

## Section 12

### *Post-Modern Foreign and Security Policy in the Enlarged European Union*

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#### **SECURITY *RE*-DIVIDED: ESDP AND JHA ARE DISTINCT**

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#### **ABSTRACT**

The objective of the paper is purposively ‘conservative’. We demonstrate that the abolishment of allegedly anachronistic concepts, such as internal vs. external security, is of doubtful heuristic value and thus often premature. Instead, we argue that security policy as a practice functions according to different logics, whereas our ‘case’ is a comparison of the European Union’s Security and Defence Policy (ESDP) and Justice and Home Affairs (JHA). While we, then, criticise the Security Governance approach for severe theoretical lacks, we orient our empirical examination towards the distinction between making and implementing an agreement as the ‘hub’ of the policy-making process. Firstly, rule-setting asks how decisions are made in the two domains: with or without the inclusion of outsiders. Secondly, we analyse whether implementation is ensured through management and enforcement mechanisms. The result of this empirical analysis is unambiguous: the political actors follow significantly different rules in the two domains. This, in turn, implies not to abandon conceptual tools, such as regime theory or law enforcement – even though they might be under continuous stress from a rapidly changing environment. There are still ‘ideal-typical’ differences in a strictly Weberian sense: internal and external security may be closely linked, such as the opposite sides of the same coin, but they need to remain separated for further empirical analyses.

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## 1) INTRODUCTION

Every social scientist appears to live in a world of flux. Since Heraclitus we know that we will never have the opportunity to step into the same river twice. It is thus not particularly puzzling that such an amount of literature is produced on Europeanisation, globalisation, democratisation, privatisation, etc. Besides the world's financial markets, security represents apparently the second-best candidate for the 'apologists of change': "The Europeanisation of security has been the great political revolution of the late twentieth and early twenty-first centuries" (Webber et al. 2004: 19). This paper will pose not so much the question in how far these assessments are suitable. Instead, it tackles one of the corollaries of those statements and asks whether security policy as a practice really leads to such a vanishing of borders that traditional concepts become useless: in how far does internal and external security policy actually merge? What implication does this have for the study of security policies?

Indeed, most contemporary debates of both academics and practitioners on European security policy build on the premise that we have witnessed significant changes in this domain during the two previous decades. Ferruccio Pastore speaks – with reference to Macchiavelli – of 'reconciling the prince's two arms' (Pastore 2001), and recently German chancellor Angela Merkel said a differentiation between internal and external security is back a number.<sup>1</sup> Policies once developed for the inside only are now designed with a view to their external applicability (European Council 1999: point 59). The Cold War threats are gone and have been replaced by less visible, more complex and increasingly fragmented security problems – reaching from transnational crime to terrorism to failed states and the proliferation of weapons of mass destruction (WMD) (e.g. European Security Strategy 2003; Cronin 2002/3; Zelikow 2003). For instance, one of the most prominent scholars argues that "internal and external security (traditionally two separate domains that were essentially the concern of different institutions, police and army), now appear to be converging regarding border, order, and the possible threats to identity, linked to (im)migration" (Bigo 2001: 91).<sup>2</sup>

Being faced with this constant stream of new real-world challenges, the discipline's reaction in most of these cases is uniform: we need to change our concepts. In this case, traditional national security policy must be replaced by some sort of new 'security governance' and the most-likely case to observe these processes is 'post-national Europe' (Habermas 1998). This new sort of governance is characterised by new actors, new issues and, consequently, altered policy-making processes (e.g. Krahnemann 2003; Grabbe 2000: 520; Lavenex 2004: 694). What these scholarly debates, however, entirely miss, is a *comparative* analysis of policy-making in 'new' and 'old' security issues. In other words, the proclaimed changes are sometimes assumed, often described, but hardly analysed.

In contrast, we argue that this tendency to incorporate essentially everything into the study of security policy comes at the expense of conceptual clarity and ultimately explanatory leverage. The objective of this paper is, therefore, to demonstrate that this abolishment of allegedly anachronistic concepts is often premature. Hence we will critically contribute to the debate on '*new* modes of governance' in European security. We question one widespread 'wisdom' of contemporary scholarship that is the alleged

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<sup>1</sup> See, 'Die alte Trennung von innerer und äußerer Sicherheit ist von gestern', cited from: <http://www.tagesschau.de/aktuell/meldungen/0,1185,OID7040132,00.html> (accessed 05.07.2007)

<sup>2</sup> For similar arguments, see the overview of so-called 'New European Security Theory' in Bürger/Stritzel 2005.

fusion of formerly distinct domains into one new ‘security sphere’. It is thus demonstrated at an empirical level that policy-making in the European Security and Defence Policy (ESDP) does still function according to a different *logic* from Justice and Home Affairs (JHA). In other words, the distinction between internal and external security remains a helpful heuristic for the explanation of these policy-making processes at the European level.

Hence, we propose a more differentiated perspective on the problematique. While we share with wide parts of the literature the view that the *problems* of security are currently transformed (e.g. Zangl/Zürn 2003: 182-205), we reject the corollary that this requires new heuristic concepts to account for the political actors’ security policies (e.g. Bigo 2001; Webber et al. 2004; Haubrich 2006). The reason is simply that states *reproduce* – rather than change – the distinction between security at home vs. security abroad – even though both might meanwhile be (not) achieved through cooperative behaviour. This implies at the most general level that neither the pure broadening of the security notion nor the conceptual overstretching of governance contributes to a better understanding of contemporary security practices. Despite some intuitive plausibility, the heuristic value-added is fairly limited. Instead, there remain some ‘ideal-typical’ differences between the two domains that are first and foremost reflected in distinct rules that the political actors follow. Nevertheless, both pillars are characterised by ‘negotiations’ as the predominant mode of interaction (Scharpf 1997: 124), and hence we distinguish between the problem of agreement and of commitment for the empirical analysis:

Firstly, the latter points out that rule-setting in ESDP functions according to an implicit *subordination* to outsiders, namely the UN Security Council and (partly) NATO. In contrast, the rules are set *among equals* in JHA. Secondly, we demonstrate that there are *soft* modes of implementation in ESDP, whereas the operation of rules resembles fairly *hard* forms in JHA. In short, this is the difference between internal and external security.

