition between police forces may create an atmosphere of distrust leading to gross mistakes, such as in the Belgian

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<sup>18</sup> A fuller discussion of the national positions of the EU member states can be found in Bigo 1996.

<sup>19</sup> The state does not have to be a unitary actor, as Risse-Kappen implies, for an official national position to be presented. (1996) It is logical that representatives who do not toe the line may well be recalled. Lord Cockfield's term in the European Commission, for example, was not extended by the British government, largely because he was seen as having "gone native."

Dutroux pedophilia case which has raised serious questions about how non-cooperation can affect practical elements of law enforcement.

Hebenton and Thomas point out the need to understand what they call “the geometry of forces at national level.” (1995:41) They also caution that national relationships with local and regional levels are important and should be carefully studied to see how interests are formed, especially since some member states’ internal dynamics are misunderstood. The way each of these levels participate in European police cooperation affects the effectiveness of policy coordination. (Hebenton and Thomas 1995)

I disagree with Risse-Kappen’s claim that liberal intergovernmentalism assumes fixed national interests before the beginning of negotiation. (1996) The EU is an ongoing process, not a one-off negotiation. Each time players come to the table, they have the opportunity to start from a new position if that best serves their national interest. Second, “national preferences” may not be one narrowly defined option but a range of possible options; the final strategy will depend, in part, on which option in its palette seems the most likely to be useful.

### **Playing the Two-Level Game**

The two-level game - a concept particularly used by liberal institutionalists (H. Wallace 1996) - allows national governments and administrations to increase their autonomy vis-à-vis national and sub-national interest groups. (Putnam 1988) In recent years, national governments have also had to battle the influence of the European institutions and interest groups as well as the pressure from domestic groups. However, a two-level strategy can also be to the benefit of interest groups which now have two flanks of attack; not surprisingly a group’s resources are important in determining its ability to play simultaneously at more than one level.

Cooperation in Justice and Home Affairs has helped modernize the police structures of the EU member states. Central data banks have not only improved access to information but have also forced many of the member states to review their legislation on the privacy of information regarding individuals. Coordination structures have been re-examined as have the actual operational structures of police forces. As

Fode predicted in 1991, "Irrespective of the extent to which the primary objective will actually be achieved, the process itself will provide a kind of extra benefit. It automatically, as it were, compels each member state to take a step backwards in order to re-assess in a different light its own national structures, functions and policies." (61)

Of course, there is a countervailing force in the two-level game. While member states are trying to escape the forces of domestic interests, the new structure may, in some cases, underline or increase the power of certain sectors. For example, the transformations of airports were delayed by disputes between shareholders of airports and governments over who was responsible for the costs. (Cruz 1993) According to the normal two-level game principle, the governments should have been able to use the ideological power of cooperation and the opening of borders to overcome such objections. However, economic operators were instead indirectly endowed with the power to block action regarding the policing of national borders. In many cases, national governments were only able to wrest this decision-making power back through large subsidies for the transformations.

A new two-level game also exists, to a certain extent between the member states and the European institutions as has been evidenced by the power struggle taking place around the Intergovernmental Conference; not only has the institutional balance of power been the subject of ongoing discussions, but simply deciding who had a place at the negotiating table reflected differences over the roles of the institutions. In the area of Justice and Home Affairs, the institutions have their own view which they try to inject into the debate. (Bigo 1996)

Brussels serves an important function as a meeting place for national interests, and is not just made up of European institutions, but numerous interest groups as well. (Bulmer 1994) In addition to interacting with the institutions, these groups talk with one another, sharing expertise and information which can increase the pressure put on national governments; information exchanges can increase the leverage interest groups have when dealing with national governments. While there may not be as many

interest groups in the field of Justice and Home Affairs,<sup>20</sup> the ones that exist do play the game.

