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Integrated security in Europe, a democratic perspective

Bruges, 14 – 17 November 2001

Hosted by
The Minister of the Interior, H.E. Antoine Duquesne
The Directorate-General Enlargement of the European Union

Organised by
The European Institute for Law-Enforcement Co-operation
and The College of Europe

An initiative under the authority of the Belgian EU-Presidency
July – December 2001

Brugge

College of Europe
Collège d'Europe

Natolin

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A CONTRIBUTION TO FREEDOM, SECURITY AND JUSTICE

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Foreword

Dr. Marc Vuijlsteke

For more than 50 years, the College of Europe has organised a Masters' Programme in European Affairs in Bruges – and since 1994 in Poland, Natolin, as well. Each and every year young students from more than 30 nationalities are given the academic experience of learning to live and work in an increasingly integrated Europe.

At the same time, we also have the ambition to function as a platform, as a Forum, open to discussion on Europe, where academics, practitioners and decision-makers can meet, discuss freely and confront their opinions, and where policies can be shaped or, at the very least, where policies can be proposed.

Today, once again, we are happy and proud to provide you with this opportunity. As a society-oriented institute, EULEC aims at making a practical contribution to the development of co-operation in the Justice and Home Affairs related domains of Prevention and Education, Law Enforcement and Criminal Justice, Legal Development and Human Rights. As such, it has developed a unique expertise and a substantial network regrouping at an international level the main actors in these domains. Thus, it was only natural for us to embark with them on this adventure, nearly one ago.

Security, crime prevention and repression, and a fair and well-functioning judicial system are important and sensitive issues for the citizen. The fact however that this field of activities is designated as "Home Affairs" and that it is dealt with by the Minister of the "Interior" indicates quite clearly its classical confinement to national territory and national policy.

It is only in recent years that co-operation between states has started to grow and that it became apparent that here again trans-national and trans-border solutions had to be found in order to tackle common problems. What had originally constituted a more or less ad hoc co-operation with little formal requirements, was codified and somewhat institutionalised with the Maastricht Treaty providing us with the Third Pillar, co-operation in Justice and Home Affairs. At the time, this was considered an important step forward, although one talked only of "co-operation", not of "integration". Nevertheless, the impetus was given and today we are already much farther. Since Amsterdam and Nice, "Justice and Home Affairs" have become more and more central to our reflection on the construction of Europe, not least under the pressure of the on-going enlargement process.

That said, one has to recognise that somewhere there is a tension – maybe even a dichotomy – between on the one hand the principles of liberalism culminating in that of the Four Freedoms, and on the other hand the justified need for internal security and judicial protection. A balance has to be found. For sure, this conference did not give us all the answers but, in any case, we have tried to bring together a wide variety of actors in these matters and in the pages that follow you will find their ideas and proposals, as well as the result of the subsequent discussions and debates.

In the light of the events of September 11th, this conference is indeed very timely and stresses once again the paramount need for co-operation and integration in those matters. We should like to hope that the proceedings you will read bring a substantial contribution to this debate.

Conference Opening Speech
By H.E. Antoine Duquesne, Minister of the Interior, Belgium

Ladies and gentlemen,

I am delighted to open this conference today in a magnificent town, such as Bruges. As you may know, in 2002, Bruges will take up the function of cultural capital of Europe. Do not hesitate to explore this beautiful town, if you find some time.

First of all, I would like to welcome the numerous participants, particularly those from the applicant countries. Indeed, the Belgian presidency has always tried, in the midst of all the European authorities and each time it has been possible, to associate as much as possible the representatives of those who will soon be our partners within the Union. Their place is at our side because the Europe of tomorrow is being built every day from now on. So, I take advantage of the opportunity of wishing them a hearty welcome and to thank them for their presence.

I also want to pay them a tribute for the hard work they are accomplishing in a variety of domains – I have had the occasion to witness it myself. The task is tough but their determination is great and thus they must receive our understanding and our full support. I always say to the representatives of the applicant countries: the current enlargement is not a gift, but it is the expression of a mutual commitment, it is a contract between real partners.

As you all know, this conference has been on the agenda for a long time. Because of the latest terrorist attacks in New York and Washington, today's and tomorrow's theme has become extremely current. Nevertheless, the topicality of the theme does not simplify the mission.

This conference should not constitute a free-thinking exercise, but it should lead on the one hand to the realisation of concrete recommendations and practical, useful answers. Indeed, more than ever, we should avoid actual developments driving us to create "Orwellian" situations. On the other hand, it is not only the task, but also the obligation of the politicians to take measures that guarantee the freedom of the citizens, and those measures should be taken now. The delicate balance between the efficiency of the law enforcement and the rights and freedoms of the citizens should be the focal issue.

The Treaty of Amsterdam has led to the progressive creation of the Area of Freedom, Security and Justice. More than ever, one realises that international and even supranational co-operation is necessary to guarantee the citizens' security. Police services demand more means and juridical possibilities, so that their efficiency and co-operation can grow. But the citizen has also certain requirements. He wants not only a guaranteed security, but also a democratic control over the police services at both the national and international level. Moreover we may not lose sight, due to today's enormous pressure, of the fact that the population's confidence in the law enforcement services is closely related to the attitude of these services towards the population. Think for instance about the respect of the law enforcement services for the human dignity and the fundamental rights and freedoms, as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the EU Charter of Fundamental Rights. Therefore the "leitmotif" of this conference should be the reconciliation between the efficient functioning of the law enforcement services and the rights and freedoms of the citizens at the European level.
Referring to the events of 11 September, today constitutes a crucial moment in the construction of the European Area of Freedom, Security and Justice. The citizens have high expectations and

are convinced that the current problems should be resolved at the European and international level. But they do not give us "carte blanche". Decisions should be adopted now, and what is even more important, those decisions should also be implemented. Therefore it is totally inadmissible now, no matter at which level, that files should be blocked because of national interests, or so-called technical problems. We have a mission to fulfil and it is our duty to bring it to a good end.

Ladies and gentlemen, I am convinced that this conference can and will contribute to the adoption of good decisions and the elaboration of a profound vision, which will seem to be the right one, even in the long term.

In my opinion three themes are of particular importance: the taking of evidence in criminal matters, the delineation and the interaction between the policy responsibility and the police function, and the control over the international police co-operation.

Taking of evidence in criminal matters

The compulsory measures of the authorities require that not only the national, but also the international co-operation in the field of Justice and Home Affairs should take place within a strictly legal framework. The police and judicial co-operation is in a high degree of development. The legal framework for that co-operation is also growing at an acceptable speed.

For instance, criminal behaviour is defined unambiguously, penalisations are harmonised and investigation ways are normalised within a European framework. The fight against the trafficking in human beings, terrorism, the falsification of the euro, the protection of the financial interests of the European Union are clear examples.

The taking of evidence constitutes one of the elements for which there are no European standards. However, the way of supplying evidence plays an enormously important role in criminal matters. Although the legality of the taking of evidence is a basic principle, recognised in all the European States, it is phrased and interpreted differently in different countries.

In practice, a different interpretation of the same principles causes problems. It should not be allowed that evidence that has been brought forward legally in one Member State, cannot be used in another Member State. There is then room for impunity and that is certainly not reconcilable with the objectives of the Union. I am convinced that we have to search together for a solution for this unacceptable situation. The discussion about this issue will not be easy, but we have to reach a solution together, through pragmatism, but also by daring to distance ourselves from our own interpretation of "legality" and from the principles that determine the taking of evidence.

The delineation and the interaction between the policy responsibility and the police function

A second important element is the delineation of the policy responsibility and the police function. The police is a public body which exercises public authority. Thus, it must be established by law. Moreover the police operations should always correspond with the internal regulations and the police function. It is obvious that what precedes, also goes for international police services and structural co-operation forms at the international level.

But there is more. The police should receive clear instructions from the police authorities. It is the task of the political authority to define the priorities of the police policy. On the other hand, the police should report on the way these instructions are put into practice. Functional co-operation between the persons in charge of policy and the police services is thus necessary.

Also in this field, we still have a long way to go at the European level. Clear structures are needed and the responsibilities should be well-delineated, so as to prevent situations in which nobody takes the final responsibility. It has to be avoided that the police take over or could take over from the authorities.

The control over the (international) police co-operation

The last topic I would like to talk about, is the control over the international police co-operation. Indeed, the police should be responsible towards the state, the citizens and their representatives. That's why it has to be subject to an efficient control mechanism. That control should not only be internal. An external control, independent of the hierarchic control, seems also necessary.

In Belgium, the control is executed by the "Vast Comité van Toezicht op de Politiediensten" (Standing Police Monitoring Committee), the so-called "Comité P". The competence and responsibility for the "Comité P" lies with the National Parliament and remains thus completely independent of the police services or the executive.

On the one hand, the "Comité P" takes care of the observance of the fundamental rights and freedoms of the citizens by the police services, but, on the other hand, it contributes to more efficiency and a better co-ordination of the police services. The main purpose of the "Comité P" is to examine the functioning of the police services and to map the problems. Afterwards propositions to solve those problems are formulated and submitted to Parliament.

I dare pretend, ladies and gentlemen, that this unique system has proved its utility more than once and that it could be used for the control over the international police co-operation. This theme has recently been dealt with at a meeting of Parlopol, during which the possibilities for an external, parliamentary guidance of the police services have been discussed. Such initiatives approximate the different visions. I would like to stress that such meetings enjoy my full support.

Nevertheless the big question remains outstanding: "How far should and could we go in the realisation of security measures?" I would like to answer the following: In our democratic society, we cannot allow ourselves to bring the fundamental rights and freedoms, which constitute the basis for our society, under discussion. Despite the potential menace, it is the honour of our democracies to accept some risks, measured, in comparison with those fundamental values.

I am already convinced that your hard work of today and tomorrow will bear fruit and that it will allow some significant breakthroughs with regard to the European Area of Freedom, Security and Justice we all vouch for.

I thank you and I wish you fruitful work.

The Area of Freedom, Security and Justice: Institutional and Substantial Dynamics in the perspective of the European Union

Prof. Dr. Jörg Monar

I. Introduction

European integration has repeatedly been driven forward by major political projects of which the single market programme of the 1980s and the EMU project of the 1990s are two prominent examples. The European Union has now entered the new millennium with a new major political project which future historians may well regard as another of these defining ventures: the creation of the "area of freedom, security and justice" (AFSJ). Laid down in Article 2 of the Treaty on European Union it occupies the same rank as a fundamental treaty objective as, for instance, the implementation of a common foreign and security policy, the single market and economic and monetary union. Politically its longer term significance could be even greater than that of these earlier important projects because it is all about delivering a range of essential public goods to the citizens of the European Union. These include key issues of internal security and access to justice, areas which have historically played a central role in legitimising the build-up of public authorities and the creation of the modern state and which - much more so than, for instance, foreign and security policy matters - are of direct concern to citizens. Not surprisingly these issues have been kept firmly under the control of national governments for most of the past five decades of the integration process, and the fact that the EU institutions have now been vested with a substantial role in this area and that they have developed very ambitious objectives for the AFSJ marks a significant new and qualitative step in the integration process.

There is no other example in the history of European integration of a policy-making area which made its way as quickly and comprehensively to the centre of the Treaties and to the top of the EU's policy-making agenda: Ten years ago - at the beginning of the 1990s - what was then called 'justice and home affairs' - did not even exist as a policy-making area within the scope of the Treaties, and the limited cooperation between the Member States which had been building up since the mid-1970s took place in the range of poorly coordinated intergovernmental groups which lacked adequate institutional structures, legal instruments and objectives. Today - after the Amsterdam reforms, the additional impetus given by the 1999 Tampere European Council and a broad range of legislation adopted or in preparation policy-making in justice and home affairs has not only become a fundamental treaty objective but also one of the most dynamic and expansionist areas of EU development in terms of generating new policy initiatives, institutional structures and its impact on European and national actors.

Such an extraordinary 'career' raises the question of the dynamics at work in justice and home affairs, i.e. the question which factors of growth and change can explain the speed and the scope of developments in this area. A distinction will be made between the institutional 'laboratories' which have helped paving the way for the extraordinary development during the last decade and the substantial 'driving' factors which have been triggering developments and further expansion of EU action. This survey of the dynamics at work will be complemented by a look at some of the specific costs of rapid change and problems of balance which have appeared in the context of the development of the AFSJ and which are intrinsically linked to its specific dynamics.

II. Institutional 'Laboratories'

Although none of the three EC founding treaties had given any explicit competences to the Community institutions in justice and home affairs their introduction as a major policy-making

area in the 1990s has clearly benefited enormously from European cooperation frameworks outside of the EC treaties. These acted in fact not only as mere precursors but also as "laboratories" which in many areas defined the bases, helpful starting points and - on some issues - even core elements for what then became the EU *acquis* in justice and home affairs.

The Council of Europe

The Council of Europe was the earliest of the "laboratories" and continues to be of considerable importance in some areas. A major part of the Council's activities has been dedicated to the establishment of fundamental elements of a pan-European legal and judicial space. The results achieved within the Council of Europe on JHA issues continue to be central points of reference for the development of justice and home affairs within the European Union. There is a whole range of Council of Europe conventions which the EU Member States which have become so much a basis for the development of justice and home affairs measures within the Union that they have defined by the EU as part of the *acquis* which the applicant countries have to adopt and fully implement as part of their obligations of membership. The agreements reached in the framework of the Council of Europe have been particularly important in the area of judicial cooperation in criminal and penal matters. Many of the Conventions - such as the 1959 *European Convention on Mutual Legal Assistance in Criminal Matters* and its 1978 Additional Protocol - have become points of departure for more comprehensive measures adopted or in the process of being adopted by the Union. Without the ground-laying work done by the Council of Europe progress in the judicial cooperation in the EU context would have been much more difficult.

The Council of Europe provided also another positive impetus. The often protracted negotiations on the conventions, which were affected by all the substantial differences between the national legal systems mentioned earlier, provided national administrations with an increasing experience in cooperation with other European countries, led to a better understanding of the particular systemic differences and difficulties in partner countries and created gradually a more favourable climate for deeper cooperation in justice and home affairs. Traditionally the national ministries of interior and of justice have been rather inward looking institutions, with only limited experience in and inclination to extended European cooperation. Yet in the area of justice and home affairs as well as in a number of other areas the Council of Europe led to what the great French lawyer Paul Reuter described as the 'progressive emergence of a European mentality' (Reuter, 1965: 127).

Yet the experiences of the EC/EU Member States with the Council of Europe were not only positive. Due to its larger membership and the purely intergovernmental basis of the organisation's proceedings even negotiations on more technical questions could take years. The diverging interests and legal systems of members also meant that in the course of the negotiations many of the originally more ambitious proposals had to be dropped or watered down in order to make a final agreement at all possible. Although the EC Member States often failed themselves to agree on common positions within the Council of Europe they had increasingly to realise - especially during the 1980s - that some of the interests they had in common could not be adequately pursued within the larger framework of the Council of Europe with its greater diversity of interests and heavy and lengthy negotiation procedures. As a result the Council of Europe has also provided the Member States with an incentive to move beyond its structural limitations by setting up their own framework and procedures for addressing JHA issues.

TREVI

The second “laboratory” - which today is rarely referred to - was the TREVI framework which went as far back as 1975 and lasted until 1993. It is certainly true that TREVI was an extremely lose form of intergovernmental cooperation. It was not based on any formal treaty provisions, was not supported by any permanent institution, lacked any legal instruments, had a very narrow mandate (initially focussed on the fight against terrorism only) and operated outside of the EC framework as part of the European Political Cooperation. Yet in spite of its limitations TREVI provided the EC Member States with a framework in which they could gradually develop their cooperation in other areas (such as the fight against drug-trafficking and organised crime), set up a range of additional working parties and explore more intense mechanisms of information exchange and operational cooperation. As a result TREVI paved the way for the more structured intergovernmental working structures of the Third Pillar in the 1990s and also played a crucial role for some of the more substantial elements of progress achieved after the formal introduction of justice and home affairs into the EC/EU treaties. It should be recalled, for instance, that most of the substance of the Europol Convention was negotiated in the context of TREVI. Europol as it exists today is at least as much a product of TREVI cooperation as it is of the EU’s Third Pillar.