This paper proceeds as follows. Firstly, we critically discuss the literature on ‘new’ security policies and focus, more specifically, on the Security Governance approach. From this review, we derive the dimensions for a comparative analysis of policy-making within ESDP and JHA. Secondly, we investigate two classical policy problems according to the distinction of making an agreement and implementing it. Finally, we link the conceptual with the empirical analysis and discuss the implications for the discipline’s current debates on security policy as a practice. Due to the significant variance of the rules that dominate internal and external security policies, the main implication is plainly to ‘re-divide security’.

## **2) SECURITY GOVERNANCE AS AN ANSWER TO NEW CHALLENGES?**

This chapter first of all introduces current debates on European security policy and points to an emerging consensus about the contemporary security environment. Secondly, we present one of the most ambitious approaches and question the actual contribution that it is able to make. Due to its descriptive quality, however, we will derive some categories for the empirical analysis and present our underlying research interest: in how far do internal and external security policies follow the same or distinct logics?

The paper’s point of departure is the increasingly widespread assumption that the internationalisation of security problems may lead to state policies that merge the

internal and the external dimension of security. In other words, states allegedly conduct security policy irrespective of whether terrorism or failed states are at stake:

The post Cold War environment is one of increasingly open borders in which the internal and external aspects of security are indissolubly linked. (...) Large-scale aggression against any Member State is now improbable. Instead, Europe faces new threats which are more diverse, less visible and less predictable (European Security Strategy 2003).

For example, so-called critical approaches share a similar view that the borders of sovereignty are vanishing (Bigo 2001: 115; Büger/Stritzel 2005: 118-120).<sup>3</sup> However, more conventional approaches also argue that the changed security environment gave rise to new security policies that increasingly blur the classical boundary between internal and external security (e.g. Haftendorn et al. 1999; Offe 2001; Cronin 2002/3; Haubrich 2006; Pastore 2001). What we can, accordingly, observe is the relatively simple adoption of the language of political decision-makers through the discipline:

In the post-cold war period both the origin and the targets of security threats have changed. States are not the only, or even the main agent of threat. In terms of origin, intra-state conflicts have replaced inter-state conflicts. Organized crime, environmental degradation and international terrorism target both society and state. Moreover, as none of the new threats of post-cold war Europe is purely military, non-military measures will inevitably play an important role in European security. This is particularly the case with the EU (...) (Kirchner 2006: 965).

In short, it is not exaggerated to speak of a consensus in the literature (and among practitioners) that the security environment is within some sort of merging process and thus increasingly complex. Consequently, two critical questions arise. Firstly, is it really the case that security policies converge into one single logic? Secondly, does this encourage us to adjust our concepts and to pay tribute to these developments by making them similarly complex?

In particular, one specific approach answers both questions in the affirmative and claims to provide a framework to account for these developments, namely 'Security Governance'.<sup>4</sup> It argues that traditional approaches cannot grasp empirical developments, such as the creation of more fluid and flexible institutions or a growing reliance and involvement of private actors (Krahmann 2003: 8-9; Webber et al. 2004; Kirchner 2006). Put it differently, the main development that these authors aim to describe and to explain is the shift from forms of pure 'government' to an increasingly fragmented 'governance' structure in European security.

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<sup>3</sup> Didier Bigo, for instance, proposed that security as a practice should be understood as a 'Möbius ribbon': "This metaphor gives sense to the merging of the inside and the outside as well as putting effective limits on the process of securitization. It could be that what is at stake is not only the question of the physical border of the state but of the boundaries of our understanding of the world. The frontiers between 'inside and outside' are under discussion because we are at the limits of our political imagination" (Bigo 2001: 96).

Despite differences, most proponents of the Welsh and Copenhagen School would subscribe to these general trends. For an overview of 'New European Security Theory', see Büger/Stritzel 2005.

<sup>4</sup> These brief considerations showed that the consensus goes far beyond the Security Governance proponents. Nevertheless, we will confine ourselves on those authors for mainly three reasons. Firstly, their explicit focus is Europe so that we can expect them to account for developments there. Secondly, their writings produce testable and comparable propositions for the real-world of European security policy. Finally, there is a substantial increase of this literature which implies to take it, at least, seriously: "A quick glance at the Social Science Citation Index (SSCI) suffices to witness an explosion of EU governance research in the past decade. While the SSCI rarely reported more than ten articles a year on EU governance in the mid-1990s, in the late 1990s and early 2000s there were between 40 and 50 articles per year" (Kohler-Koch/Rittberger 2006: 27).

While the governance approach has developed into a strong complement and sometimes even alternative to classical integration theory (e.g. Hix 1998; Jachtenfuchs 2001; Kohler-Koch/Rittberger 2006), its application to security issues is a fairly recent development. In particular, the 'new' modes of governance may have appeared like an invitation for scholars working on security issues. It emerged in parallel to the EU's introduction of the 'open method of coordination' in Lisbon in 2000. This procedure departs from the Community method of setting the rules through regulation and directives. Instead, policy-making "follows a procedural logic in which there is joint target-setting and peer assessment of national performances under broad and unsanctioned European guidance" (Eberlein/Kerver 2004: 123; Kohler-Koch/Rittberger 2006: 36-7). In other words, the steering mechanisms in EU policy-making are further moving away from 'hard' towards 'soft' forms (Abbot/Snidal 2000). From this perspective, it is fully understandable of why scholars increasingly adapt those concepts to classical domains of International Relations and the problem of cooperation under the constraining conditions of anarchy (i.e. the absence of government).

It is argued that we witness a certain convergence of the EU's three pillars (Pastore 2001: 8). While the 'open method of coordination' diverges from previous arrangements in the degree of 'bindingness', the two 'intergovernmental pillars' allegedly 'harden' their previously soft arrangements. While first-pillar "issues still dominate the agenda of policy-oriented governance research, only very recently have several research projects been dedicated to exploring the governance of the common foreign, security and defence policy and policing" (Kohler-Koch/Rittberger 2006: 32). In the European context, security governance "involves the coordinated management and regulation of issues by multiple and separate authorities, the interventions of both public and private actors (depending upon the issue), formal and informal arrangements, in turn structured by discourse and norms, and purposefully directed toward particular policy outcomes" (Webber et al. 2004: 4).