### **The Relative Weakness of European Institutions**

Although the institutional arrangements of the Third Pillar are not described in extensive detail, perhaps purposely, there are certain basic observations which can be made. With the exception of the Council of Ministers, the European institutions are only weakly involved in Third Pillar affairs. However, the Council itself is fragmented into at least two of its manifestations when dealing with Third Pillar issues. (Bulmer 1994) Furthermore, although the Council draws up Third Pillar conventions; officially, it merely notes that the member states have agreed among themselves and does not actually legislate. (Fernhout 1996)

The Commission is subject to the widest variation in power. Although it shares the power of initiative in six out of nine areas of common interest, the Commission is completely excluded in three areas, including - oddly enough - cooperation in customs matters. On the other hand, it maintains the monopoly of initiative in Article 100c, that is regarding the visa policy.<sup>21</sup> The Commission has been very cautious in using this inconsistency to expand its powers, perhaps fearing a backlash by member states if it becomes too ambitious. Instead, the Commission has focused on coalition tactics with the other institutions.

During an EP question time in 1991, Commissioner Bangemann expressed frustration about the struggle to win European Commission involvement in intergovernmental groups dealing with interior affairs, which he deemed necessary because of the intimate link with single market goals. He urged Members of the Parliament (MEPs) to make better use of their ties with national MPs to speed the ratification of Schengen. (Cruz 1993)

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<sup>20</sup> Risse-Kappen himself allows that national governments themselves may enjoy a higher degree of autonomy from societal interests in JHA than in other policy areas.

<sup>21</sup> Under the TEU, the common visa policy only governs short-term visas of less than three months. Anything longer remains the domain of the nation-state, despite the fact that open borders imply that people granted longer residence in one Schengen state may freely travel to the others. (Cruz 1993)

Despite its frustration, the Commission enjoys a privileged position compared with other European institutions. The European Parliament should be kept abreast of developments, but has often found itself left completely uninformed. A request by the EP Committee on Civil Liberties in April 1992 for an organigram of all the intergovernmental bodies involved in Justice and Home Affairs had still not been answered by the Council a year later (Cruz 1993). However, the Parliament has one important access to power in JHA; the EP must approve the budget for administrative and - when the Council of Ministers decides the Union should bear them - operational costs. (Quermonne 1992) This entrée could, in future, be used by the EP to wedge open the door to full information and perhaps participation in Third Pillar decisions.

The member states have been reluctant to give the European Court of Justice (ECJ) any access, creating an outcry from civil rights groups and others. In a 1991 decision, the Dutch Raad van State wondered why the ECJ could not be made competent to supervise at least some provisions of the Schengen Accords, noting that other extra-EC agreements named the ECJ as the competent judicial authority. (Cruz 1993) Even in a fully intergovernmental structure, the Court could play an important role as a dispute mediator. (Fernhout 1996)

The Lower House of the Dutch Parliament adopted a resolution to grant the ECJ jurisdiction over interstate disputes and to interpret the 1990 Schengen Agreement's provisions when asked to do so by national courts, as well as to supervise conformity with the European Convention on Human Rights and the UN Convention on the Status of Refugees. The Dutch Minister of Justice promised to transmit these demands to the other Schengen partners without much optimism, citing asylum decisions as too sensitive an issue for the Schengen countries to surrender to a supranational authority. (Cruz 1993) Again, jurisdiction over budgetary matters could open the door for a Court role in the Third Pillar. (Weiler 1993)

Even when power is given over to cooperative institutions in theory, implementation problems plague cooperation in Justice and Home Affairs, just as in the First Pillar as well. In the case of Schengen, France's reservation is a perfect example. Often attributed to the terrorist problems which confronted the country in 1995,

France's reticence actually dates back as early April 1993 when French Minister for European Affairs, Lamassoure remarked that France would not suppress internal borders until its partners effected the same level of controls as the République; this was justified because the Supplementary Agreement was not to enter into force until the necessary conditions for application existed in all signatory states and external border controls had become operational. (Cruz 1993)