Schengen

The third - and because of its ongoing impact in some respects most important - “laboratory” was clearly Schengen. During Schengen’s period of forced exile from the Community (which ended only in 1999) the Schengen members never failed to emphasize that its role was to be that of a “laboratory” for EC policy-making on the complete implementation of free movement and all related compensatory justice and home affairs measures. Although its focus on the objective of the abolition of internal border controls and necessary compensatory measures meant that Schengen always had a much more limited scope than EU justice and home affairs there can be no doubt that Schengen has to a large extent fulfilled this function. A few examples can show that it has served as an effective “laboratory” in many areas.

One of those areas is asylum policy. Although the Dublin Convention was signed four days earlier than the Convention implementing the Schengen Agreement the Dublin Convention was largely constructed on the basis of the work done in the Schengen context and not vice-versa. The principal criteria for determining the state responsible for examining an application for asylum, the obligations of the responsible state and most of the procedures laid down in the Dublin Convention had been agreed on in the Schengen context before consensus was reached in the Ad-hoc Group Immigration which involved all EC Member States. With the Dublin Convention still being the most substantial agreement on matters of asylum policy at the EU level so far, Schengen has clearly had a major impact on the development of EU policy in the area of asylum.

Schengen has also left its mark on judicial cooperation in the EU context. The 1996 EU Convention relating to extradition between the Member States (OJ C 313, 23.10.96) was at least in part constructed upon and supplementing the provisions on extradition of Title III, Chapter 4 of the Convention implementing the Schengen Agreement. It should also be noted that the EU had initially focussed mainly on improving the possibilities for extradition but that in the mid-1990s it came round to follow the Schengen approach which had placed more emphasis on mutual legal assistance (Elsen, 1997: 6).

As regards the area of police cooperation Schengen has set points of reference for a number of aspects of police cooperation in the EU context. The Council Resolution of 29 November 1996 (OJ C 375, 12.12.96) on the drawing up of police/customs agreements in the fight against drugs,

for instance, owes a lot to the positive experiences of the Schengen countries with manifold bilateral and multilateral agreements on law enforcement. Another example is the Schengen system of liaison officers as provided for by Article 47 of the Convention Implementing the Schengen Agreement which has been taken over - and further developed - by the Joint Action of October 1996 on a common framework for the initiatives of the Member States concerning liaison officers (OJ L 268, 19.10.96.).

Apart from these (any many other cases) in which Schengen has pre-determined and facilitated decision-making on matters of EU justice and home affairs it has also played a more general supporting role. Schengen has served as a fruitful testing ground for an increasing number of Member States on both the potential and the limits of common ground and specific techniques of negotiation and cooperation. The Schengen members had also developed a culture of cooperation which drastically increased the exchange of information between the relevant national authorities, favoured cross-border cooperation and increased the understanding of the different situations and problems in partner countries. Although its positive impact is difficult to measure, this culture of cooperation has not only set a positive example but made an essential contribution to the emergence of the wide range of administrative and policy networks which have been crucial to the rapid growth of EU justice and home affairs in the 1990s.

III. Substantial driving factors

While the various 'laboratories' have certainly much facilitated the rapid development in EU justice and home affairs the main driving forces of this process are to be found in a combination of internal and external factors which mutually reinforced each other.

Transnational challenges

The emergence of new or the increase of existing transnational challenges in areas of justice and home affairs has constantly played a key role in making the Member States agree on intensified cooperation and the build-up of new structures at the European level. In the mid-1970s TREVI came into being because of the threat posed to several Member States by international terrorism. In the mid-1980s TREVI saw its structures and mechanisms strengthened because of the increased awareness of the links between terrorism, organised crime and drug trafficking and changes in international drug trafficking routes. The sharp increase in the number of asylum applications and the mounting illegal immigration pressure at the end of the 1980s played a key role in bringing asylum and immigration on the agenda of the 1990-91 Intergovernmental Conference and in making the Member States - under strong pressure by Germany as the main 'frontline' country - agree on the introduction of the Third Pillar. New challenges in the fight against organised crime, such as the rapid growth of organised crime originating in Russia and Eastern Europe after the collapse of the Soviet Union and new patterns of the penetration of the legal economy by organised crime led to a gradual strengthening of the role of Europol and the adoption of a range of measures against money-laundering and corruption throughout the 1990s.

In some cases specific external factors have triggered major new developments in EU justice and home affairs. One example is the Kosovo crisis as a result of which several Member States had to cope with large numbers of refugees and asylum seekers in spring 1999. This led the Council to adopt on 26 April 1999 a Joint Action on practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum seekers (1999/290/JHA). This Joint Action marked an important breakthrough towards a system of burden-sharing in cases of

major cross-border refugee movements and provided an important stepping stone for the agreement reached in 2000 on the introduction of a European Refugee Fund.

New transnational challenges arising from technological progress have also made the EU move into new areas of cooperation in justice and home affairs. The rapid growth during the last decade of new forms of crime related to electronic data-processing is an example. On 27 May 1999 the Council adopted a Common Position on the negotiations relating to the Draft Convention on Cyber Crime held in the Council of Europe (OJ L 142, 5.6.1999). It not only made the Member States support the inclusion in the Convention of provisions facilitating the effective investigation and prosecution of criminal offences against the confidentiality, integrity and availability of computer data, with a particular emphasis also on content-related offences such as child pornography but also provided a basis for further measures against cyber crime within the EU.

The most recent and probably most powerful example of transnational challenges acting as a driving force for the development of the AFSJ is the impact of the unprecedented terrorist attacks in the United States of 11 September 2001. Although there have been some serious implementation delays - which have been duly criticised at the Ghent European Council in October - the range of measures taken is clearly impressive and likely to lead to rapid and substantial steps forward before the end of the year on several issues on which there has been only slow or no progress in recent months. These include the European arrest warrant, the common definition of terrorist offences, the freezing of assets, the abolition of the principle of double criminality for a wide range of offences and the adoption of the Directive on money laundering (see Council documents SN 3926/6/01 and SN 4296/2/01). There can be little doubt that the shock of 11 September will give (and has already given) a major new impetus to judicial cooperation in criminal matters and police cooperation in the fight against terrorism.

The 'spill-over' effects of economic integration

The impetus given to justice and home affairs by the transnational challenges mentioned above has been parallelled and reinforced by a number of 'internal' factors linked to the progress of economic and political integration. Among those the completion of the single market has been of particular importance. The provisions on free movement in the EC Treaties had always had potentially major implications for justice and home affairs, but it was only with move towards the completion of the single market since the mid-1980s that they came to the forefront. The abolition of the remaining obstacles to cross-border economic activities and the full implementation of the 'four freedoms' generated *de facto* a common internal security zone encompassing all Member States in which free movement, increased economic interpenetrating and the facilitation of cross-border financial activities rendered borders between the Member States increasingly ineffective both as instruments of controls and obstacles to the movements of asylum seekers, illegal immigrants and crime. After the five original Schengen members had decided to go ahead with the abolition of controls on persons at internal borders in 1985 they had to realise that this had far wider and more complex implications for various aspects of internal security than originally thought, which was one of the reasons why it took them until 1990 to agree on the crucial Convention Implementing the Schengen Agreement. The abolition of internal border controls remained blocked in the EC context, but the implementation of the single market programme raised on its own a host of questions about measures necessary to 'compensate' for the loss of traditional controlling instruments related to internal borders. The work of the various Council groups on 'compensatory measures' carried out at the end of the 80s and the beginning of the 90s led to some results which are still cornerstones for the further development of EU justice and home affairs today. The agreement reached in 1990 on the Dublin Convention and

the setting up of Europol are the most notable examples. It seems unlikely that without the constraints generated by the single market programme the Member States would have been willing to go as far with the development of justice and home affairs cooperation in the 1990s as they eventually did. The link between the single market and the AFSJ has not lost any of its importance since. As Commissioner Antonio Vitorino very recently emphasised the single market cannot be regarded as fully completed without the development of the area of freedom, security and justice (Vitorino, 2001: 8).

The spill-over effects from the single market may have reached their peak in the first half of the 1990s but they continue to have an impact on the development of today's AFSJ. A major example is the renewed emphasis which the Tampere European Council of October 1999 placed on the creation of a 'European area of justice'. One of the main arguments put forward (especially by the French Minister Elisabeth Guigou) in favour of making this one of the priorities for the future development of the AFSJ was in fact that in spite of the (near-) completion of the single market both individuals and businesses still find it very difficult (and often prohibitively expensive) to gain adequate access to judicial authorities in other Member States, to obtain judicial decisions within reasonable delays and to have their rights enforced. The Heads of State and Government followed this logic of a wide and dysfunctional gap between the EU's development as an economic and a judicial area by endorsing the principle of mutual recognition as the cornerstone for a rapid development of judicial cooperation and by giving the Council a mandate to introduce common rules for simplified and accelerated cross-border litigation on small consumer and commercial claims and common minimum standards for multilingual legal documents used in cross-border court cases (Tampere Conclusions, Council document SN 200/99). In a sense this can be regarded as a classic case of functional spillover with integration in one sector 'spilling-over' in another, previously, unrelated sector.

It should be added that these spillover effects can also be found outside of the domain of the single market. The approaching introduction of the euro, for instance, has led the Member States to use the EU justice and home affairs framework to adopt special protective measures. On 29 April 1999 the Council extended the mandate of Europol to the fight against forgery of money and means of payment (OJ C 149/16, 28.5.1999), a step which was to a considerable extent driven by concerns over the protection of the euro against counterfeiting, and on 29 May 2000 a framework decision aimed at increasing protection by criminal and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.6.2000) was adopted. Here as well action in the context of the AFSJ has been triggered by progress made in another sector.

Member States' efforts to 'europeanise' certain national problems

The history of the integration process abounds with examples of Member States pushing for common action in certain areas in order to solve certain national problems through a 'Europeanisation'. This Europeanisation, which can take various forms ranging from bringing these issues on the agenda of intergovernmental cooperation to a full communitarisation of the respective areas, can also be found in EU justice and home affairs where interests of individual Member States faced with specific challenges at national level have played a key role in introducing or extending EU action into new areas. The potential benefit for national governments attempting to 'europeanise' a national problem are twofold: On the one hand moving the problem 'upstairs' to the European level may actually provide a more efficient response to certain problems, especially if these - because of their size or transnational dimension - cannot any longer be tackled effectively by the respective Member State. On the other hand, however, pushing the issue 'upstairs' to the European level can also help with taking the heat off an increasingly acri-

monious internal political debate. Once the issue has effectively been brought on the European agenda governments can try to use collective EU action for national policy objectives or to hide behind the weighty screen of such collective action (or non-action). A few examples may show how this logic has also had its impact on the development of EU justice and home affairs.

In 1990/91 the German Government played a crucial role not only in bringing justice and home affairs on the agenda of the Intergovernmental Conference leading to the Maastricht Treaty but also in making the introduction of the Third Pillar possible. This pro-active role was to a large extent motivated by the enormous increase of asylum applications in Germany during this period and its disproportionate share in the total number of applications in the EC-12 which was going to reach 78,76% in 1992 (Reermann, 1997: 122). In this situation the German Government was, on the one hand, hoping that a move towards a common European asylum policy would lead to a more even distribution of asylum applications among the Member States and/or the introduction of a burden-sharing mechanism. On the other hand, however, 'Europeanising' the issue also offered the prospect of defusing to some extent the increasingly bitter debate about a potential restrictive revision of the relatively liberal German legislation on political asylum which was not only causing major polarisations in the political landscape and public opinion but also serious controversies in the ruling CDU/FDP itself. The new European dimension of the asylum issue was actually repeatedly used as an argument by politicians favouring a restrictive revision of the German legislation (which eventually took place in 1993) who pointed to the need to arrive at a common European approach which would mean for Germany to bring its asylum legislation into line with the more restrictive approach taken by most of its European partners. Although the attempted Europeanisation led only to very limited immediate progress towards common EU asylum policy-making it at least partially fulfilled its role in the internal German political debate.

Another telling example of the impact of national political issues on the EU's justice and home affairs agenda has been provided by Belgium. In 1996 the child abduction, abuse and murder case which became known as the 'Dutroux affair' put into question not only the efficiency but also the integrity of Belgian law enforcement authorities. It led to a major political crisis and unprecedented mass demonstrations in autumn 1996. The Belgian Government came under extreme pressure to act, and one of its responses to the crisis was to seize on evidence about the links between the Belgian case and networks of paedophiles in neighbouring countries in order to present the problem as a European and not only a Belgian one. It even took the - for Belgium rather unusual - step of submitting to the Council a national proposal under Article K.3 TEU for a Joint Action to combat traffic in human beings and the sexual exploitation of children. This Joint Action was eventually adopted by the Council on 24 February 1997 (OJ L 63, 4.3.1997). It became a stepping stone for further EU measures regarding the criminalisation of trafficking in human beings and sexual exploitation of children, including the fight against child pornography on the Internet which continues to figure high on the agenda of Council and Commission. In this case as well a national Government's attempt at 'Europeanising' a national problem triggered an expansion of EU justice and home affairs action into new areas.

A further example of the tendency towards the 'Europeanisation' of certain national issues emerged during the preparations for the Tampere European Council of October 1999. In the run-up to Tampere the French Government, and especially Mrs. Elisabeth Guigou, the French Minister of Justice, emerged as the main driving forces on progress towards the creation of a 'European judicial area' with higher standards for citizens' access to justice, basic harmonisation of certain areas of civil law and automatic recognition and enforcement of court decisions across the EU. While it is certainly true that Mrs. Guigou had a strong vision of her own how to fill the 'area of justice' element of the AFSJ with substance there was also a significant national interest

factor involved. The Jospin Government was at that time trying to proceed with a major reform of the French judiciary - an effort Mrs Guigou was primarily in charge of -, and this effort was encountering stiff opposition from large parts of the judicial establishment. By presenting the difficult national reforms as part of a wider European project of creating a more open, more efficient and fairer system of justice the French Government was clearly hoping to be able to gain more support for the reforms at the national level and to increase pressure on the French judiciary to accept those. This had its impact on the AFSJ: Although the Tampere European Council did in the end not follow the French approach on harmonisation in the judicial area (the less controversial principle of mutual recognition was preferred instead), the strong emphasis placed in the Tampere Conclusions on progress towards a 'European area of justice' and the strategic guidelines on further action in areas such as access to justice and greater convergence in civil law owes a lot to the strong French insistence at the time of Tampere, so that this is clearly another case where a new sectoral dynamic has been brought into the AFSJ driven by a set of national interests.

The driving force resulting from the AFSJ as a major European project

Major political projects, once launched on a sufficiently broad scale and backed by an effective legitimising political discourse, can become a driving force of their own. This was shown, for instance, by the Single Market Programme which - once officially launched and propagated at both the national and the European level because of its expected economic benefits - developed a forceful dynamic of its own and an almost unprecedented drive towards its completion by the end of 1992.

Justice and home affairs have always been linked to more fundamental political objectives. The creation of the Schengen system with all its 'compensatory' measures from 1985 onwards was primarily motivated by the highly political objective of the abolition of internal border controls as part of both the completion of the freedoms of the Single Market and the creation of a 'Europe of the citizens' in which citizens would experience the existence of Europe by travelling freely across borders. The aim of increasing citizens' security through more effective cooperation at the European level in the fight against drugs and cross-border crime appeared more and more frequently and prominently in European Council conclusions and texts of Council and Commission since the beginning of the 1990s. Yet it was only with the Amsterdam Treaty that these various objectives were effectively merged into the AFSJ as a major new integration project.