Elke Krahmman, for instance, focuses on the effects of (1) increasing budgetary pressures, (2) the growing awareness of global problems and new security threats, and (3) globalization on the European security architecture (Krahmann 2003: 11-2). She concludes that we can observe changes in security policy along seven dimensions. Her conceptual lenses are the two ideal-types of government (i.e. centralization and integration) on the one hand, and governance (i.e. fragmentation and differentiation) on the other (Krahmann 2003: 14-9). According to this almost exclusive focus on *describing* changes, causal relationships or mechanisms between the three "drivers" and the stated changes are by and large neglected (or, are not made explicit).<sup>5</sup>

Similarly, Emil Kirchner describes persuasively that the EU aims to accomplish the three functions of conflict prevention, peace enforcement and peace building (Kirchner 2006). Moreover, we can observe in each of these functions of the EU that coordination, management and regulation are taking place. In brief, we witness security governance. However, it remains unclear what the value-added is. We undoubtedly have a comprehensive description of possibly all or, at least, most policy processes that are going on in the Union's security policy. Although this may be an important contribution, we do neither know why this is occurring nor how the different components relate to each other. What causes or constitutes what? In other words, we are faced with the problem that governance is merely employed 'as a descriptive label' (Pierre/Peters 2000: 14; Jachtenfuchs 2001: 259).

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<sup>5</sup> Nevertheless, the claim is made to *explain* the emerging complexity of the transatlantic security architecture (Krahmann 2003: 19).

As one proponent admitted: “What Security Governance currently lacks (...) is a core ‘why’ question, and because the central question has yet to be posed there is clearly no sight of an answer” (Webber 2004: 16). This reflects the mostly atheoretical nature of the approach. First and foremost, a theoretical explanation would tell us where to look: what is important, and what can we exclude? Consequently, this approach fails by the primary function of theory, namely to reduce complexity. Instead, Security Governance reproduces much of the complexity of the real-world of European security. It points out that, for example, new actors are very important, but the state also remains an important actor.<sup>6</sup> Similarly, coordination, management and regulation had always been part of the analysis of security policy (e.g. Wolfers 1962). What is the value-added to replace an accepted concept, such as cooperation, by ‘governance’?

Despite these apparent, but possibly modifiable weaknesses, the approach has also major advantages – in particular, at a descriptive level. Therefore, we build our empirical analysis on concepts from the governance literature. The crucial difference is, however, that we apply these categories as analytical tools to answer a substantial question: what are the similarities and differences of the EU’s governance of internal and external security issues? More specifically, we are interested in how far the two domains that allegedly merge function according to the same or distinct logics. An answer to these questions may shed some light on the problem of whether to follow the mainstream with its emphasis of a new security policy; or in how far to be rather critical towards the ‘apologists of change’. It may be the case that allegedly anachronistic concepts from, for instance, regime theory can give us similarly important insights into the problematique.

### **3) SECURITY GOVERNANCE IN ESDP AND JHA: REALLY JUST *ONE* SINGLE LOGIC?**

In order to address the question of ‘governance logics’ in ESDP and JHA we derive four main categories from the theoretical literature on policy-making in the EU. Based on the understanding that security policies occur primarily in ‘negotiation systems’, this indicates to distinguish between (1) finding an agreement and (2) implementing it (Scharpf 1997: 124).

The first dimension refers to decisions either on substantive policy or on institution-building (Gourevitch 1999: 137).<sup>7</sup> Thus, we distinguish between two kinds of rule-setting in ESDP and JHA that are in practice interconnected, but should be kept separate for analytical clarity. On the one hand, the EU is actively engaged in policy-making in security to the inside (e.g. by approximating national criminal justice systems in the fight against organised crime), and the outside (e.g. sending a battlegroup to Africa). In other words, this is the analytical dimension where the Union

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<sup>6</sup> “The Security Governance approach offers propositions which are largely unremarkable (that there exists a multiplication as well as functional specialization of actors; that these actors are differentiated in terms of resources and impact; and that there is a proliferation of threats which calls forth different policy responses).” However, we have no *theoretical* proposition about “the interests, preferences, and relative power of actors” and how they are “related to expressly to analyses of coordination and policy outcome” (Webber 2004: 8). In short, rich but not yet ‘thick’ description.

<sup>7</sup> “If institutions are so important, they may themselves become the objects of struggle. People understand that institutions influence the outcome of strategic interaction, and therefore, people challenge the institutions themselves. If the outcome can be altered by changing institutions, then people will try to change them. Anything important is likely to become part of political action. When institutions are fluid, they become part of the game itself (...). This is the governance problem in international relations: the politics of contested institutions” (Gourevitch 1999: 137).

may strive for its substantive objectives, such as making the ‘near abroad’ more secure or establishing an area of freedom, security and justice (AFSJ) (Joergensen 1997: 3-4; de Lobkowicz 2002: 106; Wagner 2003: 587; Occhipinti 2003: 3; European Security Strategy 2003). On the other hand, rule-setting refers also to the establishment of the institution itself. In short, we may speak of some sort of constitutional politics (Gourevitch 1999; Jachtenfuchs 2002: 31-9; Hix 2005: 18-23).

The ‘negotiator’s dilemma’ is, however, not resolved by merely setting the rules. Instead, they need to be implemented at the respective levels to become effective (Scharpf 1997: 117).<sup>8</sup> This second dimension, namely implementation, is not solely about the enforcement problem, but also about the management of unintended non-compliance (Mayntz 2004).<sup>9</sup>

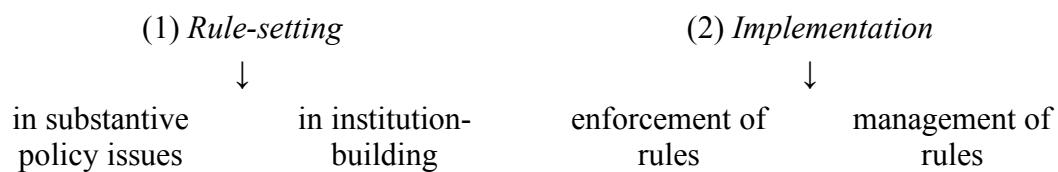


Table 1: Dimensions of the empirical analysis derived from the ‘governance’ literature

These analytical dimensions will structure the subsequent analysis. The guiding question will be in how far we can observe similar or different modes of rule-following behaviour among the political actors? In brief, what are the respective logics of policy-making in the EU’s 2<sup>nd</sup> and 3<sup>rd</sup> pillar?