Weiler explains the structure of the Third Pillar by stating that the member states were/are suspicious of the Community institutions. On the one hand, member states felt the institutions were not up to the task; on the other, they were afraid the institutions would do quite well, but would focus on Community - not member state interests. But, he argues convincingly, the three-pillar structure was not necessary, and this separation could have been created within the EC framework (Weiler 1993)

#### **IV. EVALUATING THE APPLICATION OF LIBERAL INTERGOVERNMENTALISM IN JHA**

Any evaluation of a theory's application to Justice and Home Affairs can only be a snapshot. Treaty reforms will shift the structure of cooperation so that theoretical appropriateness will not remain constant. Even between formal treaty revisions, things change. Grosheide points out that despite the fact that cooperation in Justice and Home Affairs has been intergovernmental over the last few decades, there has been a gradual decline in the "strictly national character of criminal and procedural law" (1991:71); in other words, sovereignty has gradually been pooled and shared, even before the Schengen conventions or the entry into force of the Treaty on European Union.<sup>22</sup> On the other hand, one could argue that Justice and Home Affairs is the most intergovernmental part of the Maastricht Treaty; unlike the Common Foreign and Security Policy, there is no ambition to common policy, only cooperation on common interests. (Vidal 1994) And, as Gimbal points out, there is no mechanism to punish member states who do not respect common positions or actions taken under the Third Pillar. (1994)

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<sup>22</sup> O'Keeffe and Twomey look at this issue in terms of transferring competences, but not sovereignty. (1994)

### **Predicting Cooperation in JHA**

In order to evaluate the effectiveness of liberal intergovernmentalism to predict active cooperation in Justice and Home Affairs, a distinction should be made between formal and informal integration. Formal cooperation takes place when government authorities deliberately act to integrate; this tends to be a discontinuous process and chiefly involves major historical decisions. (W. Wallace 1990) It is on this type of decision that Moravcsik's intergovernmentalism focuses. (1994) Informal integration is the stuff of daily practice: intensive patterns of interaction that develop regardless of formal government decisions. (W. Wallace 1990) Here the link is weaker and relies largely on the theory's institutionalist aspects.

Grosheide concedes that measures to beat increasingly cross-border crime could continue along intergovernmental lines, but he argues that this method is often laborious, slowing attempts to fight crime. He also questions the ability of national law to deal with purely international crime such as fraud against the European Community. (1991) Fernhout adds his doubts about the use of the EU's single institutional framework, claiming that the situation has actually been complicated by the addition of another decision-making layer. (1996)

Coming back to the reinforcement of the nation-state, cooperation within the framework of the European institutions has several advantages. The strictly intergovernmental cooperation that took place before Schengen and the Treaty on European Union were hidden, with little or no transparency. This allowed close policy networks to emerge, but easily escaped control, even by states. Fijnhaut describes the way Interpol operates as "fraternal." (1991:78) Nation-states actually regained some of their control by formalizing police links through the Third Pillar of the Maastricht Treaty. All of this corresponds with liberal intergovernmentalism's belief that EU structures are used to help states cope when their autonomous tools fail them.

Analysts appreciated the credible threat of exclusion created by the Schengen advance guard and pointed out that it would have a significant effect on cooperation in Justice and Home Affairs: "The mere fact that five, six or perhaps eight out of twelve member States from the very outset of a negotiation process can present a complete



common draft will, inevitably, have an impact on negotiation positions even within such fora which, like TREVI, are based upon the principle of consensus.” (Fode 1991:62) Such developments are in line with the likely determinants Moravcsik uses to predict cooperation. (1994)

There has been a certain momentum drawing ever more member states into JHA cooperation. Not only has the membership of Schengen grown, but JHA itself was brought into the Community framework through the common institutional framework when the Third Pillar was created. Negotiations in the Intergovernmental Conference now seem to indicate that Schengen itself will be housed within the EU framework - with appropriate opt-outs - increasingly associating the non-participating member states.