The establishment of the AFSJ as one of the fundamental treaty objectives listed in Article 2 TEU is in itself of major significance because it places all other justice and home affairs related provisions in the EC/EU Treaties under a common rationale which now ranks at least formally at the same level as, for instance, the Economic and Monetary Union and the Common Foreign and Security Policy. Yet even more important is the fact that these extensive treaty objectives have since the adoption of the Treaty of Amsterdam been backed up by the detailed Vienna Action Plan of December 1998 (OJ C 19/1, 23.1.1999), partially exceeded by the Tampere European Council Conclusions and supplemented by the new 'scoreboard mechanism' whose purpose it is to keep under constant review progress made towards implementing measures and meeting the objectives set by the Treaty, the Action Plan and the Tampere Conclusions (see COM(2000) 167). There can be no doubt, therefore, that the AFSJ has now been launched on a very broad scale.

Big steps have also been taken as regards the build-up of an effective legitimising political discourse. The Vienna Action Plan emphasises that the new Treaty opens the way to giving freedom

"a meaning beyond free movement of persons across internal borders" and that this includes the "freedom to live in a law-abiding environment" protected by effective action of public authorities at the national and European level (Paragraph 6). The Tampere Conclusions continue this line of thought by describing it as the "challenge" of the Amsterdam Treaty "to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all", a project of which it said that it corresponded to "frequently expressed concerns of citizens" (Paragraph 2). This is fully in line with the new objective of Article 29 TEU that the Union shall "provide citizens with a high level of safety" within the AFSJ. The reference to European citizens' "concerns" adds a powerful claim to legitimacy to the AFSJ's further development. The Tampere Conclusions develop this further - even with a slightly populist undertone - by stating that "people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime" (Paragraph 6).

Both of the elements needed for a political project to generate its own dynamic - a launch on a broad scale and a powerful legitimising political discourse - are therefore now present in the case of the AFSJ. Although its impact as a dynamising factor is more difficult to assess than in the case of the three previously identified factors it should not be underestimated. EU justice and home affairs have now clearly lost the primarily 'technical' appearance they were credited with at the time of the 'old' Third Pillar in the mid-1990s. They are now regarded as a major field for political action which - to name only a few of the relevant indicators - comes regularly on the agenda of the Heads of State or Government, brings national governments to send in most cases both of the responsible cabinet ministers (for interior and for justice) to JHA Council meetings and occupies one of the most prominent places in the Commission's current legislative agenda.

IV. The costs of rapid change and problems of balance

'Dynamics' means change and change, especially if it is rapid, always comes at a cost and with problems of balance. The dynamics of EU justice and home affairs are no exception to that. Some of those, such as the difficulties of certain national actors to adapt to European mechanisms and regulation, are not fundamentally different from other areas of the integration process. But there are others which are fairly specific to the particular dynamics (and nature) of EU justice and home affairs.

The predominance of the security rationale. All three key terms of the AFSJ make the promise of the EU making a contribution to the delivering of essential public goods. Yet the rapid development of EU justice and home affairs since the beginning of the 1990s has seen a rather uneven prioritisation of these aims. As regards the first of these Member States have engaged themselves in the 1998 Vienna Action Plan on the implementation of the AFSJ to give "freedom" within the EU a meaning beyond the traditional aim of free movement of persons which includes the freedom to live in a law-abiding environment. This may be only a negative definition but it clearly has its justification. A political system that provides its citizens with certain freedoms - which the EU does through its rules on free movement and the economic liberalisation within the internal market - must also ensure that these freedoms are not abused and become a source of insecurity for citizens and the legal economy. The stability, wealth and liberal internal environment of the EU makes it unfortunately a rather attractive target for international crime and illegal immigration. The EU should certainly do its own to ensure that its citizens can live as much as possible in freedom from any threats these might pose to their daily existence. In this sense recent initiatives such as the adoption of the 2000 "Millennium Strategy" against organised crime and the measures taken or under discussion as regards combatting facilitators of illegal immigration all make a contribution to freedom within the EU.

Quite obviously "freedom" seen from that angle appears to be linked very closely to "security", the second in the list of key terms defining the AFSJ. Providing internal security for its own citizens is one of the most fundamental public goods any state has to deliver and ranks high amongst its primary sources of legitimacy. The strong security rationale of the AFSJ is reflected in the Treaties - which establish the aim of providing citizens with a "high level of safety" (Article 29 TEU) - and has been reaffirmed by the Tampere European Council Conclusions of 1999 which stated that "people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime". It seems fair to say that most of the progress achieved so far has indeed been focussing on the internal security dimension of the AFSJ. The sophisticated Schengen external border control system, the expanding role of Europol, the establishment of the "provisional judicial cooperation unit" in preparation for the new cross-border prosecution agency Eurojust during the last few months and the impressive range of decisions adopted or under negotiation regarding the fight against organised crime, money-laundering, drug trafficking and other major forms of international crime testify to the major efforts undertaken in the EU context.

However, there is a risk of the strong security rationale of the AFSJ dominating entirely its further construction. After 50 years of European integration the EU has grown into more than an abstract legal entity with limited economic purposes. It has become a political community in the making which is based on common fundamental values. These values are rooted in the open and liberal organisation of the societies of the Member States which is also reflected in the Charter of Fundamental Rights solemnly proclaimed by the EU institutions in December 2000. The security rationale of the AFSJ should therefore be adequately balanced by its freedom dimension. This means, for instance, that EU measures in the fight against cross-border crime and illegal immigration, which now involves a range of major EU wide data-bases, must respect highest standards in terms of the protection of personal data and comply with strict rules on the interception of telecommunications and other investigative techniques. It also means that EU action in the area of asylum policy, which is likely to expand considerably over the next few years, should not be allowed to undermine the principles and the spirit of the Geneva Convention. There is also scope - and quite considerable scope - for giving "freedom" in the context of the AFSJ a wider and even more significant meaning. Many of the freedoms which EU citizens enjoy should also be extended to legally resident third country nationals. The EC directives of 2000 on equal treatment and the 2001-2006 action programme on best practices in enhancing non-discrimination are encouraging steps in this direction and contribute to a better balance between security and freedom within the AFSJ.

The third and in no way less important public good the AFSJ is about is "justice". The 1998 Vienna Action Plan has declared that it is the Union's aim to give citizens "a common sense of justice throughout the Union" with an impact on day-to-day life which includes both better access to justice and full judicial cooperation among Member States. With the EU still consisting of 15 different national legal and judicial systems the intended "common sense" of justice may still take many years to emerge. Yet there can be no doubt that measures such as the framework decision of March 2001 on minimum standards regarding the status of victims of crime in criminal proceedings, the ongoing mutual recognition programme and the measures in preparation on minimum standards of legal aid, common procedural rules for small civil and commercial claims, the production of "user guides" on the different national judicial procedures and the approximation of compensation arrangements for victims can considerably reduce the problems citizens (and companies) are still experiencing in cross-border legal cases and make an effective contribution to the emergence of a "common sense of justice". Improving citizens' access to justice across internal borders in parallel to the progress made or under way with the various forms of criminal justice cooperation provided for by the 2000 Convention on Mutual Legal Assistance,

the exchange of information on criminal records and the introduction of fast-track extradition procedures is also a way of arriving at a sound balance of "justice" and "security" considerations.

Ultimately both the credibility and legitimacy of the AFSJ as a political project will depend on whether all three of the essential public goods "freedom", "security" and "justice" will be developed in balance with each other, with the freedom and justice dimension not being overshadowed in any way by the security rationale, however legitimate the latter may be. This is admittedly a difficult task, especially at a time when the devastating terrorist attacks in the United States have demonstrated the extent of the vulnerability of modern industrialised societies to non-conventional threats to internal security. Yet concerns over security must be adequately balanced by considerations of freedom and justice if the very values the EU is based upon are not going to be put at risk.

A tendency towards restriction and exclusion. The intergovernmental origins of today's AFSJ have had as a consequence that most of its *acquis* has been based on intergovernmental consensus favouring agreements on the least common denominator. That least common denominator, however, has in most cases meant restrictive measures. In the area of asylum, for instance, Member States have found it easier to agree on measures reducing the burden on their asylum systems (such as the Dublin Convention) than on the more 'positive' question of defining common minimum conditions for the reception of asylum seekers. In the area of immigration, as another example, agreement was earlier and easier reached on the principle of making entry for employment "purely exceptional" (Council Resolution on admission for employment of June 1994, OJ No. C 274/3 of 19.9.1996) than on measures favouring the integration of legally resident third country nationals which are seriously under negotiation only now. This tendency towards restriction has been accompanied and reinforced by the legitimising rationale of providing EU citizens with a high level of safety (see above) which is based on an implicit distinction between a "safe(r) inside" and an "unsafe(r) outside", with the EU's frontiers as the dividing line and law enforcement and border controls as key instruments to maintain and further enhance this distinction. The result of this has been the emergence of powerful effects of exclusion as regards third country nationals and threats of exclusion towards applicant countries not meeting the standards of the EU/Schengen *acquis* (Monar, 2000). Since Tampere a slight counterbalancing of the tendency towards restriction and exclusion has taken place, primarily as regards action regarding the fair treatment of third country nationals and cooperation with third countries. Yet the EU still has some way to go to prevent the AFSJ from turning into a mere "fortress", and there can be no doubt that the AFSJ has become a new major hurdle in the enlargement process.

Deficits in democratic control. Today's EU justice and home affairs have rapidly developed out of a purely intergovernmental context largely marked by uncodified procedures and the adoption of non-binding texts with little or no involvement of parliaments. In addition areas such as border controls and policing have always belonged to the domain of the executive branch of the state. Both of these factors have not helped EU justice and home affairs to develop effective mechanisms of parliamentary control. This has been particularly evident in the case of the Schengen system (Wallace, 2000). Although the information of national parliaments has improved over the last few years and although the European Parliament does now need to be consulted on all legally binding Council acts many of the former still struggle with late or incomplete information by their governments and difficulties with the legal and procedural complexities involved (see below) while the European Parliament's opinions do still not entail any binding effects on the Council. Both the European Parliament and national parliaments have also suffered from inadequate and/or late information on legislative initiative introduced both under the first and the Third Pillar by Member States. Since formal national government initiatives in justice and home affairs have significantly increased during the last few years this clearly reduces the chances of

effective parliamentary control. Specialised agencies such as Europol and Eurojust are not subject to any direct parliamentary control. All this has to be regarded as a serious problem because measures in justice and home affairs can have far more direct implications for the rights of individuals than those in other areas of EU policy-making.

Lack of transparency. The problems of transparency within the AFSJ - and before Amsterdam within the "Third Pillar" - have been repeatedly criticised and have even found their own "cruisaders" amongst which Tony Bunyan is probably the most prominent. Some of these problems are "systemic" in the sense that they stem from the complex negotiation outcomes between national governments which have dominated the AFSJ so far. The rapid development of EU justice and home affairs has only been possible at the price of repeated complex compromise packages between Member States' diverging interests which have caused an unprecedented degree of complexity and fragmentation. The partial or total opt-outs of Denmark, Ireland and the United Kingdom from Schengen and Title IV TEC, the participation of Iceland and Norway as non-EC countries in the Schengen system and the opt-outs from ECJ preliminary rulings under Article 35(2) TEU are only the most notable examples. This has undermined the unity of the EC/EU legal order, reduced the transparency of the AFSJ and added to the difficulties of parliamentary scrutiny. The persisting legal and procedural differentiation between decision-making under Title IV TEC and Title VI TEC - again a result of intergovernmental compromising - makes comprehensive policy-making more difficult and reduces transparency.

Whereas this systemic problems of transparency seem rather difficult to be overcome in the short term more could be done - with a bit more of political will - on problems of transparency stemming from the almost traditional culture of secrecy in justice and home affairs matters. The original almost impenetrable secrecy into which justice and home affairs cooperation was shrouded until well into the 1990s has fortunately given way to much greater openness which is reflected, amongst others, in the Council's justice and home affairs web site which contains a host of relevant information and documents. Yet some shortcomings remain both as regards the information of parliaments (see above) and information of the public. The EU should develop a better information policy on the aims and benefits of action taken in the context of the AFSJ. There seems to be rather little - so far - in terms of a strategy of "selling" the importance of the AFSJ as a major political integration objective to the European citizen. Otherwise there is a risk that this project which should serve the citizens' interests only comes into the headlines if there is talk about "big brother" data-bases or - as the British quality newspaper "The Independent" titled on 20 August 2001 - the EU using a "secret network to spy on anti-capitalists". If the interior ministers would not have, again, covered their decisions on using existing EU police and judicial networks for investigations on anti-globalisation demonstrators by a veil of secrecy and revealed some of the evidence available on the strategy of violence pursued by the groups targeted they could have avoided creating legitimate suspicion as to the purposes and priorities of EU action in justice and home affairs. Decisions such as those to discontinue in 1999 - without replacement - the informative annual Schengen reports (apparently) because of the incorporation of Schengen into the EC/EU *acquis* clearly do not help with the creation of a better informed public opinion about EU justice and home affairs.

Deficits in judicial control. The AFSJ's rapid growth out of the 'old' Schengen and Third Pillar cooperation frameworks with their exclusion or extreme limitation of judicial control by the European Court of Justice has left its traces. Some aspects of the intergovernmental 'culture' of restricting judicial control at the European level clearly persists. Both under Title IV TEC and Title VI TEU significant limitations are still imposed on judicial review by the Court, especially as regards border controls and measures by Member States relating to the maintenance of law and order and the safeguarding of internal security (Peers, 2000: 44-48). This is a problematic aspect

if one considers, again, the potential consequences of measures in these areas for the rights of individuals.

Deficits in institutional efficiency. In less than 10 years the EU's institutional set-up for dealing with justice and home affairs has gone through several major rounds of changes which have, *inter alia*, led to the creation of a new justice and home affairs portfolio in the Commission, the establishment of specialised Directorate-Generals in the Council and the Commission, a comprehensive set of new committees and working groups in the Council framework and substantial procedural and organisational changes in all institutions, including the European Parliament. Yet decision-making on justice and home affairs within the EU continues to be affected by serious problems of efficiency which include deficits in the coordination and preparation of initiatives and meetings, a lack of prioritisation of objectives, absence of longer term planning, frequent failures of senior Council committees to effectively manage and concentrate the activities of working groups and weaknesses in the follow-up of decisions. Some of these problems are, again, "systemic" in the sense that they stem from the range of complex political compromise packages which made the rapid growth of EU justice and home affairs possible. This applies, for instance, to the sub-optimal split between the strings of decision-making under ("communitarised") Title IV TEC and ("intergovernmental") Title VI TEU. Yet other problems can be clearly ascribed to the absence of any comprehensive strategy and badly conceived or implemented procedures. The efforts of the Belgian Presidency to arrive at a clear programme of priorities at the Laeken European Council in December 2001 could lead to a more focused strategy for the further development of the AFSJ. No less important is the so-called "Haga"-process on improving the working methods in justice and home affairs - launched in January 2001 at a meeting at Haga castle in Sweden - which could bring about a comprehensive overhaul of procedures which have grown in a less than systematic way out of previous Third Pillar, Schengen and EC procedures and have been affected by inter-institutional rivalries at both the national and the European level.

IV. Conclusions

The extraordinary pace of the development since the 1990s would have been impossible without the 'laboratory' roles played by the Council of Europe, TREVI and Schengen. Yet the main impetus for the rapid development has come from a combination of new or increasing transnational challenges, a powerful spill-over effect from economic integration, national interests in a 'Europeanisation' of certain national problems and the emergence of the AFSJ as a major political project in its own right with its own legitimising rationale.

These dynamics are likely to continue to drive the AFSJ forward. The spill-over effect from economic integration may have peaked in the 1990s, but transnational challenges such as international terrorism, immigration pressure and transnational crime - are continuing to evolve. Member States will continue to be confronted with certain national problems in this area which they would like to solve or at least defuse by moving them upwards to the European level, and as a political project now regularly flagged up by the Heads of State or Government and supported by the new "scoreboard" system the AFSJ is generating a dynamic and logic of its own.

All this does not mean, of course, that the development will be a smooth one and progress easy. On many of the more sensitive issues in question - such as immigration - the Member States are engaged in difficult internal debates which limit the scope for substantial agreements at EU level. There also remains a high degree of inertia, in some areas even hostility against change 'imposed' by the European process, in ministries, police forces, the judiciary and the legal professions. Dynamics of change tend to be much slower in the realm of mentalities, and EU justice and

home affairs are far from being an exception to that. Differences between national legal systems and administrative structures tend also to be more pronounced than in many other EU policy-making areas.