### 3.1 Decision-Making and the Question of Participation

#### THE ‘SUBORDINATION’ TO OUTSIDERS IN ESDP

The EU’s rules with respect to crisis management are neither *legally* binding nor precise nor is there any involvement of the European Court of Justice (ECJ) (Abbot/Snidal 2000: 421). The most critical difference to JHA, however, is the question of *who has, in fact, a say in this decision-making process*. Is the EU as an international institution really autonomous? Accordingly, we explore the EU’s crisis management by re-constructing the policy-making at the level of world politics in a hypothetical manner.<sup>10</sup>

Let us assume some ethnic tensions, for example such as we witnessed in Macedonia in 2003. The EU member states and, in particular the neighbouring ones,

<sup>8</sup> For authors, who regard the EU’s crisis management as a pure coordination game, implementation is unproblematic since agreements are self-enforcing (Wagner 2003: 586). This paper, in contrast, incorporates also institution-building and has, therefore, to take into account commitment problems.

<sup>9</sup> For enforcement, we may ideal-typically distinguish between a hierarchical and a soft mode of governance. While the former threatens or applies legal sanctions against rule violators (Downs et al. 1996), the latter focuses on so-called ‘naming and shaming’ as a softer means to achieve rule conforming behaviour among the participants (Héritier 2002). In the case of unintended (non-)compliance, the hierarchical governance mode refers to mutual monitoring efforts, such as in the EU’s monetary policies. The soft method focuses on socialisation of states by raising the awareness for new norms and persuading them in a deliberative process (Risse 2004).

<sup>10</sup> The main reason to illustrate the argument using hypothetical examples is the paper’s objective to exclude idiosyncrasies of a single case as much as possible and to be better able to point to the inherent *logic* of the process rather than empirical facts. This illustrates persuasively the qualitative differences.

are highly concerned about potential violent outbursts, instabilities, refugee flows, etc. For that reason, there will be an extra-ordinary meeting of the General Affairs and External Relations Council that will formulate – on the basis of unanimous agreement – a common EU position with respect to the crisis. It should mediate between the conflict parties and offers, therefore, some diplomatic support for negotiations. The High Representative should visit the region and accommodate the conflict parties. However, in order to decide this step, there had already been an implicit prerequisite, namely an informal agreement with NATO and its Secretary-General about the Alliance’s desired role in the unfolding of the crisis.<sup>11</sup>

Hypothetically, the EU’s diplomatic initiative may be unsuccessful; the conflict parties are unwilling to compromise on the most critical aspects. Violent outbursts follow and particularly one of the conflict parties seems to be engaged in gross human rights violations. After some EU member states’ appeal, the United Nations Security Council deals with the issue, but – due to the Chinese veto – does *not* authorise any actions under Chapter VII to be taken that could harm the country’s rights as a sovereign state. Furthermore, the legitimate government does not want any outsiders to intervene into the crisis. It regards the struggles as a domestic, law-enforcement problem and halts the mediation talks with the EU’s High Representative.

In sum, this imaginary example clearly points to the distinctiveness of international security. Whatever the EU may be hypothetically committed to invest in order to tackle a certain problem, *it cannot do it by itself*. Apart from the *de facto* influence of NATO and the U.S., it needs, moreover, some form of authorisation – either by the UN Security Council or by the target state,<sup>12</sup> in other words, from ‘outside’! This is what makes the ESDP so distinct. It is about the (potential) use of force in international politics and thus requires specific procedures of legitimisation (and initiation).<sup>13</sup>

In addition to these policy questions, the EU member states, secondly, do set rules when they create ESDP as an institutional arrangement to deal with international security. We briefly point to one of the most salient issues in this context – that is operational planning (e.g. Rynning 2003: 57-8). The EU conducts several operations – both civilian (e.g. Palestinian Territories) and military; and the latter on a EU-only (e.g. DR Congo) or on a Berlin Plus basis (e.g. Bosnia and Herzegovina). Put it simply, these operations need to be planned.

From a purely functional perspective, nobody in Brussels or the other European capitals would doubt the necessity to give the Union the capacity to plan and lead its operations autonomously. The main demand for such a facility is based on the need to create parallel and coherent planning in crisis management – *simultaneously* at the political and military level. As a crisis unfolds, the EU’s High Representative may initiate political and military means, whereas the EU’s Military Staff and the ‘Civilian-

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<sup>11</sup> Due to the fact that NATO has the ‘right of first refusal’, when a crisis unfolds, the Alliance still enjoys primacy (e.g. Meiers 2005: 125-6).

<sup>12</sup> “The *United Nations Security Council has the primary responsibility* for the maintenance of international peace and security. (...) *The EU should support the United Nations* as it responds to threats to international peace and security. The EU is committed to reinforcing its cooperation with the UN to assist countries emerging from conflicts, and to enhancing its support for the UN in short-term crisis management situations” (European Security Strategy 2003; emphasis added).

<sup>13</sup> For instance, three out of seven questions that constitute the framework of Joergensen explicitly take this distinctiveness into account: in how far is leadership European or external? How is crisis management legitimated? Which role do various international institutions play? (Joergensen 1997: 7-9)

Military Cell' create options and designate specific forces for military-civilian operations.<sup>14</sup>

This simultaneity is at the moment not given and thus the main share of operational planning has to be accomplished *after* the Council has designated one of the five headquarters that can lead EU operations. Nobody has a strong incentive to plan in advance since s/he would be automatically in the position to 'lead' the operation, which may *not* be preferred for various reasons. The lack of an operational planning facility weakens ESDP substantially because it simply causes fewer options during the unfolding of a crisis. This would be a prototypical example of where 'delegation' makes functionally sense. The question consequently arises of why the EU is prohibited to invest more into these planning facilities. The answer is simply American opposition to these plans based on the concern that operational planning at the EU level may duplicate NATO's planning facilities of SHAPE:

France and Germany quietly dropped the idea of creating an independent military headquarters in Tervuren, near Brussels, something the US and Britain believed was a direct challenge to NATO. However, Mr Blair conceded that the EU did need operation planning headquarters if it was to carry out missions independent of Nato.<sup>15</sup>

In sum, this second example implies that institution-building in ESDP is highly influenced from the outside. This is similar to many other policy-domains, but the major difference is that these externalities do not only indicate some costs, but the latter are *prohibitive*. In short, the rules are *not* set for these reasons.