### **Inaction and Inertia**

Much of the inaction in Justice and Home Affairs can be attributed to the existence of unanimity and mismatched national ambitions. The UK's dislike for supranational institutions has been strong. Duff points out that many measures, including the establishment of Europol, have been held up because the UK - standing alone against the other member states and the institutions - refuses to grant the ECJ jurisdiction in JHA matters. Three directives meant to make Article 7a's free movement of people a reality are frozen because they depend on the Convention on the Crossing of External Borders, blocked due to a British-Spanish dispute over Gibraltar. (1997)

National preferences have played a strong role. Fijnhaut explains at length the effect of Germany's position on the retarded development of European policing. Although some elements in Germany supported the Europeanization of policing, he points out a fundamental indecisiveness between influential Germans on this question. In the end, Fijnhaut considers the conversion of certain German elements to be one of the major reasons why police cooperation began to be “communitarized.” However, groups in other countries such as France and the UK also expressed resistance. Nonetheless, European police *confederations* have long supported the creation of a European policing agency to facilitate their work. (1991) It seems that this is one area where the political elites were already very capable of acting autonomously of the

professional interests within their borders without a second level to free them from domestic interests.

Moravcsik argues that Commission power, where it does not have an agenda-setting function, could only result from “the exploitation of technical, strategic or political information which, hypothetically, places it in a privileged position to provide proposals, mediate negotiations, or mobilize domestic constituencies” (1995:616). Seen from this view, it is natural that the European framework has not proved to be highly effective for catalyzing action in JHA. Since action in this field has always taken place within an intergovernmental, and often inter-agency framework, the Commission does not have the same monopoly of information it has in many other areas. Duff reinforces this argument, saying that the EU’s unimpressive record in Justice and Home Affairs is not surprising because the Commission has little or no power to “articulate a common interest and initiate proposals.” (1997:129)

There has been more Commission activity in the field of immigration and asylum, in part, because there are clear interest groups acting in this field which pressure the Commission and provide it with greater information than in other Third Pillar issue areas. The Commission also has a larger scope for action because certain aspects of these policies fall within the First Pillar through Article 100c. In addition, a longer tradition of intergovernmental cooperation in these areas means that a greater trust in the cooperative regime has been established. Fernhout says that other aspects of the Third Pillar - until recently the exclusive domain of national governments - is politically unrealistic because governments do not have the operational experience to convince them of the benefits of doing so. (1996) The importance of member state confidence in cooperative structures was developed by regime theorists, whose work figures prominently in Moravcsik’s approach. (1994)

Moravcsik also claims that “intergovernmental demand for policy ideas, not the supranational supply of those ideas” is what drives integration. (1995) This would explain the hesitance of the Commission to present its draft convention on the admission of third country nationals - although it is commonly known that this document has been drawn up. One of the reasons for holding back the draft is the

conviction that it will only be refused and could be seen as an attempt to push the Commission's limited competences forward. This is a case of supranational supply waiting for the intergovernmental demand to catch up.

Donner's explanation is similar: inertia in this field is a result of political factors - most notably disagreement about the purpose and scope of cooperation and the use of Community law. (1996) Along these lines, H. Wallace considers the Maastricht debate over the three-pillar structure to have been about philosophies of integration as well as reflecting a power struggle between the Commission and the Council. (1996)

According to liberal intergovernmentalism's institutionalist leanings, integration goes forward when it is the best policy alternative. Any time the goal can be better achieved outside the institutional framework, regime theory would predict that it should do so. (H. Wallace 1996) Formalizing links between police forces may actually render their cooperation less effective because it becomes too bureaucratic and rigid to meet the demands of daily operation, especially in politically sensitive areas. (Fode 1991) In such cases, it is natural that Europeanization creeps forward. Since the member states are nervous about using Community structures for JHA cooperation, rendering Community action easier and more effective could actually drive cooperation outside the EU structure. (Donner 1996)