Yet there can be no doubt that a major breakthrough has been achieved with the Amsterdam Treaty and the Tampere agenda. The large number of new initiatives launched since and the shift from 'soft' to 'hard' instruments justify the assumption that the AFSJ - in spite of all these obstacles - will become much more of a reality during the next few years. The shock of 11 September 2001 will provide an additional impetus and has already led to substantial progress on some important issues such as the European arrest warrant. Whether the AFSJ will be regarded as a success, however, will also depend on whether the problems of the predominating security rationale, the tendency towards restriction and exclusion and the deficits in terms of democratic and judicial control, transparency and institutional efficiency can be eliminated or at least substantially reduced. Persisting or even widening problems of parliamentary control, in particular, would be a cost which even the most sustained dynamics of development of the AFSJ could not justify. At present the AFSJ as a political project is clearly suffering from several problems of balance - especially from that between the partially conflicting aims of "security", "freedom" and "justice" where the security rationale tends to dominate the agenda, but also from those between efficiency and democracy, and confidentiality and transparency - which will need to be sorted out rather soon. This not only to sustain the so far extraordinary dynamics of the AFSJ and to give it a more positive, less restrictive meaning but also to provide it with the legitimacy and support by the EU citizens which will be needed to justify and implement the unprecedented changes which the development of the AFSJ will mean for the internal security and judicial environment in which they live.

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The Area of Freedom, Security and Justice in the Perspective of Member States[1]

By Dr. Christoph Ehrentraut

I. Development and assessment of the co-operation in justice and home affairs

A. From Maastricht to Amsterdam

1. The work under the Treaty of Maastricht: A productive second phase

It has been almost ten years since the Intergovernmental Conference of Maastricht reached an agreement on the Treaty Establishing the European Union that created in Title VI a single institutional framework for co-operation between the Member States in the area of justice and home affairs.
The newly-established co-operation came on the heels of various forms of co-operation that the Member States of the European Community had previously set up in an informal manner: for instance TREVI, the Ad-Hoc Group Immigration, the European Committee to Combat Drugs, the "Customs Mutual Assistance Group", judicial co-operation as part of the European Political Co-operation, the Co-ordinators for the Freedom of Movement and Schengen.

1.1. The first phase

The work that had been done prior to the establishment of the European Union is important to consider if one wants to arrive at a fair assessment of the co-operation that has taken place under the Treaty of Maastricht. In this respect, during the first phase, the predominant view was frequently one of scepticism or even negativity. It led, for instance, to a warning statement by the competent Commissioner, Padraig Flynn, to the Justice and Home Affairs Council in November 1994 in view of the disappointing results that had been achieved in the first year. In his statement, Commissioner Flynn raised doubts as to whether the co-operation within the institutional framework of the European Union had actually achieved and would further achieve any tangible improvement over the purely intergovernmental co-operation that had existed prior to Maastricht.
However, if one considers that several important initiatives had already been undertaken before the entry into force of the Treaty of Maastricht, then it comes as no surprise that the initial results were somewhat modest. The Dublin Convention was concluded in 1990, the negotiations on the Convention of the Crossing of External Borders were close to finalization – with the exception of the issue of Gibraltar, the London Ministerial Resolutions led to an initial consensus on asylum law in 1992 – albeit in a legally non-binding form. The political initiative to set up a European police office was seized and the Convention on Mutual Assistance and Co-operation between Customs Administrations ("Naples") was in existence since 1967.
Admittedly, it is also true that not enough use was made of opportunities to achieve results in a legally binding form. In the first phase, the Council availed itself mainly of recommendations or resolutions[2]. And when a Joint Action was chosen in specific cases, its content was either so non-binding that it confined itself merely to describing the status quo as, for example, the Joint Action regarding a Common Framework for Initiatives Concerning Liaison Officers[3]. Or, it contained a regulation that favoured the continued validity of national law, thereby ruling out a constitutive regulatory effect[4].

1 *The paper represents the author's personal view.*
2 *With the exception of the Joint Action concerning the Europol Drugs Unit (95/73/JHA) and of the Conventions on Europol (95/C 316/01), on the Customs Information System (95/C 316/02) and on the Protection of the European Communities Financial Interests (95/C 316/03), all agreed on 26 July 1995 .*
3 *Of 20 December 1996 (97/12/JHA)*
4 *Article 9 of the Joint Action of 17 December 1996 concerning the Approximation of the Laws and Practices of the Member States to Combat Drug Addiction and to Prevent and Combat Illegal Drug Trafficking (96/750/JHA)*

But was this really surprising in areas that are traditionally at the very core of national sovereignty and that were of an extremely sensitive political nature? It was all the less surprising, considering the Treaty itself provided legal instruments whose legally binding effect had been left open (Joint Action, Article K.2 para. 2 (b) TEU) or that were unsuitable for co-operation between the Member States in this area (Joint Position, Article K.2 para. 2(a)).

1.2. The second phase

Nonetheless, co-operation began to intensify from the mid-1990s onwards. The reasons for this are manifold: becoming accustomed to the new forms of co-operation, the conclusion of lengthy negotiations on conventions, growing political pressure – for instance from the European Parliament and from the preparation for the Intergovernmental Conference at Amsterdam – but, above all, initiatives launched by the European Council. The European Council, fully aware of the shortcomings of the co-operation, issued concrete mandates to the Ministers of Justice and Home Affairs containing specific terms of reference regarding substance and timeframes. This related, in particular, to co-operation between police forces, with which the European Council pressed full speed ahead by commissioning Action Plans – initially for the fight against drugs[5] and later on for the fight against organised crime[6]. These mandates resulted both in greater use being made of the legal instruments of the third pillar and in a more binding content of Joint Actions. Examples are the Joint Action on Information Exchange Risk Assessment and the Control of New Synthetic Drugs[7] and the Joint Action that made involvement in a criminal association a punishable offence in 1998[8]. Previously, the Council had adopted the Conventions on Extradition[9], the Convention on the Protection of the European Communities' Financial Interests[10], the Convention on the Fight against Corruption involving Officials of the European Communities or of the Member States[11] and the Convention on Mutual Assistance and Co-operation between Customs Administrations (Naples II)[12]. Though adopted, it is well known that the entry into force was and still is subject to ratification procedures.
By contrast, asylum and migration policy, which drew less political attention at that time, continued to be confined almost exclusively to recommendations and resolutions by the Council in the second phase.[13] Nonetheless, the political consensus that was reached is extremely useful since it represents - despite the non-binding legal nature of almost all the measures - a common understanding of the Member States on fundamental problems of asylum law and defines a minimum level of harmonization, below which it will be difficult to remain in the future.

2. The Treaty of Amsterdam: Between continuous and cautious progress

The Amsterdam Treaty drew conclusions from the shortcomings in the third pillar and brought about improvements in the institutional framework for co-operation: A complete right of initiative for the Commission (Article 34 para. 2 TEU), more rights for the EP (Article 39 TEU and Article 67 TEC), and a stronger role for the ECJ (Article 35 TEU and Article 68 TEC). Asylum, migration, external border policies (Article 63 TEC) and judicial co-operation in civil matters (Article 65 TEC) were transferred from the third to the first pillar. This communitarisation increased, at first sight, the gap in the level of integration within the area of justice and home affairs. But this gap was again reduced, on the one hand, by a greater institutional alignment of

5 European Council at Cannes, 26/27 June 1995, Presidency Conclusions, chapter III.2.
6 European Council at Dublin, 13/14 December 1996, Presidency Conclusions, chapter V.2.
7 Of 16 June 1997 (97/396/JHA)
8 Council Doc.13673/98 Press 427, 2146th Council Meeting – Justice and Home Affairs
9 Of 10 March 1995 (95/C 78/01) and of 27 September 1996 (96/C 313/02)
10 Of 26 July 1995 (95/C316/03) with Supplementary Protocols in 1996 and 1997 (of 29 November 1996, 97/C151/01 and of 19 June 1997 (97/C 221/02)
11 Of 26 Mai 1997 (97/C 195/01)
12 Of 18 December 1998 (98/C 24/01)
13 An overview in van Krieken, The Asylum Acquis Handbook, The Hague, 2000, Hailbronner Immigration and Asylum Law and Policy of the European Union, The Hague, 2000

the third pillar to the Community regime. On the other hand, the whole area of justice and home affairs policy was held together by the Treaty itself which laid down in Article 61 TEU and Article 29 TEC the overall objective of establishing "an area of freedom, security and justice". The incorporation of the Schengen *acquis* into the European Union acknowledged the successful work of the forerunner countries on the creation of an area without border controls which had developed sufficient substance and profile as well as gained enough support from Member States of the European Community to be "fit for Europe". At the same time, the complicated modus of incorporation of the Schengen *acquis* with special provisions for the United Kingdom, Ireland and Denmark confirmed what the discussion on the evolution of the third pillar itself indicated, either openly by exclusion and opting in clauses or in a rather disguised form by defending the rules of the Maastricht Treaty (unanimity rule) or by introducing transition provisons: A significant rift among the Member States in the readiness to achieve more integration in the area of justice and home affairs.

Nonetheless, the objection that was raised, namely, that the steps taken towards communitarisation were half-hearted because of the restricted role of the Community institutions for a transitional period of five years[14], should be dismissed. The sensitive nature of the issue and, more specifically, the difficult start under the Treaty of Maastricht made a careful transition toward the Community regime in the spirit of co-operation advisable - as opposed to adopting a more confrontational "all-or-nothing" approach that would place the Member States at a disadvantage. The tough negotiations on the first substantial instruments under the Amsterdam Treaty – for instance, on the Directive on Temporary Protection of Displaced Persons in Mass Influx Situations[15] – confirm, with the benefit of hindsight, that this decision was indeed the right one. Likewise, the lack of agreement on the application of the majority rule with regard to immigration policy must not necessarily be a weakness of the Amsterdam Treaty either[16]. It is not unusual, when creating new Community competencies, to introduce these into the Treaty along with a requirement for a unanimous vote, as former Article 8b TEU (now Article 19 TEC) on the Right to Vote in Municipal Elections as part of the EU citizenship shows. The disillusionment about maintaining the principle of unanimity resulted mainly from a mixture of unrealistic expectations on the one hand and shortcomings in the process itself on the other – starting with obviously insufficient preparation and management of negotiations on the part of Member States right through to obvious "horse trading" over entirely unrelated exceptions to the principle of unanimity in the final phase of the negotiations.

Weaknesses in the Amsterdam Treaty could be seen in the creation of new legal instruments and mandates, which lack precise content. Like the framework resolutions in the third pillar[17], which replaced the Joint Actions, the "minimum standards" in Article 63 TEC has left some confusion as for its exact meaning. The unclear implications of this term for the remaining competencies of the Member States have significant substantial effects which initially slowed down the negotiation process on the proposed directives in the area of asylum policy. In addition, as for police co-operation the Treaty confined itself by and large only to creating specific terms of reference, timeframes and specifications that remained within the framework that had already existed under the Treaty of Maastricht, but had not been utilised. Notwithstanding the integration of the relevant parts of the Schengen *acquis* there was no significant further development extending beyond the Treaty of Maastricht which, in terms of quality, would have represented a comparable quantum leap as the communitisation of asylum and migration policy[18].

14 *For example by the former European Commissioner for Justice and Home Affairs Gradin, Perspectives of a European Immigration and Asylum Law, p. 9, in Hailbronner/Weil, From Schengen to Amsterdam, 2000; A mixed judgment on the relevant provisions of the Amsterdam Treaty by Labayle, Un espace de liberté, de securité et de justice, Revue trimestrielle de droit européen, 1997, p. 111*

15 *Of 20 July 2001 (2001/55/EC)*

16 *Critical on the position of the German government which blocked an agreement on the application of the majority rule Gimbal, Die Innen- und Justizpolitik nach Amsterdam, p. 153, in Weidenfeld, Amsterdam in der Analyse, Gütersloh, 1998*

17 *rechmann in Callies/Ruffert, Kommentar zum EU-Vertrag und EG-Vertrag, 1999, Art. 34, 9; Bieber, Reform der Institutionen und Verfahren – Amsterdam kein Meisterstück, Integration 1997, p. 243*

18 *Ehrentraut, Die Bekämpfung der organisierten Kriminalität in der Europäischen Union, Integration 1999, p. 256*

B. From Tampere to Nice

1. The European Council at Tampere: Missed opportunities

Only six months after the Amsterdam Treaty entered into force, the European Council dealt for the very first time exclusively with issues relating to justice and home affairs policy.
The Tampere Conclusions, however, hardly represent a new impetus for further developing the substance of justice and home affairs policy; they are more of a symbolic-political nature. This is mainly attributed to the unfortunate timing of the European Council which took place too soon after the (belated) entry into force of the Amsterdam Treaty. An opportunity was missed to evaluate the initial experiences under the Amsterdam regime and then to take corrective measures, as well as to identify comprehensively substantial prospects that extend beyond Amsterdam.
The theoretical explanations given for the concept of an "area of freedom, security and justice" at the beginning of the Tampere Conclusions were sound - and given the fragmentary regulations in the Treaty itself - necessary, but they were by no means new. They had already been set out in detail previously in the Vienna Action Plan of December 1998[19], which, for its part, was based on the fundamental observations in the Communication of the Commission "Towards an Area of Freedom, Security and Justice"[20], that had been published in July of the same year.
The main content of the Tampere Conclusions were: affirmations of the content of the Treaty, calls for more rapid action and deadlines, and definitions of priorities. In this regard, too, they mainly followed on from the Vienna Action Plan. The Tampere Conclusions also contained concrete proposals, specifications and modifications of the Vienna Action Plan, which, as a matter of fact, had shown too much hesitancy in determining how best to implement the provisions of the Amsterdam Treaty on creating an area of freedom, security and justice (mandate of the EC Dublin).[21]
A new and significant impetus that was injected by the Tampere Conclusions was the notion of a Common European Asylum System to be adopted in the long-term. In this context the Geneva Refugee Convention was clearly affirmed. Furthermore, the demand for the establishment of Eurojust in the field of judicial co-operation was an important innovation. In the area of police co-operation, the mandate to establish a European Police Academy was new and – in particular with respect to enlargement – important. However, measured against the fact that the European Council had already launched the establishment of a European police office in 1992, the progress achieved in Tampere on police co-operation does not appear to be that significant.
Nonetheless, Tampere should not be assessed in too negative a light either. It gave concrete shape and content to the multitude of individual mandates that were listed in a rather unsystematic way in the Amsterdam Treaty. This refers in particular to measures relating to money laundering, crime prevention (European Network for Crime Prevention) and the fair treatment of third country nationals. As for migration and asylum policy, an input with significant elements was given by a preparatory joint position paper drawn up by the French and German Ministers of the Interior and the British Home Secretary. However, considering what could have been achieved by a special European Council on Justice and Home Affairs at a later stage, the results achieved at Tampere could hardly have been more progressive than they were at this particular point in time.

2. The Treaty of Nice: Amsterdam confirmed

The question of majority decisions in the areas of justice and home affairs was propelled into the spotlight once again when the Intergovernmental Conference 2000 focused on the "leftovers" of the Amsterdam Treaty. The application of Article 251 of the Treaty, as supplemented by para-

19 Council Document 13844/98, JAI 44 of 4 December 1998
20 COM(1995)459 final of 14 July 1998
21 A critical assesment of the Vienna Action Plan by Monar, Die Entwicklung des „Raums der Freiheit, der Sicherheit und des Rechts“: Perspektiven nach dem Vertrag von Amsterdam und dem Europäischen Rat von Tampere, Integration 2000, p. 26

graph 5 of Article 67 in the Treaty of Nice, was again criticised as being a half-hearted measure, since its scope was limited: it only refers to asylum policy and some aspects of refugee policy, and it will only take effect once an agreement has been reached on common rules and main principles in accordance with the Amsterdam Treaty. In all other respects, the procedure provided for in Article 67, para. 2 of the Treaty of Amsterdam will continue to apply - even though a political agreement was reached by virtue of a Declaration on Article 67 that Article 251 is to be applied to migration policy. It is uncertain whether the requirements set forth in Article 67, para. 5 will be met by 1 May 2004 – regardless of the fact that, again, new definitions were introduced – “common rules and main principles” – which give rise to new questions as to substance and procedures.
The fact that the Treaty of Nice affirmed the results achieved under the Amsterdam Treaty, illustrates that the provisions set forth in the Amsterdam Treaty in this area finally were less a result of the specific dynamics of the “horse trading” that had taken place at the end of the negotiations. Rather, they are an expression of a basic reluctance among Member States, a reluctance that did not disappear between 1997 and 2000. Member States have not yet developed enough confidence in the idea that a pure Community procedure in this political area would guarantee the best possible decisions. This political signal should be taken into consideration in the negotiations on the proposed directives in the field of asylum and migration policy.