Therefore, we can conclude from these illustrations that new security problems may blur the classical boundaries, but the states' policies simultaneously reproduce the 'inside/outside' distinction. Although it is not unthinkable that the EU may intervene without prior authorisation, such as NATO did in Kosovo in 1999, it will be required to somehow legitimate its actions at the international stage and action would most likely lead to major frictions with China or Russia. Similarly, the EU may gradually strengthen its planning facilities, but it remains always dependent on 'outside actors': "The decisions taken in St Malo, Cologne and Helsinki were all designed to take into account the concerns expressed by the United States and other non-EU Allies. In fact, the United States was the invisible guest at the table of each of these meetings" (Sloan 2000: 19).<sup>16</sup>

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<sup>14</sup> Interview with a German senior official, whose task was the coordination of the German Presidency in 2007, in this particular domain; German background paper of the 'Post-Hampton Court' status quo (Berlin: May 2007). See also, "Defence collaboration to be boosted" by Judy Dempsey, *Financial Times*, 18 June 2004; and, "Ein Hauptquartier, das nicht so heissen soll" by Martin Winter, *Sueddeutsche Zeitung*, 31 May 2007.

<sup>15</sup> "US calls Nato meeting on EU defence" by Judy Dempsey, *Financial Times*, 17 October 2003. See also: "It is quite proper for the US to remind the Europeans that when, as now, they go into constitution-drafting mode, they should not ignore the interests of itself or Nato. They did so at the time of the Maastricht treaty negotiations, and are doing so again." "Crossed Wires on European defense", *Financial Times*, 18/19 October 2003.

See, furthermore, "Blair reassures U.S. on European defense – 'I will never put at risk NATO' he says" by John Tagliabue, *International Herald Tribune*, 18 October 2003; or, "NATO and EU try to defuse defense dispute", by Judy Dempsey, *Financial Times*, 20 October 2003; or, "Straw sets limits to EU military plan", by Ian Black and Patrick Wintour, *The Guardian*, 21 October 2003; or, "France, Britain, Germany said near EU defence deal", by Mark John and Marie-Louise Moller, *Reuters News*, 28 November 2003.

<sup>16</sup> Another instance was, for example, the question of an independent European satellite system that might be extremely helpful in future military operations. While the rules were ultimately set, first of all, an 'approval' from the U.S. was required: "The US has given the green light to the European Union to develop a high precision satellite navigation signal that could underpin Europe's defence and security

In short, the logic of ESDP is primarily directed towards, and determined from, 'outside' influence. This makes it qualitatively distinct from JHA and implies to conceptually separate internal from external security practices.

### **RULE-SETTING AMONG EQUALS IN JHA**

In contrast, policies adopted in JHA are increasingly legally binding on the member states since the treaty of Amsterdam. The Council adopts framework decisions, decisions or conventions and member states are obliged to implement them. The reform treaty even foresees a change in the mode of decision-making to qualified majority.<sup>17</sup> The Commission has a (shared) right of initiative and the ECJ can give preliminary rulings for most countries on JHA matters (Müller 2003: 173, Occhipinti 2003: 22).

Let us assume that available intelligence finds criminal groups in Europe, which smuggle humans into the EU. On the basis of a Commission proposal, the Council in 2002 had, for this case, adopted a framework decision defining and criminalising human trafficking.<sup>18</sup> While the member states were free in the form through which to criminalise this offence, they were obliged to transpose its substance into national law by August 2004 (Commission 2006a). While the framework decision takes note of other international efforts to fight human trafficking, they do not determine the content of the EU framework decision (Monar 2001: 749).<sup>19</sup> The decision has been reached by *internal* EU negotiations (Nilsson 2002: 5).

In reaction to the aforementioned trafficking structures, Europol, as the central agency for law enforcement information from the member states, sets up an analytical work file on the issue and asks national police to investigate.<sup>20</sup> In all member states law enforcement agencies can prosecute human trafficking, because European law has bindingly defined human trafficking and specifically criminalised it. The decision was taken exclusively within the EU. While national rules on prosecution continue to apply,<sup>21</sup> the framework and its substance is defined by the EU (Walsh 2006: 632-3).

So in JHA the EU takes binding, enforceable, almost hard law decisions on the basis of exclusive agreements within the Council. External actors do not substantially influence the content and practice of these policies. Decision-making in JHA is coordinated, internal security policy for the European Union's territory. The legitimate monopoly of force over its territory is embedded among the member states, but not beyond it (Jachtenfuchs et al. 2005: 36-7).

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ambitions. The approval came after US and EU teams reached an agreement setting out how both sides will co-exist rather than compete over the development of Europe's Galileo satellite navigation system, often considered a rival to the Pentagon-controlled Global Positioning System." "US backs EU development of military satellite system" by Judy Dempsey, *Financial Times*, 27 February 2004. The agreement ended a three-years dispute. See, "US and EU poised to agree on satellite navigation networks" by Judy Dempsey, *Financial Times*, 3 February 2004.

<sup>17</sup> Presidency Conclusions of 23.06.2007, 11177/07 CONCL 2, Annex I, see <http://consilium.europa.eu>.

<sup>18</sup> Official Journal L 203 of 1.8.2003, 1.

<sup>19</sup> Quite the contrary: in negotiations with third parties in, for example, the European Neighbourhood Policy, the EU includes the condition to adapt national law to EU requirements to ensure that the EU approach works. So instead of having external constraints on decision-making, the EU is a constraint for third parties (Schimmelfennig and Sedelmeier 2004; Union 2004: 6).

<sup>20</sup> Official Journal C 26 of 30.01.1999, 1.

<sup>21</sup> The separation of powers on the national level foresees a steering role for political actors in setting criminal law, while the application and interpretation is left to courts and police, which act under the authority, but not the influence of the state (Mathias 2002).

Institution-building, the second aspect, abounds. Europol, Eurojust and Frontex were established in the last decade to support and coordinate the efforts of national law enforcement agencies in the fight against organised crime (Occhipinti 2003: 234-6). ESDP and JHA face similar transnational challenges, but the absence of external veto players in the latter domain has allowed the establishment of institutions when the member states were unsatisfied with other international arrangement (Andreas/Nadelmann 2006: 100, 186). Even the opt-in that Britain secured in the June 2007 European Council for the movement to QMV is a case in point, as it demonstrates that further elements of supranational governance and institutional developments are established, even when some internal actors stall.

In addition, the member states have expanded the role of Europol repeatedly. It now deals with virtually all aspects of organised and serious crime. In the same period, it has grown in size and established an impressive technical infrastructure to fulfil its information sharing task (Wagner 2004: 9-13). Eurojust and Frontex add European competences in complementary judicial and border control policies. They increasingly affect strategic decisions of national law enforcement agencies. Since March 2007 a protocol to the Europol convention is in force, which allows Europol to ask member states' agencies to open investigations.<sup>22</sup> This political reaction to (perceived) functional needs has transformed Europol from a reactive to a powerful proactive agency (Statewatch 2002). This development might be internally dominated by power considerations among the member states (Andreas/Nadelmann 2006: 7), but *external actors did not play a role*.