There are times when an intergovernmental framework is simply more appropriate than a supranational one. It is possible that national governments bargaining among themselves can better preserve democratic control over a policy area than a supranational body. (Risse-Kappen 1996) With little direct protection of civil rights at the EU level, Justice and Home Affairs may well be a matter for national governments who can be held accountable for abuses rather than the EU. Certainly national parliaments, whose power to control government actions and cooperation in JHA has decreased without a corresponding increase of control at the EU level, might share this concern. (Fernhout 1996)

The UK's lack of interest in Schengen can also be traced to the effectiveness of policy alternatives. Unlike most of its partners, the United Kingdom is an island; its natural borders are stronger than open, commonly policed borders are likely to be. A

new compromise bringing Schengen into the EU framework might allow the UK and Ireland to accept some provisions of the pact without lowering their borders. In this way, these two countries could move closer to the rest of Europe on, for example, information and cooperation mechanisms without compromising their strong natural borders.<sup>23</sup> (*Financial Times* 7 May 1997)

According to Moravcsik, the interests which shape integration in the Community pillar are defined in economic terms. It is important, then that Duff points out that the intergovernmental character of the Third Pillar is in contrast with the “supranational driving force that it enjoys in economics.” (1997:127) But Moravcsik accounts for this difference when pointing out that other interests gain importance where economic motivations are weak. (1995)

Inaction in Justice and Home Affairs in some cases reflects Scharpf’s joint decision trap. When negotiations do not take place in a problem-solving framework, results are suboptimal. Lack of innovation in this domain follows Scharpf’s predictions of the inertia resulting from unanimous decision-making. (1988) Because the Third Pillar is isolated from the majority of EU policies, linkages cannot be introduced to move things along. However, this may imply that eventual decisions will be of a higher quality than if linkage were an option. The problem is waiting for any decisions to be reached; thus far, European partners are even having trouble agreeing, literally, what ground they should cover.

### **Defining the Common Territory**

One of the difficulties in police cooperation has been the definition of the common territory to police.<sup>24</sup><sup>25</sup><sup>26</sup> Member states have jealously guarded their territory and their borders which are symbolic of sovereignty. Unrestricted policing power is one of the most potent elements of sovereignty; to surrender this monopoly of power is to

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<sup>23</sup> This compromise was predicted very accurately in Fernhout 1996.

<sup>24</sup> Smith 1996 presents an extensive thesis on the importance of establishing and maintaining EU boundaries for strategy formation *inter alia*.

<sup>25</sup> The Irish Presidency recognized the need to define a common JHA space, and consequently introduced an “Area of Freedom, Security and Justice” in the draft treaty presented in December 1996.

<sup>26</sup> The necessity of creating a European criminal and judicial jurisdiction was discussed at length in a two-day debate organized by the EP’s Committees on Civil Liberties and Budgetary Control in April of this year. (*Agence Europe* 19 April 1997)

surrender a portion of national independence, (Diederich 1994) so despite Europeanization, "The public space remains fragmented into national units." (Laffan 1996:93) Donner argues that no policy harmonization can be effective as long as the question of territorial jurisdiction is outstanding. (1996)

Regardless of delays and hesitations, sovereignty has been partially relinquished in the sphere of policing. The clear lines of national territory have been eroded by international crime, but strong lines have not yet been drawn at the European level. Raoux and Terrenoire go so far as to declare that Maastricht created the judicial and policing space necessary as a corollary to the suppression of internal borders. (1992)

The lowering of internal borders is meant to be linked to compensatory measures, including the strengthening of common external borders, but several problems have arisen. The Convention on the Crossing of External Borders has been held up by a dispute between the UK and Spain over whether Gibraltar indeed makes up a part of EU territory. Until this debate is resolved, the geographical extent of the common territory to police is undefined.