II. Institutional questions

A. The Council: Structures of co-operation

1. Intra- and cross-pillar deficits

The structures of co-operation in justice and home affairs in the Council of the European Union are not an issue of purely technical nature. In fact, the structures help to ensure that the best possible results are achieved in efficient procedures. These criteria - efficient procedures and the quality of the decisions - form the measuring stick for the working structures within the Council.
Particularly in the field of justice and home affairs the working structures refer to two aspects: the work performed within the area of justice and home affairs and the organisation of work beyond the field of justice and home affairs. Under the Treaty of Maastricht there were obvious deficiences in the intra-pillar structure: too many decision-making levels, or discussion levels to be more precise[22]. This often led to situations in which even proposals that were intended to be legally non-binding were tossed back and forth through the Council structures. By contrast, at the same time (1994), in the first pillar, the Directive on the Right of EU Citizens to vote in Municipal Elections[23] that was legally binding and caused considerable political problems for Member States was negotiated and adopted in the Council in three-layer decision-making process within six months.
Deficits also in cross-pillar co-operation became visible in the second phase under Maastricht when a more ambitious approach was taken. For instance in the customs area: the distinction between goods that fell under the competence of the Community (cigarettes, alcohol) and goods that were subject to co-operation in the third pillar (such as drugs), led to parallel work on legal instruments in respect of mutual judicial assistance between customs administrations and on the establishment of the Customs Information System, the Naples II Convention[24] and CIS Convention[25] on the one hand and Regulation No. 515/97[26] on the other. This distinction was not only impractical in terms of operational work, but also led to separate procedures in the

22 *On deficits under the Maastricht Treaty O'Keefe, Recasting the Third Pillar, 1995 Common Market Law Review, p. 893; Commission Report for the Reflection Group, Intergouvernmental Conference 1996, p. 50;*
23 *Council Directive 94/80/EC of 19 December 1994*
24 *Of 18 December 1998 (98/C 24/01)*
25 *Of 26 July 1995 (95/C 316/02)*
26 *Of 13 March 1997*

Council that, at best, could only have been brought together again at Coreper. This, however, would have extended beyond the functions and possibilities of this committee. As a result, the handling of the sensitive interfaces between the first and the third pillar was shifted from Council bodies to become the subject of internal co-ordination among the Member States.

2. Remedies

The Council responded by setting up horizontal groups, for instance in the fight against drugs. The insight that a successful fight against drugs cannot be achieved through repressive measures of the third pillar alone, but rather calls for a comprehensive strategy encompassing both prevention and international co-operation, led to the establishment of the so-called Horizontal Drug Group in 1995. This Group is still responsible for implementing and monitoring the recommendations and results of the Action Plans to Combat Drugs that follow an integrated approach.

2.1 Intra-pillar co-ordination

The Amsterdam Treaty led to an improvement in the intra-pillar working structures. In the communitarised areas of asylum and migration policy and judicial co-operation in civil matters, the structures were adapted to those of the first pillar, though not fully taken over. The establishment of the Strategic Committee for Immigration, Frontiers and Asylum[27] between Coreper and the working groups broke with the traditional three-level decision-making process in the first pillar. The establishment of this committee is justified and has proven to be worthwhile. Not just from an institutional point of view, because according to Article 67 TEC the Community regime is not being applied in a pure form during the 5-year transitional phase anyway, but above all in terms of meeting the listed criteria of efficient procedures and optimum decision-making. Given the volume of mandates in the Amsterdam Treaty and the multitude of proposed directives in the field of asylum and migration policy (approx. 7 proposals), a body is needed at a level above the working groups to deal with the numerous and politically sensitive cross-links and horizontal aspects of the proposals – for instance, family reunification or access to the labour market. The Strategic Committee is able to ensure that the individual directives and the overall policy are coherent, because it combines expertise with political responsibility, a fact that also considerably eases the burden on Coreper. The need to find political solutions to the horizontal issues in asylum and migration policy is enhanced further by the fact that this aspect has not always been given sufficient consideration in the proposals that the Commission has submitted in a remarkably short period of time.
In the remainder of the third pillar, the decision-making structures were flattened. In this regard, not only the Article 36 Committee but also the so-called Multi-disciplinary Group has been pursuing an interdisciplinary approach that had been adopted in the final phase under the Maastricht Treaty. The Multidisciplinary Group, which was set up to draw up the Action Plan to Combat Organized Crime[28] and which is restricted to the third pillar, is developing a joint, complementary strategy for measures in the fields of police co-operation and judicial co-operation in criminal law and criminal procedure. This approach prevents repetition of something that had happened as a result of the strict separation between police and criminal justice working groups, which interestingly enough, reocurred at the first European Jurists' Forum which was held in Nürnberg in September 2001. The Forum dealt, *inter alia*, with judicial co-operation in criminal matters – without making the link to police co-operation. Since the discussion was confined to one field and since no use was made of important additional information, the solutions proposed were bound to be incomplete and of limited value only. The Multi-disciplinary Group embodies the proper problem-oriented approach that has moved away from thinking along the lines of the original structures.

27 Annex to Council Document 6166/2/99, CK 4 12 rev. 2 of 16 March 1999
28 European Council at Dublin, Presidency Conclusions, chapter V.2.

2.2. Cross-pillar co-ordination

As regards the need for cross-pillar co-ordination, the Amsterdam Treaty has reduced it with a respect to the first pillar, but, at the same time, has increased it as a result of the institutional gap that was created within justice and home affairs. Nevertheless, the decision-making structures in the Council that were created in particular for the fight against drugs and against organised crime demonstrate that institutional differences are being overcome in practice to ensure that the best possible results are achieved. An example of this are the so-called Jumbo Councils in which the Eco-Fin Council and the Justice and Home Affairs Council meet in order to deal, *inter alia*, with money laundering.
It can therefore be anticipated that the implementation of the most recent conclusions of the Council on the prevention of and the fight against terrorism which cut through the pillar structure of the Union[29], will be equally successful.

B. The Role of the Commission: From "shall be associated" to an exclusive right of initiative

The role the Commission plays in the area of justice and home affairs has steadily grown. Today, the Commission has a right of initiative in all areas. Yet the lack of its exclusivity in the newly communitised fields has been subject to criticism from purists in the theory of the institutions[30]. Generally, the Commission's right of initiative should contribute to a more coherent policy and a better defined long-term strategy in justice and home affairs. By contrast, in particular in the first phase under the Maastricht Treaty, initiatives by the Member States were often rather dominated by the formal objective of reaching an agreement on a proposal while holding the Presidency of the Council than by achieving a substantial added value to the work[31]. The exercise of the right of initiative by the Commission requires a keen sense for the interests of the Member States and their citizens, which – no matter how far apart the positions among the Member States are - must be in the center of the reflections.

1. Police and customs co-operation, judicial co-operation in criminal matters

By granting a right of initiative to the Commission in the third pillar, the Treaty of Amsterdam broke with the exclusive right of initiative of the Member States in police and customs co-operation as well as judicial co-operation in criminal matters. Under Maastricht, the rights of the Commission as defined in the Treaty were limited to being "fully associated with the work" (Article K.4 para. 2 TEU). Occasionally, in the first phase, because police co-operation continued to be characterised by the atmosphere of the former TREVI work, the impression at expert meetings outside the Council was that the representatives of the Commission were merely tolerated rather than accepted as a full-value delegation.
However, although it did not have a right of initiative, the Commission demonstrated presence and expertise as by organising conferences like the Conference on Drugs Policy in Europe in 1995 or the Conference on Trafficking in Women in 1996. These conferences dealt with all aspects of these issues, including police and criminal justice. Furthermore, the Commission issued communications, such as "Illicit Traffic in Nuclear Material and Radioactive Substances" [32] or "On a Union Policy on Corruption"[33]. The conclusions drawn at the Conferences and the recommendations contained in the Communications were presented to the Member States once again at informal ministerial meetings. Finally, the Commission made use of its budgetary com-

29 *Feuille de route réprenanant l'ensemble des mésures et initiatives à mettre en oeuvre dans le cadredu plan d'action par le Conseil européen le 21 Septembre 2001, Annex to Council Document 12800/01*
30 *Manin, The Treaty of Amsterdam, p. 6, in The Columbia Journal of European Law, 1998; Brinkhorst, Reforming the Treaty on European Union – The Legal Debate, Kluwer Law International, p. 171, The Hague 1996*
31 *Ehrentraut (n. 18), p. 255. A general critical assessment in the Rapport d'information sur la coopération dans les domaines de la justice et des affaires intérieures, deposée par la délégation de l'assemblée nationale pour l'Union europeéne, p. 43ff, Paris 1996;*
32 *COM(94)final of 7 September 1994 and COM(96)171final of 19 April 1996*
33 *COM(97)192final*

petency in order to develop finance programmes such as OISIN on police co-operation[34] or FALCONE on the fight against organised crime. By undertaking these activities, the Commission won recognition from the Member States and was able to influence the development of policies. At the same time, by managing the financial programmes, the Commission gained insight into the practical work and the needs of the Member States that could be of benefit for the right of initiative it was later granted.

2. Asylum, migration, judicial co-operation in civil matters

As regards asylum, immigration, fraud, drug abuse and judicial co-operation in civil matters, the Commission shared a right of initiative with the Member States from the outset. However, it made little use of this right of initiative. The European Parliament criticised this and called upon the Commission to make use of its right of initiative in the area of asylum and immigration[35]. Yet, the Commission was in a difficult situation. Particularly in view of the political sensitivity of the issues and of the experience of the Member States, a shared right of initiative could not possibly lead to a complementary and fruitful competition aimed at finding the best possible solutions, which had probably been the intention of the Treaty. Likewise, it would be too simple to use the Commission's lack of monopoly over initiatives as one of the main explanations for the disappointing results achieved in the first phase under the Maastricht Treaty. Even if the Commission had had an exclusive right of initiative, it would have been difficult to achieve more at the time because the time was simply not ripe for further-reaching solutions.
The time now appears to be ripe – at least as far as asylum and migration policy are concerned. Even though the Amsterdam Treaty once again provided for a shared right of initiative, the Member States – at the Commission's request – granted the Commission a *de facto* monopoly over proposals. This was actually a huge vote of confidence for the Commission – considering the sensitivity of the issues that was confirmed by the Treaty of Nice. This political gesture by the Member States should be acknowledged and should result in intensive consultations with the Member States prior and subsequent to the submission of proposals by the Commission.

III. Prospect: Laeken and beyond

On 16 November 2001, the Justice and Home Affairs Council will deal with preparations for the European Council in Laeken, that will assess at its meeting in December 2001 the progress in the implementation of the Tampere Conclusions. In doing so, the European Council will not confine itself to an assessment; rather, the Heads of State and Government will also issue mandates and outline prospects for the future as they have done at previous meetings.
A large number of activities and initiatives have been taken since Tampere.

A. Asylum and Migration

1. Short-term

The first acts have been adopted on asylum and migration policy - the European Refugee Fund[36], the Eurodac Regulation[37], Directive on Temporary Protection[38] - and the Commission has submitted the remaining proposals for minimum standards. This has been a Herculean task for

34 Of 20 December 1996 (97/12JHA)
35 Résolution du Parlement européen sur la cooperation dans les domaines de la justice et des affaires intérieures, Decembre 1996, in Council Document 12977/96, CK 4 65 of 19 December 1996. On previous efforts of the European Parliament to press for initiatives from the Commission, Fortescue, First Experiences with the Implementaion of the Third Pillar Provisions, p. 20; 24 in Bieber/Monar, Justice and Home Affairs in the European Union, Brussels, 1995
36 Council Decision of 28 September 2000 (2000/596/EC)
37 EC-Regulation 2725/2000 of 11 December 2000
38 Council Directive 2001/55/EC of 20 July 2001

which the Commission deserves a lot of respect and recognition. Yet this is only the first and – without discrediting the value of the Commission's work – the easiest part of the work that needs to be done. The difficult negotiations on the Directive on Temporary Protection gives an idea of the efforts that will have to be made in future.
It is certain that it will not be possible to meet the deadlines of the "Scoreboard", which gives a biannual update on progress in the creation of an area of freedom, security and justice[39]. From the Member States' perspective it is doubtful whether the commendable, swift submission of the Commission's proposals are truly that beneficial for the negotiations. Notwithstanding the respect the Commission deserves for the significant achievement of submitting all proposals in due time there is a certain lack of coherency in some of the proposals and in how the proposals relate to each other. A more successful approach could have been to spend more time on the drafting of the proposals and on consultation with the Member States thereby resisting the temptation - with a view to the Scoreboard[40] - to meet one's own obligations swiftly and to pass on the responsibility and the pressure to the Council.
Given that all proposals have been submitted, it is now all the more important for the future procedure to achieve horizontal solutions to problems in the proposed Directives. There are numerous cross-links among the directives, some of which are highly sensitive political issues, such as family reunification or the "asylum-migration-nexus". This underlines the necessity of giving a clear structure to the future work, achieving an initial consensus on the most important horizontal issues, and avoiding getting bogged down by protracted negotiations on individual proposals. And if it becomes evident that despite this strategy, it should still not be possible to meet the deadlines set forth in the Treaty of Amsterdam, this must not be seen as a reason to panic and take premature decisions: the communitisation of asylum and migration policy through the Amsterdam Treaty is in itself a giant leap forward. European citizens to whom the institutions are ultimately answerable for all work performed within the EU, should have a greater understanding of the fact that it is not always possible to meet deadlines if viable solutions for difficult political issues are to be found.

2. Long-term

For the creation of a Common European Asylum System in the long-term – which is the second phase of harmonising asylum policy[41] - specifications should only be made on the basis of experience gained with the practical application of the minimum standards[42]. As regards the content of the Common Asylum System, it must be taken into consideration that harmonisation is not synonymous with uniformity. Here, too, the Member States should be granted flexibility that allows them to take into account situations that are relevant for asylum law, particularly the geographical and historical features that vary from Member State to Member State.

B. Police Co-operation

It is more difficult to assess police co-operation and to predict its future than it is to assess asylum and migration policy. Whereas there has been a continual evolution from the "soft law" under Maastricht to "minimum standards" under the Amsterdam Treaty right up to the Common European Asylum System that has been identified by the European Council in Tampere as a long-term goal, police co-operation has developed rather in the opposite direction. Even before the Maastricht Treaty entered into force, an initiative had been taken in 1992 at the European Council at Luxembourg with the proposal to set up a European Police Office. The

39 Published by the European Commission, latest version of 26 October 2001, COM(2001)628 final
40 Which is occassionally considered as a „name and shame approach", European Voice, 12 – 18 October 2000, p. 13
41 Tampere European Council, 15/16 October 1999, Presidency Conclusions, chapter A.II.
42 In its Communication „Towards a Common Asylum Procedure and a Uniform Status, Valid throughout the European Union, for Persons Granted Asylum„ (COM(2000)755final of 22 November 2001) the Commission seems to favor a parallel procedure between the first and the second phase

essence of this proposal surpassed anything that was achieved in the following years in the field of police co-operation. In terms of quality, similar results in combating organised crime were not achieved until criminal law began to be harmonised in implementing the Action Plan on Organised Crime[43].