Overall, institutions in JHA have multiplied and gained competences based on perceived functional needs of the member states. While fundamental control over law enforcement remains on the national level, the powers of EU institutions go beyond coordination. They are determined unilaterally by the member states. JHA almost falls in the category of hard law with strong institutional compliance mechanisms and legal bindingness. It is a policy field exclusively dominated by the member states and its decisions are made among equals.

To summarise, the exploration of rule-setting in the two domains shows that JHA and ESDP follow *distinct* logics. Decision-making in ESDP is strongly influenced by non-members, whereas in JHA exclusively the members themselves set the rules. The same can be said for institutional developments. The parallel existence of NATO constrains institution-building according to a predominantly functional logic. This applies particularly to the question of operational planning. In contrast, in JHA institution-building is determined by (perceived) necessities of the member states only. This is by no means external influence, such as observed as in ESDP.

## **3.2 Implementation and the Problem of Compliance**

### **'SOFT' IMPLEMENTATION IN ESDP**

There exist no legal sanctioning mechanisms in ESDP, whereas this is absolutely common to all security regimes. For instance, the much more demanding NATO Response Force is frequently faced with so-called 'rhetoric-implementation gaps' although the degree of structural commitment is stronger than in most ESDP affairs (Bell 2006: 2). There is neither any involvement of the European Court of Justice and only some reluctantly accepted cooperation with the European Commission. The

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<sup>22</sup> Official Journal C 312 of 16.12.2002, 1.

Intergovernmental Conference following the Convention on the Future of Europe clearly pointed out that there was no indication that this may change in the future. Merely the question of a common market of defence goods plays a role in some debates. However, the newly established European Defence Agency primarily serves as a coordinative mechanism or a ‘facilitator’, but definitely not as an initiating or regulative agency (e.g. Schmitt 2004).<sup>23</sup>

After the Franco-British initiative of St Malo in 1998, there were different proposals on the agenda of how to organise a potential European Security and Defence Policy.<sup>24</sup> In this context, there was a relatively far-reaching British-Italian idea to model it highly similar to the European Monetary Union. ‘Naming and shaming’ would have been forcefully institutionalised because the differentiation of ‘leaders’ from ‘laggards’ would have been made easier. ‘Convergence criteria’ and a peer-review mechanism, however, would have not implied enforcement, such as in hard law (Missiroli 1999; Wijk 2000). Even more so, the then-established catalogue system of the Headline Goals 2000 and 2010 makes even the identification of ‘laggards’ in a sense softer.<sup>25</sup> In short, enforcement is weak to non-existent in the intergovernmentally organised ESDP.

In addition to the question of enforcement, ESDP has developed some mechanisms to manage other forms of non-compliance. For example, the EU’s defence ministers regularly meet on ‘capabilities commitment conferences’ to deliberate on (non-) progress within the headline goal process.<sup>26</sup> Furthermore, the ‘battlegroup’ concept indicates that the governments agree to designate two groups per half-year that can be requested by the Council. However, the decision to send these forces (or not) remains a national *choice*. In addition, and in contrast to the NATO Response Force, however, there is *no certification process* during the preparation phases (Meiers 2005; Bell 2006). Accordingly, the EU does not build a capacity to interpret strictly the ‘battlegroup *rules*’.

Although the process is relatively transparent, we see that the management of compliance is rather rudimentary. It ultimately depends on *self-assessment* of the participating member states, whereas this lesser constraint on the governments does also have advantages: most importantly, it is frequently easier to achieve and gives some flexibility to the states (e.g. Abbot/Snidal 2000: 423).<sup>27</sup>

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<sup>23</sup> See also, “UK and France disagree on role of arms agency” by Judy Dempsey, *Financial Times*, 18 May 2004.

<sup>24</sup> “Joint Declaration Launching European Defence Capabilities Initiative”, British-Italian Summit, (London: 19-20 July 1999); and similarly implying French support for these ideas, Jacques Chirac (1999): “French Action Plan”, Letter of the French President to the Finnish Presidency of the EU, (Paris: 22 July 1999). Both are cited from: European defence: core documents (2001): *From St-Malo to Nice*, Vol. I, (compiled by Maartje Rutten), *Chaillot Papers*, No. 47, (Paris: WEU Institute for Security Studies), 46-53.

<sup>25</sup> We could essentially adopt the same line of reasoning when we might have selected the European Security Strategy in 2003 and the resulting constraints on the member states’ national security policies. Nevertheless, ministries of defence strongly adopt practices that were initiated within ESDP, but mainly on a *voluntary level*. See, for example, for the least-likely case, namely the UK, Aktipis 2007.

<sup>26</sup> See the results of the meeting of the EU defence ministers, (Sintra/Portugal: 28 February 2000); and, Presidency Conclusions, (European Council: Nice, 7-9 December 2000): Appendix to Annex I to Annex VI: Achievement of the Headline Goal. Review Mechanism for Military Capabilities, cited from: European defence: core documents (2001): *From St-Malo to Nice*, Vol. I, (compiled by Maartje Rutten), *Chaillot Papers*, No. 47, (Paris: WEU Institute for Security Studies), 94-107; 181-185.

<sup>27</sup> This satisfaction is apparently the current state of affairs among large parts of the European militaries in 2007. There is a strong sense of frustration over the NRF and relatively satisfaction with the EU’s battlegroups – although the real litmus tests have not yet occurred (Interviews with senior officials in the German Ministry of Defence: April/May 2007)

In sum, when we follow the continuum proposed by Kenneth Abbot and Duncan Snidal, ESDP is merely at the very bottom-line of 'soft law' and much closer to ordinary political arrangement than 'hard law' (Abbot/Snidal 2000: 422). Each member state remains its own judge.

### THE LOGIC OF LAW AND 'HARD' IMPLEMENTATION IN JHA

In order to illustrate the fundamentally different logic of virtually hard law in JHA, the following part explicates empirically how rules are enforced and, in a second step, how non-intentional (non-)compliance is dealt with.