National boundaries are not just about geographical limitations, but are about political and sociological identities. Laffan explains that European integration has disturbed traditional national political spaces, but because of the economic focus of integration, the EU has no cohesive political identity. "Economic integration bore the burden of building a polity. Yet the Union has great difficulty in breaking free of its economic shackles: market integration, 'a level playing pitch', and the criteria of economic rationality form the leading constitutional values of this system....There is thus a disjuncture in the EU system between economic and political integration." (1996:92-93)

The creation of a new European territory is particularly important in the area of Justice and Home Affairs because of the intimate link with the policing function. Some analysts have questioned whether such a function can exist without a state. (Bulmer 1994) For it is certain that the EU is not a state. In its ever shifting forms, there are moments when the EU appears to be very similar to a state, but it is not a polity, and may never be (H. Wallace 1996); it is perhaps most appropriate to think of the Union

as a “politing” - a process of governing carried out between states and assisted by institutions, but never a finished institutional system.

Even when national definitions are overcome, it is difficult to reach a common definition of which greater territory should be policed. Is Schengenland the common space? The European Union? Greater Europe? The international arena? Each defined territory comes with its own institutional framework for police cooperation.<sup>27</sup> This multiplication has long been a source of duplication and bureaucracy, and harmonization of these structures may improve the efficiency and effectiveness of police cooperation between nations.

A new problem is developing concerning non-geographical territory that needs policing. Heberton and Thomas address the importance of the computer revolution for the evolution of police techniques and cooperation, but they do not consider new technologies as an extension of the territory to police. But cyber-crime is a growing phenomenon - whether it be child pornography, fraud or money laundering. Such abuse of information technology is usually a cross-border affair, raising new questions for transnational police cooperation.

## V. CONCLUSIONS

Liberal intergovernmentalism is a useful tool for better understanding developments in cooperation on Justice and Home Affairs. The two-step process of preference formation and negotiating helps explain crucial elements such as the timing for decisions - for example, Schengen is the result of a fundamental shift in German position and domestic pressure on the French and German governments by economic players.

Once cooperation is identified as a desirable goal, its mechanics are clearly explained by the theory's institutionalist leanings. Relative power, the intensity of preferences, and the credibility of threatened exclusion are powerful factors which have shaped cooperation on Justice and Home Affairs. The structure of the Third Pillar

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<sup>27</sup> Birch advocates greater reliance on Interpol, especially as it is not constrained by the geographical limits facing the European organizations; Switzerland, for example, is at the heart of the EU but only has access to Interpol. (1992)

reflects national philosophies and long-term goals for integration, but also comes from an incomplete trust in the cooperative regime.

Finally, the two-level game has allowed governments to reinforce their bargaining position. National police structures are modernizing themselves. But a new phenomenon is occurring, which Moravcsik did not take into account. Other interests are becoming skilled players at the two-level game. The European institutions are using coalitions with one another and interests to incrementally increase their power. The bargaining power of other players is increasing because of new opportunities and EU-wide networks which provide greater information and expertise.