1. Short-term

Hence the focus is again on Europol: the implementation of the mandates laid down in Article 30 para. 2 TEU and of the Tampere Conclusions – the employment of joint investigative teams, the authorisation to ask Member States to initiate investigations and the establishment of a competency for money laundering – have been initiated, but not all entered into force[44]. However, the events of 11 September 2001 have led to swifter implementation in some areas. In addition, the Europol Convention needs to be supplemented in parallel[45].

2. Long-term

Yet, what will the future of Europol be like? In early October 2001, reports circulated in the press that the crisis centre set up by Europol immediately after the suicide attacks in the USA was relying on so-called open sources – which was probably a reference to media reports[46]. Only two Member States were said to have handed over confidential information later on. Indeed, terrorism is the most delicate mandate for Europol, which according to Article 2 para. 2 of the Convention did not fall within Europol's competency from the beginning. However, the reluctance to intensify co-operation and to evolve Europol is also manifest in other areas: The authorization of Europol to ask Member States to initiate investigations will be implemented at the lowest possible level. That Member States should deal with such requests from Europol, give them due consideration and inform Europol if an investigation will not be conducted can hardly be considered as a substantial progress, in particular if laid down in a legally non-binding instrument[47]. The draft amendment of Article 3 of the Europol Convention itself is limited to the simple statement of the right of Europol to ask the competent national authorities to initiate, conduct or co-ordinate investigations in specific cases, but it does not entail any obligations on the side of the Member States[48]. Furthermore, the use of the unclear term "operational"[49] in connection with Europol in the Amsterdam Treaty should not obscure the fact that these operational competencies remain with the Member States. Article 30 of the Treaty Establishing the European Union confines the role which Europol plays to "facilitating and supporting their preparations in a supportive capacity". Regardless of an amendment of Article 3 of the Europol Convention, Europol will continue to play a subordinate, auxiliary role vis-à-vis the Member States: Europol's competencies continue to be expanded, most notably by the future remit to fight the counterfeiting of the Euro, which could put the organization in a rather unique position vis-à-vis the Member States, or by the recent proposal to extend its scope to the crimes that are listed in the Annex to the Convention. But a significant deepening of the powers of Europol has not taken place.

This ultimately gives rise to the question that was asked at the end of the above-mentioned newspaper article: Is Europol to continue to be a suppressed partner of national police forces or is it going to develop into a common European police force? It remains to be seen whether the European Council will address this question in Laeken and whether it will reply with the same courage and determination that was displayed by the European Council in Luxembourg in 1992.

43 Of 28 April 1997 (97/C 251/01)
44 On the competence for Europol for money laundering Council Act of 30 November 2000 (2000/C 358/01)
45 Council Document 14546/01, EUROPOL 97 of 27 November 2001
46 Was soll aus Europol werden?, Frankfurter Allgemeine Zeitung, 4. Oktober 2001, p. 16
47 Council Recommendation of 29 September 2000, Council Document 7369/3/00, EUROPOL 5 rev. 3 of 7 September 2000
48 Council Document 14546/01, EUROPOL 97 of 27 November 2001
49 The semantic meaning of this term is simply „functioning". Whether it is intended to refer to the classic executive police powers (such as arrests, searches, seizures) ist not clear. Reluctant on executive powers for Europol in the near future, Storbeck, Rechtsfragen und praktische Probleme in der polizeilichen Zusammenarbeit, in Hummer, Rechtsfragen der Anwendung des Amsterdamer Vertrages, Innsbruck, Wien 2001

IV. Recommendations

A. Institutional aspects

- Strengthen and expand problem-oriented and horizontal approaches in intra-pillar and cross-pillar working structures in the Council, particularly with regard to the Multidisciplinary Group, and with regard to the leading role of the Strategic Committee and the Article 36 Committee.
- Clarify the relationship of the Task Force of European Police Chiefs with the leading Council groups in the third pillar.

B. Asylum and Migration Policy

- Intensive debate on the proposals for minimum standards (first harmonisation phase) scaling the main topics down into horizontal and cross-section issues.
- Specifications on a Common European asylum system (second harmonisation phase) only on the basis of experience gained with the application of the minimum standards.

C. Police Co-operation

- Swift entry into force of the Tampere Conclusions in relation to Europol and taking a political decision regarding the further expansion of Europol.
- Swift implementation of the conclusions drawn by the Justice and Home Affairs Council on terrorism and on supplementary measures in the field of refugee, asylum and visa policy.

From Networks to Institutions…or Vice Versa? Opportunities for "Good Governance" in EU Police Co-operation[1]

By Dr. Monica den Boer[2]

Introduction

The European Union is one of many policy venues that seeks to develop forms of international police and justice cooperation. To a certain extent, we witness a combination between: a proliferation of frameworks and instruments, and a dynamic interplay between different supranational, national and subnational levels of governance. Hence, the development of police cooperation within the EU could be characterised as an evolution which interacts strongly with other international bodies which have a certain mandate in the international criminal justice arena, such as the United Nations, Interpol, and the Council of Europe. At the same time, the development of initiatives in the field of police cooperation remain insufficiently compensated with a parallel maturing of a judicial and democratic control system.

What I would like to do in this paper is first of all to sketch the multi-level policing governance in the EU in more detail. Second, I would like to make some observations about Justice and Home Affairs policy-making in the EU, with special focus on the legacy of the Tampere Summit. Third, I would like to formulate three desiderata for the further development international policing, including the application of “good governance” principles. Fourth, I would like to guide you through four phases of an evolutionary model towards a supranational policing governance, implicitly presuming that state sovereignty may be subject of gradual release. I will conclude by arguing that models merely assist us in sketching fuzzy futures, and that it is a “mission impossible” to design a rational planning course for a crowded policy space such as EU police cooperation.

1. EU Police Cooperation: A Multi-Level Governance

Law enforcement cooperation in the European Union (EU) can be viewed as a form of multi-level governance (MLG)[3]. The point of departure in this approach is the existence of overlapping competencies among multiple levels of governments and the interaction of political actors across those levels. Executives and representatives of law enforcement organisations from the member states are only one set among a variety of actors in the European polity. When we apply a multi-level model to European police cooperation, the following picture emerges:

- First, at the ***supranational and/or intergovernmental level*** between the member states of the EU, we find the European police office Europol, the Anti Fraud Office (OLAF[4]) of the European Commission, and the Schengen framework. The range has recently been expanded by the Task Force of Chiefs of Police and pro-Eurojust, while the creation of Joint Investigation Teams and a European Police College are under preparation.
- Second, at the ***national*** level we find several national law enforcement facilities that are meant to improve the national coordination of cross-border information exchange, international mutual (legal) assistance, and cross-border operational activities. Important in this regard are the Europol National Units (ENU’s), the Interpol National Central Bureaux (NCB’s) and the national SIRENE[5] offices, which function as 24-hour facilities for the verification of SIS[6]-alerts.

1 *This paper builds on a chapter which is forthcoming in Francesca Longo (ed.), The EU and the Fight Against Organised Crime: Towards a Common Police and Judicial Approach, University of Catania, Sicily (2001).*
2 *Associate Professor, Centre for Law, Public Administration and Informatisation (CRBI), Tilburg University, and Policy Director European Institute for Law Enforcement Co-operation (EULEC)*
3 *Gary Marks, François Nielsen, Leonard Ray and Jane Salk, “Competencies, Cracks and Conflicts: Regional Mobilization in the European Union”, in Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck, Governance in the European Union, Sage, London, pp. 40-63.*
4 *OLAF = Office de la Lutte Anti-Fraude.*
5 *SIRENE = Supplementary Information Request at the National Entry.*
6 *SIS = Schengen Information System.*

- Third, on the ***sub-central and trans-regional level*** we find several cooperative ventures between police forces and/or judicial organisations across national borders. These forms of cooperation often have a semi-formal character, to the extent that they can be based on a memorandum of understanding or function on the basis of a semi-permanent secretariat. Examples of this kind of cooperation are the *Cross Channel Intelligence* Conference (Kent County Constabulary, France - in particular the Pas de Calais region, and the Federal Police in Ghent, Belgium); and *NEBEDEACPOL*, which is a longstanding cooperative venture between chiefs of police in the Netherlands, Belgium and Germany, particularly in the Aachen-Liège-Maastricht area.

2. Evaluating JHA Policy-Making

When we observe the evolution of EU police cooperation, we can distill the following trends: 1) proliferation, 2) insufficient exploitation of current array of legal instruments; 3) lack of convergence between institutions, instruments and practices; 4) absence of long-term agenda(s) (except orientations provided by Action Plan on Organised Crime and the Tampere programme); and 5) growing institutionalisation. Below, I will elaborate these trends.

The proliferation of policy instruments and legal regulations in the international criminal justice arena may be rather confusing, particularly to law enforcement officials "on the ground". In particular law enforcement officers with an executive task tend to be inundated with new initiatives and have difficulty in the correct interpretation and application of rules and regulations. Operational law enforcement officials – be they police, customs or immigration officers – are becoming entangled by an increasingly dense web of rules and procedures. Hence, some level of convergence between forms of cross-border law enforcement cooperation may be required. It is beyond doubt that national, regional and local authorities play an important role in designing co-ordination and information structures, which facilitate the functioning of the individual law enforcement official.

The rapid succession of agreements and regulations has resulted in the lack of a profound exploitation of the existing array of instruments. Even the staunchest intergovernmentalists would concede that the *ad hoc* style of Justice and Home Affairs policy-making is due to the strong dominance of national agenda's, the hasty succession of EU Presidencies, and of course – as we have seen in the aftermath of the 11th of September – the occurrence of national and international security crises. Furthermore, the requirement of unanimity within the JHA-Council – at least as far as Title VI instruments are concerned – often triggers lowest-common-denominator decision-making .

Within this context, there seems to be a leap towards the consolidation of operational cross-border police co-operation (in this context we may think of the incorporation of Schengen into the TEU and the EU Convention on Mutual Assistance in Criminal Matters of May 2000), while insufficiently bolstered by parallel systems of democratic and judicial control. The adoption of the Charter of Fundamental Rights at the Nice European Council in December 2000[7], the imminent creation of Eurojust, and the preparations for Parlopol[8] are encouraging steps towards enhanced accountability, but these initiatives do not hang together and their impact may be limited (for instance because they are not legally binding, like the Charter).

One of the encouraging proposals submitted at the Tampere summit concerned the full exploitation of currently available JHA-instruments.[9] Indeed, a formidable *reservoir* of legal instruments has been built up in the area of JHA co-operation. The majority of these instruments have a non-binding character, and may thus be regarded as symbolic agreements between the

7 *http://europa.eu.int/comm/justice_home/unit/charte/pdf/charter_en.pdf.*

8 *Speech by António Vitorino, "Democratic Control of Europol", Europol Conference organised by the Senate and House of Representatives of the Dutch States General, The Hague, 8 June 2001. Speech /01/274. To be found at:*
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_actiongettxt=gt&doc=SPEECH/01/274|0|AGED&lg=EN.
See: Monica den Boer (forthcoming), Towards a European Framework for Police Accountability: The Case of Europol.
gettxt=gt&doc=SPEECH/01/274|0|AGED&lg=EN.

9 *Brief van de Staatssecretaris van Buitenlandse Zaken, Tweede Kamer der Staten-Generaal, 21 501-20, Nr. 94, p. 11.*

individual EU Member States. They lay the ground for future legal instruments and framework decisions.

The continuous pressure to adopt new legal instruments seems hard to control, and the existing JHA *acquis* has not yet been subject of a profound assessment.[10] The European Commission has been given the task to monitor the ratification and implementation of JHA-instruments by means of a 'scoreboard'[11], yet at the same time this instrument cannot assess the effectiveness, efficiency and degree of organisational convergence to be achieved within and between the EU Member States.

For European police co-operation, the consequence of the 1999 Tampere Council was further institutionalisation, including further consolidation of Europol. Joint investigation teams[12] were to be created without delay. This decision was formalised on the basis of Article 13 of the Convention on Mutual Assistance in Criminal Matters, which was adopted and signed by the JHA-Council on 29-30 May 2000.[13] Meanwhile, the Council adopted a recommendation concerning the support of Europol to these joint investigation teams, which effectively gives this institution a semi-operational mandate.[14] Moreover, in line with Article 30-2(b) of the Amsterdam Treaty, Europol has acquired the competence to ask Member States to conduct a (criminal) investigation.[15]

Another institionalisation trend which has been infused by the Tampere programme is that national police academies have to establish a network that matures into a European Police College for senior law enforcement officials (CEPOL). A Council Decision to this extent was taken in December 2000.[16] Last but not least, the Tampere programme announced the creation of an operational Task Force of European Chiefs of Police to exchange experience, information and best practice concerning current trends in the fight against cross-border criminality, and to contribute to the planning of operational measures.

3. Three Desiderata for Future EU Police Cooperation

Against the background of the previous observations, three desiderata can be distilled for a future system of EU police cooperation:

1. No system of EU police cooperation without a system of judicial cooperation, and no system of executive EU police cooperation without judicial and democratic control.
2. No system of EU police cooperation without intersection with "horizontal" cross-border police cooperation.
3. No system of EU police cooperation without application of "good governance" criteria

Ad 1: *No system of EU police cooperation without a system of judicial cooperation, and no system of executive EU police cooperation without judicial and democratic control.*

On 14 December 2000, the Council decided to create a Provisional Unit for Judicial Co-operation, which now functions under the name "Pro-Eurojust".[17] The objective of this provisional body is to consolidate the judicial co-operation between the Member States and to stimulate the co-ordination of criminal investigations and prosecution, in particular with a view to support the

10 *Monica den Boer, Taming the Third Pillar. Management and Decision-making in Justice and Home Affairs, Current European Issues, 1998, Maastricht, EIPA.*
11 *http://europa.eu.int/comm/dgs/justice_home/pdf/com2000_782nl.pdf. The European Parliament welcomed the decision of the European Council to create a "scoreboard" as it allows transparency about the implementation of the Tampere decisions.*
12 *This article provides that "by mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and for a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team." The Tampere programme demanded that rules had to be drafted to facilitate secondment of Europol representatives to these joint investigation teams.*
13 *OJ C 197 du 12.07.2000, p. 1.*
14 *"Projet de recommendation du Conseil concernant l'appui d'Europol aux équipes communes d'enquête", 30.11.00, C 357 du 13.12.00, p. 7.*
15 *"Possibilités pour Europol de demander aux Etats membres de demander une enquête", 28.09.00, C 289 du 12.10.00.*
16 *Adoption d'une décision du Conseil portant création du Collège Européen de Police (C.E.P.), 22.12.00, L 336 du 30.12.00, p. 1.*
17 *"Décision du Conseil instituant une unité provisoire de coopération judiciaire", 14.12.00, L 324 du 21.12.00.*

Joint Investigation Teams. The forerunner to Eurojust is not meant to compromise further discussions about Eurojust's functions and tasks.

The European Commission was disappointed that - despite strenuous efforts - no consensus could be reached about the creation of a European Prosecutor, not even when limited to matters related to protecting the financial interests of the Community. First, in its communication of 22 November 2000, the Commission remained relatively realistic, as it suggested that two Eurojust-proposals could be brought together, and that Eurojust should have a particular mandate in the fields of cross-border crime and forgery of the Euro. A strong connection between Eurojust and OLAF was seen as desirable. The European Commission did not suggest that Eurojust should exercise judicial supervision on Europol. In a separate communication, that was fed into the pre-Nice IGC-process, the Commission suggested a special European Prosecutor should be established whose powers would be limited strictly to the protection of the Community's financial interests.[18] Meanwhile, we are awaiting the adoption of an instrument under the Belgian EU-Presidency which establishes Eurojust.

Within the academic arena, we see discussions about whether Eurojust should become Europol's equal "sparring partner" (which facilitates the mutual exchange of information), or whether Eurojust should be placed hierarchically above Europol (where Eurojust would award authorisations e.g. in the context of coercive means). Pragmatism tells us however that a Eurojust, which is constructed as an institution in which magistrates are seconded liaisons, will not be able to fulfil such a hierarchical position.[19]

As to the issue of democratic control, in October 2001 a second conference was organised about interparliamentary control on Europol. This issue will not be elaborated here as it will already be covered by other contributions (Coveliers, Jurgens) in this publication.