Third pillar instruments are legally binding on the member states. The Commission has no sanction mechanisms, but the member states must inform it on the implementation of framework decisions. On the basis of this information the *Commission* compiles detailed reports, in which it 'names and shames' laggards (Commission 2004b). The reappearance of issues in numerous action plans is aimed to be a socialising mechanism for the states, to remind them to adapt their policies (Coordinators' Group on the Free Movement of Persons 1989; Union 1997; European Council 1999; European Council 2004).

The ECJ can give preliminary rulings on the validity of implementations (Art. 34 TEU).<sup>28</sup> This is particularly relevant, as third pillar measures require the transposition by national parliaments, before they can be enforced before national courts (Hix 2005: 131). In a recent landmark decision, the ECJ required all national organs to ensure that their action within existing national law were in the spirit of the framework decision, even if not yet formally transposed.<sup>29</sup> The ECJ thus cannot force member states to implement third pillar law, but it begins to develop case law, which gradually increases the obligation of member states to comply (Adam 2005; Baukloh et al. 2005).

These instruments are meant to enforce the implementation of binding rules nationally. When considering merely the treaty, they seem relatively weak, but once we take into account the way European institutions use the instruments, they appear surprisingly hard and adaptive (Hix 2005: 131). The fact that third pillar law is legally binding provides the necessary leverage for this activism by the ECJ and the Commission.

Concerning, secondly, the management of (unintentional) non-compliance, it appears from the Commission reports that the large diversity in criminal law systems (Spencer 2002) often leads to unintentional non-compliance (Commission 2004a).<sup>30</sup> The Commission reports on the transposition of framework decisions, however, show that even politically contentious issues tend to be implemented. Reporting, thus, can be considered as mutual monitoring, using an *external arbiter* to compile and analyse the individual transpositions. This is different from pure self-assessment. Additionally, the EU facilitates the socialisation of law enforcement officers through the European police college (CEPOL) to increase knowledge of and trust in national forces and European structures (Bigo 2000; Müller 2003: 217).

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<sup>28</sup> With the exception of the UK, which has not signed the necessary declaration according to art. 35(2) TEU.

<sup>29</sup> Case No. C-105/03 *Pupino*, see <http://curia.europa.eu>.

<sup>30</sup> But contrary to this impression, the compliance record for JHA is only slightly higher for the UK and Germany when compared to first pillar directives (authors' own calculations based on Commission reports and Mastenbroek 2003).

An illustrative example is the European Arrest Warrant (EAW) that had to be transposed by the end of 2003. Even though some governments were critical towards its ambit, e.g. Italy, and it required significant changes in several member states, e.g. Germany, the EAW was implemented in all member states (Jachtenfuchs et al. 2005; Commission 2006b). This opposition was overcome through a combination of peer pressure (Friedrichs 2006) and court decisions on its lawfulness (Mölders 2006).

Implementation and compliance controls in JHA are thus much more elaborate than in ESDP. Soft *and* hierarchical modes of governance are used side by side. While the institutional and legal structures do not fulfil all the requirements of hard law (Abbott et al. 2000: 422), within soft law JHA structures are relatively close to the hard side. The ECJ plays an increasingly important role. National courts can adjudicate state action on the basis of European measures and the Commission reports. They, while not binding, overtly identify laggards, which defy their legal obligations. Such mutual monitoring is supported by education measures for law enforcement officials to strengthen trust. The member states have committed themselves to adhere to the decision taken in JHA and in combination with the pressure from the relatively soft compliance instruments find themselves under a strong obligation to comply.

The most significant differences between JHA and ESDP can thus be summarised in the following overview:

	<b>ESDP</b>	<b>JHA</b>
<b>Rule-setting</b>	<ul style="list-style-type: none"> <li>- third party influence in decision-making (NATO / U.S. / 3<sup>rd</sup> country)</li> <li>- relatively weak institutions (e.g. no standing operational headquarters)</li> <li>- functionally driven, but <i>strong</i> outside influence</li> </ul>	<ul style="list-style-type: none"> <li>- decision-making among equals</li> <li>- increasingly strong and numerous institutions (Europol, Eurojust, Frontex)</li> <li>- functionally driven, but <i>no</i> outside influence</li> </ul>
<b>Implementation</b>	<ul style="list-style-type: none"> <li>- self-assessment among EU member states in the Council</li> <li>- no legal sanctions</li> <li>- limited ‘naming &amp; shaming’</li> <li>- weak legal obligations</li> </ul>	<ul style="list-style-type: none"> <li>- delegated assessment by Commission and courts</li> <li>- judicial control by ECJ</li> <li>- explicit ‘naming &amp; shaming’ by the Commission</li> <li>- legally binding rules</li> </ul>
<b>Logic of the policy field gravitates towards...</b>	↓ <b>Policy coordination</b>	↓ <b>Hard law</b>

Table 2: Differing logics in ESDP and JHA

To sum the empirical analysis up, we have shown that political actors follow fundamentally different rules in ESDP and JHA. Distinct logics apply to both central aspects of governance, namely rule-setting and policy implementation. While ESDP shows elements of only policy coordination, JHA virtually falls into the area of hard law:

Table 2 illustrates that ESDP adheres to the traditional model of international security cooperation, whereby sovereignty concerns of states result in little obligation and bindingness. On the two-dimensional scale of Abbot and Snidal, ESDP not even fulfils the requirements for soft law, but remains predominantly ‘policy coordination’ (Abbott/Snidal 2000: 422). Self-assessment predominates in the implementation process, while rules are set in coordination with *non*-members. The latter even have, in contrast to JHA, a veto position on rule-setting in both substantive and institutional issues.

JHA, contrarily, exhibits central elements of hard law on the two dimensions (Abbott/Snidal 2000: 421). Rule-setting among EU members is comparable to national policy making in internal security – only on a scope-wise limited basis and for a multi-national territory. The precise and obligatory rules are enforced internally through numerous hard law-like compliance mechanisms. A combination of delegated enforcement by European institutions and mutual monitoring puts strong pressure on the member states to comply.