## REFERENCES

- Agence Europe* 11 April 1997
- Agence Europe* 19 April 1997
- Agence Europe* 25 April 1997
- Bigo, D. (1996) *Polices en Réseaux: l'expérience européenne*. (Paris: Presses de la Fondation Nationale des Sciences Politiques)
- Birch, R. (1992) "Why Europe needs Interpol", *Police Review*, January, pp. 120-121
- Bulmer, S.J. (1994) "The Governance of the European Union: A New Institutional Approach", *Journal of Public Policy*, Vol. 13, No. 4, pp. 351-380
- Bulmer, S. and Scott A. (eds.) (1994) *Economic and Political Integration in Europe: Internal Dynamics and Global Context* (Oxford: Basil Blackwell Ltd)
- Cameron-Waller, S. (1994) "Interpol's Point of View". In Pauly, A. (ed.) *Schengen en panne*. (Maastricht: Institut européen d'administration publique), pp. 101-110
- Cruz, A. (1993) "View of a Europe without borders". CCME briefing papers, No. 12, pp. 1-31
- Diederich, F. (1994) "La coopération policière". In Pauly, A. (ed.) *Schengen en panne*. (Maastricht: Institut européen d'administration publique), pp. 69-88
- Donner J.P.H. (1996) "Comments on the article by R. Fernhout" in Winter, J.A. et al. (eds.) *Reforming the Treaty on European Union – The Legal Debate*. (The Hague: T.M.C. Asser Instituut)
- Duff, Andrew. (1997) *Reforming the European Union*. (London: Federal Trust)
- European Voice* 23-29 January 1997
- Fernhout, R. (1996) "Justice and Home Affairs: Immigration and Asylum Policy – From JHA co-operation to communitarisation" in Winter, J.A. et al. (eds.) *Reforming the Treaty on European Union – The Legal Debate*. (The Hague: T.M.C. Asser Instituut)
- Fijnhaut, C.J.C.F. (1991) "The 'Communitarization' of Police Cooperation in Western Europe". In Schermers, H.G. et al.(eds.) *Free Movement of Persons in Europe: Legal Problems and Experiences* (Dordrecht: Martin Nijhoff Publishers), pp. 75-92
- Financial Times* (7 May 1997) "EU Schengen accord near"
- Fode, H. (1991) "Cooperation on Law Enforcement, Criminal Justice and Legislation in Europe". In Schermers, H.G. et al.(eds.) *Free Movement of Persons in Europe: Legal Problems and Experiences* (Dordrecht: Martin Nijhoff Publishers), pp. 61-69
- Gimbal, Anke (1994) "Innen- und Justizpolitik – die dritte Säule der Europäische Union" in Weidenfeld, W. (ed.) *Maastricht in der Analyse*. (Gütersloh: Verlag Bertelsmann Stiftung)
- Grosheide, J.H. (1991) "Cooperation in the Field of Criminal Law, Police and Other Law Enforcement Agencies". In Schermers, H.G. et al.(eds.) *Free Movement of*



- Persons in Europe: Legal Problems and Experiences* (Dordrecht: Martin Nijhoff Publishers), pp. 70-74
- Guimezanes, N. (1994) "La Convention de Schengen: une présentation française". In Pauly, A. (ed.) *Schengen en panne*. (Maastricht: Institut européen d'administration publique), pp. 5-42
- Hebenton, B. and Thomas, T. (1995) *Policing Europe: Co-operation, Conflict and Control*. (New York: St. Martin's Press)
- Hrebly, V. (1994) *La Libre circulation des personnes : Les accords de Schengen* (Paris : Presses Universitaires de France)
- Irish Presidency of the Council of the European Union. (1996) *The European Union Today and Tomorrow: Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future*. CONF 2500/96. (Brussels: Council of the European Union)
- Johnston, D. (1994) *The Idea of a Liberal Theory: A Critique and Reconstruction*. (Princeton, New Jersey: Princeton University Press)
- Keohane, R. & Hoffman, S. (1991) "Institutional Change in Europe in the 1980s" in Keohane, R. & Hoffman, S. (eds.) *The New European Community*. (Oxford: Westview) pp. 1-40.
- Kohler-Koch, B (1996) "The Strength of Weakness: The Transformation of Governance in the EU". In Sustarsson, S. and Lewin, L. (eds.) *The Future of the Nation-State* (London: Routledge)
- Krupnick, C. (1996) "Between Neorealism and Liberal Institutionalism: The CFSP and European Security Cooperation" in *Revue d'Intégration Européenne/Journal of European Integration* Vol. XIX, Nos. 2-3, Winter/Spring, pp. 143-164
- Laffan, B. (1996) "The Politics of Identity and Political Order in Europe", *Journal of Common Market Studies*, Vol. 34, No. 1, March, pp. 81-102
- Lindberg, L.N. (1994) "Comment on Moravcsik". In Bulmer, S. and Scott A. (eds.) *Economic and Political Integration in Europe: Internal Dynamics and Global Context* (Oxford: Basil Blackwell Ltd) pp. 81-85.
- Milward, A.S. (1992) *The European Rescue of the Nation-State* (London: Routledge)
- Monar, J. et al. (eds.) (1993) *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic*. (Brussels: Interuniversity Press)
- Moravcsik, A. (1994) "Preferences and Power in the European Community: A Liberal Intergovernmental Approach". In Bulmer, S. and Scott A. (eds.) *Economic and Political Integration in Europe: Internal Dynamics and Global Context* (Oxford: Basil Blackwell Ltd), pp. 29-80.
- Moravcsik, A. (1995) "Liberal Intergovernmentalism and Integration: A Rejoinder", *Journal of Common Market Studies*, Vol.33, No. 4, pp. 611-628
- O'Keeffe, D. and Twomey, P.M. (eds.) (1994) *Legal Issues of the Maastricht Treaty*. (London: Chancery Law Publishing)
- Pauly, A. (ed.) (1994) *Schengen en panne*. (Maastricht: Institut européen d'administration publique)