Ad. 2. *No system of EU police cooperation without intersection and convergence with "horizontal" cross-border police cooperation.*

Police co-operation in the EU thus far tends to be based on state-centrism, which cultivates the establishment of national coordination mechanisms within the EU member states. In the future, top-down forms of police cooperation may begin to intersect with horizontal forms of police cooperation.

Figure 1: Layers in Vertical and Horizontal Police Cooperation

	"Vertical" Police Co-operation	**"Horizontal" Police Co-operation**
Institutional Appearance	Europol, OLAF, Eurojust, Task Force	Schengen, Bilateral and Multilateral Agreements, MoU's
Level of Co-operation	Formal, Policy-Making, Strategic, Semi-Operational	Informal, Policy-Making, Information-Exchange, Operational Co-operation Across Borders
Actors	National politicians, senior executive (Directors General, Secretaries General, COREPER diplomats)	National, regional and local politicians and executive, practitioners (police, judiciary, immigration and customs at local and regional level)
Objective	Centralised intelligence-gathering, high-profile targets (organised crime, terrorism), principle of subsidiarity	Decentralised approach to internal security, flexibility, focus on (Eu-)region al security cooperation

18 Communication from the Commission, Additional Commission contribution to the Intergovernmental Conference on institutional reforms, "The criminal protection of the Community's financial interests: a European Prosecutor", Brussels, 29.09.2000, COM(2000) 608 final.

19 Pierre Barthelet and Constance Chevallier-Govers, "Quelle relation entre Europol et Eurojust? Rapport d'égalité ou rapport d'autorité?", in Revue de Marché commun et de l'Union européenne, no. 450, July-August 2001, 468-474.

With the incorporation of Schengen into the EU, many bilateral and multilateral arrangements have already been brought under the scope of the EU.[20] It is not unlikely that this will result in a linkage between the formal "vertical" information-exchange through national co-ordination points, and "horizontal" information-exchange in police border regions, which generally tends to carry a more informal, autonomous and spontaneous character. Furthermore, police co-operation currently within the remit of the EU is increasingly acquiring an operational character following the integration of cross-border competencies of the SIC into Title VI TEU. An organisation like Europol may gain effectiveness and credibility when rooted in sub-central intelligence gathering.[21]

Ad. 3: *No system of EU police cooperation without application of "good governance" criteria (if this can be developed at all, it should naturally not just apply to Europol but to all JHA institutions and practices).*

As pointed out previously, JHA-decision-making in the Third Pillar has been subject of considerable acceleration, often to the detriment of democratic control. For instance the various extensions of mandate of Europol– on the basis of a series of joint actions – call into question the exercise of democratic scrutiny (accountability).[22] Parliamentarians regard the democratic control on Europol – and on JHA affairs more widely – as a structural deficit.

The evolution of an EU-wide policing governance deserves the application of a system of checks and balances. Questions should be raised such as: Does this instrument fit the general policy framework? Will EU Member States – taking account of slow ratification procedures – actually require these legal instruments in five to ten years time? Are other legal instruments available - perhaps within the scope of other international regulatory frameworks - which already satisfy the need for a normative regulation? Could there be overlap between this and the other policy instrument? Are legal and democratic control sufficiently warranted? What is the social legitimacy of this instrument, or is the personal safety of the citizen served by this instrument? In short: Before legal instruments are adopted, they should be checked against questions concerning normative coherence, proportionality, subsidiarity, substantive quality, accountability and social legitimacy. These prerequirements could be fed into the development of a good governance system[23] for the field of Justice and Home Affairs co-operation. If a "good governance system" can be developed at all, it should naturally not just apply to Europol but to all JHA institutions and practices. A "quality label" for legal instruments in the field of criminal justice co-operation could therefore be a welcome addition to monitor JHA-instruments. If such a system would be applied retroactively, not all JHA-instruments would have survived the checks and balances-test.

4. EU Policing Governance in Evolution

In line with the "good governance" philosophy, it may be conceivable that the current intergovernmental policing governance may slowly evolve into a supranationalist system that incorporates federalist elements. Such a view should no longer be considered as "pie in the sky", since the President of the European Commission, Mr. Prodi, argued in favour of a European Police Force.[24]

20 *An inventory was made of all the bilateral arrangements and agreements concerning police and customs cooperation (former Section 7: Art. 39 (4-5) SIC), Brussels 27 November 2000.*

21 *Monica den Boer (2001), "Intelligence Exchange and the Control of Organised Crime: From Europeanisation via Centralisation to Dehydration?", forthcoming in conference proceedings Centre of European Policy Studies, Brussels.*

22 *An example is the extension of Europol's mandate anti-terrorism. May 1998; Note from Europol to K.4 Committee, "Counter Terrorism: Report from Europol", Brussels, 21 April 1999, No. 7514/99, Limite, Europol 19. Europol would not insert terrorism under its mandate until two years after the entry into force of the Europol Convention; Memorie van Toelichting bij de goedkeuringswet van de Europol overeenkomst, Tweede Kamer der Staten-Generaal, vergaderjaar 1996-1997, 25 339, nr. 3, p. 4.*

23 *See e.g. Commission White Paper on European Governance, Brussels, 11 October 2000, SEC (2000), 1547/7 final; http://europa.eu.int/comm/governance/work/en.pdf.*

24 *De Telegraaf, 13 November 2001; "What the EU really wants now is its own police force", http://news.telegraph.co.uk/core/Content/display. Similar lines of thinking have been developed by C. Chevallier-Govers, who suggests an evolution from co-operation patterns to integration, in De la coopération à l'intégration policière dans l'Union européenne, Bruxelles, Bruylant, 1999, and by Christopher Harding, who analyses the development of an intergovernmental to a supranational methodology, in "European Regimes of Crime Control: Objectives, Legal Bases and Accountability", in Maastricht Journal of European and Comparative Law, 2000, Vol. 7, No. 3, pp. 224-243.*

The objective of designing an evolutionary model for EU police cooperation is to create a counterfactual model, which functions as a leading orientation for the future. In practice, the evolution of such a system is neither rational nor systematic. When compared with the current practice, we witness a rather hybrid polity, which accommodates both intergovernmental and supranational elements. The four evolutionary phases can be read as a series of successive and incremental[25] stages, in which system elements can be built on top of already existing ones.[26]

Figure 2: Towards a Supranational Policing Governance in the EU

	INTERGOVERNMENTAL POLICING GOVERNANCE	SUPRANATIONAL POLICING GOVERNANCE
MINIMAL INTEGRATION	**PHASE 1** • Unanimity Rule in JHA Council • No right of initiative for the Commission • No obligation Council to consult EP • Diffuse objectives (accumulation of national agenda's) • Complexity as a consequence of wheeling and dealing • Fragmentation of legal instruments • Facultative arrangements (flexibility and options) • Differentiated integration • *Ad Hoc* Extension of (Europol's) mandate	**PHASE 3:** • QMV for Police and Justice Cooperation in Criminal Matters (Commission: single right; EP: co-decision) • Institutionalisation European Judicial Network: EUROJUST • Joint Investigation Teams with support of Europol (and perhaps Eurojust) • Harmonisation of criminal (procedure) law only for EC-related offences (fraud, money laundering, corruption) • Scoreboard (European Commission as Monitoring Agent) • Joint Policy on Cross-border crime
MAXIMUM INTEGRATION	**PHASE 2:** • Amendment of / addition to Europol Convention in the event of extended (operative) mandate • Unanimity requirement in JHA Council remains • Commission: Shared Right of Initiative • EP: Entitled to scrutinise Council proposals • Reinforcement of the European Judicial Network (EJN) • Improvement of interoperability • Peer evaluation mechanisms • Hybrid fusion between national and pan-European agenda's with regard to crime-control	**PHASE 4:** • Joint Parliamentary Control (EP + National): Parlopol • European Code of Criminal (Procedure) Law (subsidiarity!) • ECJ complete jurisdiction • Europol part of the EU-budget • European Public Prosecution Service (EPPS) with authority over Europol, Eurojust and related institutions[27] • European Ombudsman: Competence Complaints about JHA-institutions • Uniform EU Data Protection Board • Joint Communication Networks (ICT) • Joint LE Training (CEPOL/EPC) • Uniform Criminal Policy (long term integrated strategy) • Interregional control of serious and organised crime (networks supported by ICT, e.g. EMMI's[28]) • Integration of horizontal agreements[29] with "vertical" police co-operation[30]

25 *Neil Walker, Policing in a Changing Constitutional Order, London, Sweet & Maxwell, 2000, on p. 256f.*
26 *The model does not indicate which system elements become redundant and can consequently be removed. More reflection is required on the avoidance of proliferation, where old and archaic system elements survive and remain their position next to new system elements.*
27 *Possibly by means of a special European Prosecutor for Europol affairs, with the competence to exercise pre-judicial consultation, to supervise joint investigation teams and to co-ordinate cross-border investigations. See e.g.: Gert Vermeulen, "A European Judicial Network linked to Europol? In Search of a Model for Structuring Trans-National Criminal Investigations in the EU", Maastricht Journal of European and Comparative Law, 1997, Volume 4, No. 4, pp. 346-372, on p. 371.*
28 *EMMI = Euregional Multi Media Information; project which commenced in the Police Region Limburg-South (the Netherlands) and which has been extended also to other Dutch border-regions.*
29 *E.g. covenants, cross-border crime investigation agreements, bilateral agreements etc.*
30 *Europol in co-operation with the Europol National Units (national criminal intelligence services) in the Member States.*

As already suggested: the scenarios sketched above do not follow a neat sequential and linear pattern. What we may perceive is a patchwork of different arrangements, some of which have a purely intergovernmental character, and some of which that hint into a supranational direction. When measured against currently existing governance patterns, the scenarios above are not totally devoid of realism.

Within the leading institutions of the EU, but also within the national governments of the Member States, reflections on forms of criminal justice governance are continuous. For instance, the European Parliament favours a much more strengthened control of Europol's activities.[31] Currently, the control of Europol activities tends to be rather fragmented (i.e. subjected to a wide variety of legal rules, e.g. in relation to the protection of personal data)[32] and minimal, certainly when comparing it with the standards of national accountability mechanisms. The protocol on privileges and immunities which applies to Europol officers is also not unproblematic in view of its future operational mandate, and parliamentary opposition was staged against the exchange of data between Europol and certain third countries.[33] On the other hand however, one could argue that Europol is still a pioneering institution that needs time to mature. Hence, it will also take time before the legal framework will be watertight; the accountability mechanisms will slowly mature following Europol's widening responsibilities.

The European Parliament thinks Europol should no longer be financed by the individual Member States, but directly from the EU-budget (which of course opens up new possibilities for supervision and administrative management). Moreover, it advocates the creation of a body where complaints against Europol-officers can be lodged, and strongly recommends that Europol be subjected to the authority of one member of the European Commission.[34]

Reflections continue on the creation of a European Data Protection Body or Commissioner for the privacy questions that will emerge within the context of Europol's activities[35], also because it is possible that there will be data exchange between these computerised registers.[36] The European Ombudsman, Jacob Söderman, opines that his mandate should also include supervision of certain activities of Europol.[37]

Finally, national accountability standards and procedures for law enforcement practices could become subject to 'approximation'. The Rule of Law could act as a guiding normative principle, which implies effective translation of the national democratic systems of checks and balances into an EU-wide system. Some authors argue that the creation of a European rule of law should be developed co-jointly with a genuine European legislation, a European government, a European Parliament (which can exercise effective supervision), and a European judge.[38]

31 *Aanbeveling van het Europees Parlement aan de Raad betreffende Europol: "Versterking van de parlementaire controle en uitbreiding van de bevoegdheden", "Europol-Strafprocedures-EU-drugsstrategie na 1999", "a) A4-0064/99, JO C 219/101, 30.7.1999.*

32 *Stelling van het Europees Parlement in de Resolutie over het ontwerpactieplan van de Raad en de Commissie hoe de bepalingen van het Verdrag van Amsterdam inzake de totstandbrenging van een ruimte van vrijheid, veiligheid en rechtvaardigheid het best kunnen worden uitgevoerd (13844/98 – C4-0692/98 – 98/0923(CNS)), OJ C 219/61, 30.7.99; Monica den Boer, "Hollen of stilstaan? Justitie en Binnenlandse Zaken in het nieuwe Verdrag van Amsterdam, Nederlands Juristenblad, 3 oktober 1997, afl. 5, 1625-1630. Zie ook: Jelle van Buuren, "Uitbreiding bevoegdheden Europol omstreden", in Staatscourant, 23 juli 1999, p. 2.*

33 *OJ C 88/1, 30.3.1999, Council Decision of 12 March 1999. The privacy criterion in Article 2.2 of the Decision can be characterised as difficult to measure.*

34 *Bulletin Quotidien Europe, No. 7443, 12/13 April 1999, p. 13. Furthermore, the European Parliament recommends the interconnection between the European Judicial Network and Europol; national parliaments should obtain more insight into the activities of Europol by means of a broader information-provision (e.g. access to agenda's and reports). In France there have been calls for the creation of an interparliamentary committee which can exercise supervision onto Europol's information exchange. In: Protocol relatif aux privilèges et immunités d'Europol, Compte-Rendu Intégral, Sénat, Séance du Travail, 1er Avril 1999, p. 2056.*

35 *European Parliament, Directorate-General for Research, Working Paper, "An Area of Freedom, Security and Justice. The Impact of the Amsterdam Treaty", Draft Report, Civil Liberties Series, LIBE 105 EN, p. 24. See also: Peter Hustinx, "The Supervisory Role of National and International Data Protection Boards with Regard to International Databanks in the Criminal Justice Sector", colloquium "Combating (Cyber)Crime and Protecting Personal Data in the EU", EIPA, 1 and 2 July 1999 (mimeo).*

36 *A Joint Secretariat has been established within the EU Council Secretariat to accommodate the Joint Supervisory Authorities of SIS, CIS, and Europol.*

37 *"Some of the provisions of this Title VI are addressed to national authorities, and therefore could not fall under my mandate. Setting also aside the provisions related to the jurisdictional role of the Court of Justice, the remaining provisions of this Title concern basically the promotion by the Council of police cooperation through Europol. Since Europol in the development of these activities, will be acting as an instrument of the Council, its actions are reviewable by the European Ombudsman." Uit: Jacob Söderman, "The Establishment of an Area of Freedom, Security and Justice. Some Thoughts from the European Ombudsman Perspective", speech for the Committee on Civil Liberties and Internal Affairs, European Parliament, Brussels, 24 March 1999.*

38 *André Klip, "Neuere Entwicklungen im europäischen Strafrecht und in der europäischen Zusammenarbeit und Strafsachen", 22. Strafverteidigertag vom 20.-22. März 1998 in Erfurt, 1999, pp. 39-54, on p. 50.*

When we compare this list of proposals, recommendations and suggestions with the outcomes of Tampere, there is still a lot that remains to be achieved. Similarly, the Committee of Wise Experts has forwarded a number of proposals that can be considered more radical than results accomplished thus far in the field of Justice and Home Affairs co-operation.