#### **4) ESDP AND JHA ARE DISTINCT! BUT WHAT DOES THAT IMPLY?**

After having identified the most important differences between ESDP and JHA, this chapter points out the implications of the empirical evidence. The aim is to suggest what lies behind our ‘conservative’ claim to ‘re-divide security’. We have demonstrated empirically that internal and external security policy-making in the EU follows different logics. They may address similar ‘globalised’ problems, but their take on them and the dynamics of policy-making are systematically different. The European Security and Defence Policy is tailored to enable rapid reactions in situations of *external* crisis (Wagner, 2003). The attempt by the EU to develop coherent influence on its environment, however, remains incomplete without the consent of external institutions. Justice and Home Affairs, in contrast, focuses on the establishment of a legal internal order *within* the EU and its member states. The political decisions are adopted unanimously by the member states, often in response to a problem at hand. This established order then provides a basis upon which operational decisions are taken by law enforcement agencies without major political involvement.<sup>31</sup>

These significant differences imply that, even though security governance may embody a good descriptive label (Pierre/Peters 2000: 14), it is largely inadequate as an analytical concept. Governance as a tool is useful to the degree that it helps to raise awareness for some empirical novelties, such as the multiplication of actors in both domains or the transnationalisation of problems (Webber et al. 2004: 16). Where it fails, is the *explanation* of security as a practice by political actors. We have shown that contrary to the claims made by the ‘apologists of change’, the way problems are interpreted and acted upon does not dissolve the distinction between internal and

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<sup>31</sup> This has led to complaints about the lack of a grand strategy for JHA (Weyembergh 2004: 276-7; Aden 1998).

Andreas and Nadelmann argue that the functional link in criminal justice policy making lies not so much in the transnationalisation of problems, but in the domestic context (Andreas/Nadelmann 2006: 105).

external security, but rather re-establishes the old dichotomy. The second main weakness is that Security Governance fails to fulfil the requirement of reducing complexity. Hence, where could we go from here?

Most of the ‘apologists of change’ acknowledge that there may still be important differences between internal and external security, but argue, at the same time, that we may nonetheless observe gradual convergence. In contrast, we argue there are still *ideal-typical* differences between the two domains in a strictly Weberian sense because the political actors do still follow qualitatively distinct rules (Weber 1999 [1967]: 192). That is what we termed the two ‘distinct logics’ of ESDP and JHA.

If we want, accordingly, to *understand* contemporary security as a practice, the ideal-typical distinction between the in- and the outside is still a powerful heuristic device. After all, we do learn something about concrete cultural appearances in their context, their causal conditions and their meanings (Weber 1999[1967]: 193). There are, for example, different rules of what constitutes membership in rule-setting or in how far primarily functional rules apply to a domain. Other rules imply whether to delegate monitoring of compliance or whether to rely exclusively on self-assessments; and so on. These are not merely regulative, but also constitutive differences. There may be discrepancies to the empirical reality, such as it is intended in this sort of analytical procedure. However, this non-congruence is, in fact, the space where social research will be accomplished. In particular, differences between ideal-types and observable reality represent *not* a strong case to abolish the whole concept of internal vs. external security (Weber, 1972: § 1 D).

From a Scharpfian perspective, ESDP and JHA represent fundamentally different ‘games real actors play’. Their respective systems of rules structure the courses of actions that the political actors may choose in a qualitatively distinct way. In short, it is institutions not assumptions that reduce empirical variance (Scharpf 1997: 38-40).<sup>32</sup> If these systems of rules differ significantly, we should keep them separate because distinct causal mechanisms seem to be at work. Our empirical evidence clearly pointed out the significant variances of the EU’s security rules and implies thus to ‘re-divide security’ in our analyses.

## 5) CONCLUSION

The paper’s point of departure were the widespread assumptions that, firstly, security policies are currently in a state of flux; and, secondly, that new approaches are therefore required, such as ‘Security Governance’. We did largely subscribe to the empirical reality of changing security problems, but critically questioned the second trend by asking in how far internal and external security policies actually merge in practice. We consequently adapted some of the analytical tools of governance approaches and applied them to their most-likely case, namely the European Union. The empirical evidence was unambiguous. The political actors follow fundamentally different rules in ESDP and JHA. In other words, distinct logics dominate both rule-setting and policy implementation. The former is pursued among equals in JHA, while the member states have implicitly to subordinate their policies to outsiders in ESDP. Here, implementation is merely based on self-assessments, whereas the political actors have delegated monitoring to a certain extent in JHA. Thereby, this paper aimed to close a gap in the

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<sup>32</sup> However, these institutions merely define the broad range of acceptable courses of rules-following, in which the political actors will pursue (non-) strategic behaviour. This represents the domain for empirical policy research (Scharpf 1997: 42).

debate, namely to compare different security practices within the European Union. The result, however, was inherently conservative.

As just indicated, the corollary of our empirical analysis is to keep the study of internal and external security separate – if only for analytical reasons. Having shown that the two realms follow their particular regularities indicates that allegedly anachronistic notions, such as security regimes (e.g. Tonra 2003; Haftendorn et al. 1999) or law enforcement regimes (e.g. Occhipinti 2003: 228-231; Andreas/Nadelmann 2006: 224) still capture a lot of what is going on in the real-world of the EU's political practices.<sup>33</sup> JHA policy-making adds a strong element of law to political science. The development of global prohibition regimes goes a long way to explain the reaction of states to 'old and familiar crimes using a new medium' (Nadelmann 1990; Andreas/Nadelmann 2006: 57). In contrast, ESDP is still characterised primarily by the member states' desire to capture 'joint production economies' of external security (Lake 1999: 35-9). Both incentives and obstacles to this endeavour may be captured by different approaches of regime theory (Haftendorn et al. 1999; Tonra 2003). On the contrary, the *analytical* value-added of Security Governance approaches becomes not obvious from this perspective.

Finally, it is heuristically appealing to go back to one of the most criticised approaches in International Relations. While Kenneth Waltz made some strong statements about international politics that remain contested, he also formulated some clear requirements for theory-building in political science. He argued theories must deal with the coherent logic of 'autonomous or bounded realms'. Then, the researcher should discover some law-like regularities within this realm. Ultimately, we should develop a persuasive approach of explaining the observed regularities (Waltz 1979: 116). This paper clearly pointed out that JHA and ESDP do *not* constitute a single autonomous realm. We need not fully subscribe to Waltz's approach of theorising to acknowledge that this represents a major obstacle to account for distinct realms with one single set of explanations. From this perspective, security as a practice appears less as a 'möbius ribbon'. Instead, we should rather see the internal and external domains of security as opposite sides of the same coin. They may be closely linked, but need to remain separated for our empirical analyses.

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<sup>33</sup> It would also be interesting to take a more actor-centered, ethnological perspective and focus on the different ways to address problems, between lawyers and law-focused law enforcement actors, which dominate JHA, and diplomats/military, which dominate ESDP.

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