- Putnam, R.D. (1988) "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organization*, 42, 427-460
- Quermonne, J.-L. (1992) "Trois lectures du traité de Maastricht: Essai d'analyse comparative", *Revue Française de Science Politique*, Vol. 42, octobre, pp. 802-818
- Raoux, A. and Terrenoire, A. (1992) *L'Europe et Maastricht : le pour et le contre*. (Paris: le Cherche midi éditeur)
- Risse-Kappen, T. (1996) "Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union", *Journal of Common Market Studies*, Vol. 34, No. 1, March, pp. 53-80
- Scharpf, F. (1988) "The Joint-Decision Trap: Lessons from German Federalism and European Integration", *Public Administration*, Vol. 66, pp. 229-78
- Schermers, H.G. et al.(eds.) (1991) *Free Movement of Persons in Europe: Legal Problems and Experiences* (Dordrecht: Martin Nijhoff Publishers)
- Schutte, J.J.E (1991) "Criminal Law and the European Community". In Schermers, H.G. et al.(eds.) *Free Movement of Persons in Europe: Legal Problems and Experiences* (Dordrecht: Martin Nijhoff Publishers), pp. 93-96
- Smith, M. (1996) "The European Union and a Changing Europe: Establishing the Boundaries of Order", *Journal of Common Market Studies*, Vol.34, No. 1, March, pp. 5-28
- Sustarsson, S. and Lewin, L. (eds.) (1996) *The Future of the Nation-State* (London: Routledge)
- Vidal, J. (ed.) (1994) *Mise en oeuvre du traité de Maastricht et construction européenne*. (Paris, La Documentation Française)
- Wallace, H. (1996) "Politics and Policy in the EU: The Challenge of Governance" in Wallace H. and Wallace W. (eds.) *Policy-making in the European Union*. (Oxford: Oxford University Press)
- Wallace H. and Wallace W. (eds.) (1996) *Policy-making in the European Union*. (Oxford: Oxford University Press)
- Wallace, W. (1990) *The Transformation of Western Europe*. (London: Pinter/Royal Institute of International Affairs)
- Weidenfeld, W. (1994) *Maastricht in der Analyse*. (Gütersloh: Verlag Bertelsmann Stiftung)
- Weiler, J.H.H. (1993) "Neither Unity nor Three Pillars – The Trinity Structure of the Treat on European Union" in Monar, J. et al. (eds.) *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic*. (Brussels: Interuniversity Press)
- Wincott, D. (1995) "Institutional Interaction and European Integration: Towards an Everyday Critique of Liberal Intergovernmentalism", *Journal of Common Market Studies*, Vol.33, No. 4, pp. 597-609
- Winter, J.A. et al. (eds.) *Reforming the Treaty on European Union – The Legal Debate*. (The Hague: T.M.C. Asser Instituut)