5. Conclusion: Fuzzy Futures?

Even though it is hard to imagine that in a decade or so the landscape of European police co-operation looks radically different, we certainly endured a waking-up exercise during the past decade. In the early nineties, key police officials regarded such institutionalised European police cooperation as politically and practically unachievable.[39] As a consequence of the intergovernmental decision-making system to which European police co-operation is still subjected, many aspects deserve to be thoroughly revised and improved. In the evolution from an intergovernmental to a supranational EU policing governance, progress will mainly be an aggregate of individual proposals from the Member States. This is reinforced by the reluctance of EU Member States to create a pan-European infrastructure for law enforcement co- operation. Hence, even if the "Brussels-Laeken declaration[40]" may have consequences for the criminal justice arena, the emergence of an EU policing governance may the result of spontaneous default rather than rational planning.[41]

39 *M. Anderson, M. den Boer, P. Cullen, W. Gilmore, C. Raab and N. Walker, Policing the European Union: Theory, Law and Practice, Oxford, Clarendon Press, 1995.*

40 *See website of the Belgian Presidency of the EU 2001: http://www.eu2001.be/Main/Frameset.asp?reference=01-01&lang=en&sess=445390284&; see also Benelux memorandum over de toekomst van de Europese Unie, 20 June 2001.*

41 *Monica den Boer, "Internationalization: A Challenge to Police Organizations in Europe", in R. Mawby (Ed.), Policing Across the World: Issues for the Twenty-first Century, London, UCL Press, 1999, pp. 59-74.*

Judicial Co-operation in the European Union

by Prof. Dr. John A.E. Vervaele

Ladies and Gentlemen,

When we are speaking about judicial co-operation in criminal matters we know today that Europe has a set of co-operation instruments of such a complexity that we need computerised systems to find our way around. In the Netherlands, we have automatised, informatised systems. The European judicial network has produced a very useful CD Rom, taking into account the international conventions, the regional conventions, the bilateral conventions, the reservations of many Member States, and even to a certain extent domestic provisions concerning international co-operation. It is extremely complex. It is a patchwork. And of course this wealth of instruments is not in itself an obvious guarantee for a coherent and homogeneous co-operation system in the European area. We all know - it has been underlined - that the importance of Justice and Home Affairs was discovered quite late in the experiment of regional integration within the European Community and within the European Union. I could say "better late, than too late, or never". We might have the impression - right or wrong, it is a perception - that within that late discovery and the elaboration of that Justice and Home Affairs area there was more focus on police co-operation than on judicial co-operation. I refer to the Schengen laboratory and to the Europol Convention. This perception might explain why judicial authorities, at least certain areas of judicial authorities, feel the need to make appeals to the executive, to the Parliaments, to the public. I refer for instance to the appeal of Geneva while investigating judges and prosecutors are saying we do need more regulatory instruments, more operational activity, we need another framework for our European dimension to make judicial co-operation work in Europe. So the field is appealing to heaven for more and better judicial co-operation. Of course then you come to the question or to the point "is the European dimension really that important for the judiciary?" We all know that for police forces and for judicial authorities of course the main part of the agenda of the daily work is not European but domestic. But that does not mean that there is not an increasing EU dimension for policemen, for public prosecutors, etc. If I see some figures - and there are not that many figures in Europe about that - what do I see? And I refer to a very - in my opinion a very useful work done by the multidisciplinary group on organized crime in the Council – they have evaluated the judicial co-operation system in the Member States, both in the books and in practice. The results are available and fully transparent. What do I see? I take just my home country the Netherlands. 25.000 incoming requests at the judicial authorities a year that is an enormous figure. I see that in very specific countries like Luxembourg, some examining judges have a day to day job of dealing with judicial requests, the letters rogatory. So there is an increasing demand, an increasing necessity to co-operate in the judicial area of the single market and of the European Monetary and Political Union. We cannot deny that.

At the same time, we see, and I quote the results of the evaluation process. An evaluation that on some points was very positive. I quote again it was to some extent found out that in Member States letters rogatory were hampered by outdated practices, administrative routines and bureaucratic hierarchy. So it means that we are not fully conscious about that European dimension of the judicial work in the Member States, and there we have a serious problem, I think, in all Member States.

Ladies and Gentleman, in my speech I would like to address two main questions. First of all, if we have an overview of the systems of judicial co-operation in the EU: "Is there in the current stage, is there a difference, a substantial difference to the instruments of judicial co-operation we have in the international area? Does the regulatory framework of the 15 Member States have a

"plus-value" compared to the international regulatory framework?" That is the first question we have to deal with. That is linked to trust and that is linked to increased integration. And of course, it is also linked to the necessities, the interests of the first pillar. The economic monetary union, the economic union, the internal market, the common policies, and so on. Second, are we able with the existing instruments to cope with the real needs concerning justice integration in Europe, and when I say needs, I want to make it also concrete. We have needs in the first pillar, in the existing structure, and we have needs in the third pillar. In the first pillar we have needs concerning what is called proper interests of the European communities as such. I refer to the financial interests of the budget of the Union, EC fraud; I refer to the single currency the Euro; I refer to corruption by civil servants in Community or Union institutions that are proper needs of the Community institutions as such. Moreover, of course, we have also in the first pillar needs of enforcement, of substantive policy areas in community law. Environment, trade, competition, and so on. That is very obvious. In the third pillar we have defined as Member States already in the Treaty of Maastricht common interests, linked to the common history of the Member States. Organised crime, terrorism - you know the list. These are common interests. They are interests where we have a need to protect and to enforce.

If we look back - and I focus on judicial co-operation - we all know that we have the classic convention of 1959 of the Council of Europe. A very important convention in judicial co-operation. Why is that convention so important? Why was it a milestone? Because it introduced for the first time on a multilateral level the obligation between European States to co-operate in criminal matters. This was a worldwide *unicum*. And that was not that obvious, don't forget that – the whole tradition was that for enforcing criminal law and for enforcing tax law, sovereignty, sovereignty … In the US, they say the revenue rule and the act of State doctrine reflect pure sovereignty in that areas. So we changed that at the end of the fifties for the European region. And on a multilateral level, that is also very important. Of course, at that time the obligation to co-operate was limited with quite a lot of exceptions. We must see that in the specific historical context. Of course exceptions for political offences, exceptions for tax offences. Exceptions linked to sovereignty and public order. Exceptions not really being exceptions but limitations linked to the procedure. At that time we had in principle a double procedure for judicial co-operation in criminal matters. In the rule, in principle, it was the indirect co-operation, the judicial authority, the Minister of Justice, the Minister of Foreign Affairs and back again. So you had a political phase and you had a judicial phase. And of course, we had a lot of reservations. It was an international convention and States were free to make reservations to every specific article. And a lot of States made a lot of reservations. In the seventies we were able to limit the fiscal exception, the tax exception, in a specific protocol. Today, I think, most of them - I believe even all Member States of the EU - have ratified the convention and have ratified the protocol, even Luxembourg. The protocol came into force for Luxembourg on 1st January 2001. The reach for a full ratification of the Council of Europe instruments for judicial co-operation in criminal matters, it took a long time, a very long time. Meanwhile we have made progress, substantive progress in side-tracks. In 1985 and at the beginning of the 1990's the Schengen treaties were adopted by 5 Member States. The Schengen treaties are extremely important for the principles of judicial co-operation because we were able to impose as a rule direct co-operation between judicial authorities. So avoiding, in principle, the royal or diplomatic way, that is very important for efficiency and also very important for not being dependent from the executive, for certain cases. Second, we were able to limit even more the tax exceptions in the Schengen treaties, at least for indirect taxes.
Within the framework of the third pillar we were able to go beyond the classic forms of co-operation under the Convention of 1959 and to elaborate our own Convention, the 2000 Convention on judicial co-operation. This convention will be a very important instrument, which should be commented upon in the light of the Europol convention, in the light of the

integration of the Schengen provisions, and in the light of what has been mentioned already, the Naples II Convention on customs co-operation and judicial customs co-operation. At this very stage we are of course not able to go into this comparison. Why is this mutual judicial co-operation Convention of 2000 so important? First of all, it is of course, re-insisting on direct co-operation. Schengen was limited, for some States - here we are speaking about the 15 Member States of the EU. So, in principle direct co-operation. Second, we have the possibility - and that is new for judicial co-operation – of course well known for administrative co-operation, but it is new for judicial co-operation, we have the possibility of spontaneous exchange of information between judicial authorities. There must be no request as such. That can be very important. If a judicial authority in a Member State has information at his disposal and he is of the opinion that it might be very interesting for the enforcement in another Member State he can transfer it. He has the right to transfer it. There are cases today already on the table which are of interest and I will not specify. Third, we have in the 2000 Convention specific forms of investigation. Also in the Naples II Convention, called specific techniques of investigation, or pro-active techniques of investigation. Control delivery, covered investigation, interception of telecommunication and joint investigation teams. We also have some specific techniques of interrogation (hearing by video conference and the temporary transfer of persons held in custody). It is of course, of utmost importance, that these new techniques are introduced under the form of the classic letters rogatory. So we can if this convention is fully ratified - or between the States that have ratified this Convention - we can ask for that type of investigation. Which is of course quite revolutionary. But, if we look more closely at the legal provisions in the Convention, we see that for those special techniques of investigation, Member States are still very careful and maybe still very afraid. Why do I say that? Because in most of the provisions, the use of these techniques, is conditional in the sense that there must be an agreement between States to use that, so there is no automatic right for the judicial authority to use them. There must be an agreement between States to use them, and when they are used, specific provisions of domestic law do apply. So there you see, that, of course this is a compromise, after long standing negotiations. But there you see that Member States are still protecting domestic rules, domestic provisions, domestic traditions. To a certain extent they want to accept to assist to co-operate with these techniques, but under very strict conditions. And they want to be the head of, the leading of the operation. We will come back to this later. Another point is the actors, the authorities. Who is competent for requesting letters rogatory? Traditionally when we spoke about judicial co-operation that was very easy, it were the judicial authorities, meaning public prosecutors, examining or investigating judges and the judiciary. Today it is a complete other picture. Why? Because in practice, and also in the Convention of 2000, we have been widening the field of accuracy, including under strict conditions, and only for some forms of letters rogatory: police forces. Including under strict conditions and only for some forms of letters rogatory: administrative law enforcement agencies. Law enforcement agencies active in securities, active in free competition, active in environment, and so on. So it is not limited anymore to strict judicial authorities. And of course, we have on the table today, after September 11th, the role to play, by the intelligence forces, linked to judicial activities. Also, they want to have access to cross-border means of gathering evidence, they want to be part of the exchange of law enforcement information. That is the aim of the whole exercise. So we see a widening of the authorities. If you have a look upon the Naples II Convention and the Judicial Co-operation Convention of 2000 you will find articles in which they are defining which type of authority can do what. So that is a very complex patchwork of authorities. The same with the Naples II Convention, if it is complex, it is because - it can be used both for administrative purposes and it can be used for judicial purposes, depending on first pillar or third pillar agenda. So you see all these things are mixed up. I will come back to this.

Not only new actors but also new tools, new instruments. I already mentioned the pro-active investigation techniques, I have mentioned the fact that they can be extended to administrative authorities, so all this is widening the scope - and maybe one more element - which is in my opinion quite important. It is a first step. In the Judicial Co-operation Convention of 2000, we see for the first time the possibility, when an investigation is executed in another country, not to use the local, the domestic law, of that country for the investigation. Let's say a Belgian authority is asking for a letter rogatory in Spain. Normally in Spain when the letters rogatory, an enquiry in an enterprise, in a corporate body or in a bank, normally Spanish law would apply. *Locus regit actum*. We see possibilities in the Convention always with agreements with these States to use the law of the *forum*, the law of the tribunal, which will judge the case at the end, the law of the requesting state. And that is of course very interesting, because it means that there are possibilities for the first time to use not the law of the land where the investigation is happening but the law of the *forum*. This principle, used in private international law, is for the first time in principle accepted within the 15 Member States. Why is that interesting? Because it opens possibilities not only for increasing the efficiency of admissibility of evidence, but also for trans-national legal protection. It can be, and it is linked to admissibility of evidence, it can be that the law of the *forum*, the law of the tribunal that will judge, in my example Belgium - and Belgium is a bad example in that, I think - it could be that they ask for the presence of a lawyer during the investigation. If in Spain that is not possible due to the local Spanish law, it could be imposed due to the rule *forum regit actum*, in order to safeguard quality of the evidence and the admissibility and the use of that. So this is new. That means that there are signs that we have to progress in Europe to an open system in which we are using each other's legal provisions much more than before. So there will be an increasing need also for domestic judicial authorities and for domestic tribunals to know the law of the other countries. Today, the reality is that we do not know each other. At least we do not know the specificities of the regulatory framework in other countries and that is the reason why we need liaison magistrates. I will come back on that. So, I see new tools, new actors, and also, new fields, specific fields of judicial co-operation. We see an evolution towards specific instruments - and I think a very good example is - that we have a protocol to the new convention of 2000, a protocol on judicial co-operation, but specifically for letters rogatory linked to financial investigation, financial enquiries and linked, let's say, to bank accounts. In which we get rid of, we abolish bank secrecy, and which we oblige judicial authorities of other States, we oblige States to co-operate for identifying bank accounts, for monitoring financial transactions, and so on … So we have a general framework and we might have – this is the first step, I think – in specific areas, very specific provisions obliging beyond the general framework Member States in specific areas. This is a very interesting progress, certainly in the light of what has happened on September 11th, and widens the possibilities for seizure of assets of crime, and so on.

Besides this regulatory framework, legislative framework, we must underline a very important shift to, let's say, operational forms of judicial co-operation within the European region. It is of course, important to see that under the third pillar we have tried to – let me say – to oil the system, to make it more efficient. We have done that be obliging Member States to have representatives, national representatives, for the European judicial network, being a network with national contact points. We have moreover obliged Member States to provide for liaison magistrates in the Ministries of Justice, but not all Member States are co-operating with that system. It is a minority who are doing it. I call that – it is not, I do not mean that in a negative way – oiling the system, making it more efficient and these people working in the European judiciary network, and as liaison magistrates are doing in my opinion a very important job also linked to knowledge of each others' systems and trust. Trust, once again, the notion of this morning - the Americans say full faith and credit in each other's systems. This operational form of judicial co-operation could be defined as the second phase of the third pillar. The third phase - we could

also say the third generation - is of course, beyond the classic forms of judicial co-operation, the classic form of State/State co-operation. That you find in the Treaty of Amsterdam, the famous area of Freedom, Security and Justice. You find it also in the Tampere conclusions. In fact, politicians and judicial authorities are looking for a new script of justice integration in the single legal area. Because that is our reality. And we have a lot of difficulty to find that new script, to find new concepts. What are the main concepts? You know them from Tampere. Mutual recognition of – and here we are speaking mostly about the investigative phase – so mutual recognition of free trial orders or free trial warrants: search orders, seizure orders, arrest warrants, let's say, Euro orders, that means when an investigating judge, an examining judge, or a public prosecutor is deciding to seize the property of a person this decision should have automatic direct recognition in other states. This is of course a completely other concept than State / State judicial co-operation. The same thing with the European arrest warrants. It is completely another concept than the classic extradition procedure. It is mutual recognition of pre-trial decisions. Second, - between brackets it is not literally said like that, but the idea is behind – "free circulation of evidence". It means that when evidence is gathered in one country, it should be admissible evidence in another one. Today we have many problems in courts at tribunals concerning the admissibility of evidence. This is a real big problem in the EU. Of course, the concept of mutual recognition and free circulation of evidence are linked to the concept of minimum common standards. We cannot trust each other if we do not have minimum common standards. That sounds very easy "minimum", because it is "minimum common standards", but in fact it is the same as "minimum harmonisation". And that means that we need a common base in substantive criminal law and I insist, also in procedural criminal law – a common base, otherwise, we will not build a necessary trust. We have been very busy in the third pillar with this harmonisation process, through conventions and today mostly through framework decisions. But the legislative harmonisation process has been limited to substantive areas of criminal law and to sanctioning. There are so many proposals and some proposals have been adopted and have been even implemented by the Member States. So this is a very clear track and it has huge consequences for the Member States. In the procedural area Member States are not really willing to accept yet the idea of a substantive harmonisation in the area of procedural criminal law. I personally believe that is really necessary – and I come back to my example of evidence, in order to build a necessary trust for mutual recognition and free circulation of evidence. Beside mutual recognition and free circulation of evidence we have two other concepts in the Treaty of Amsterdam and the Tampere conclusions which are of great importance. Let me call them new instruments, new tools but also agency or institution building. And I mean the joint investigation teams on the one hand and Eurojust on the other hand. We all know that the joint investigation teams as a concept are mentioned in the Treaty of Amsterdam. They are also in a specific article in the judicial co-operation convention of 2000. That does not mean that we have them in practice. There are several proposals on the table, several proposals of Member States within the framework of the third pillar to establish the joint investigation teams. If we have a look at these proposals we could summurize the idea behind as a type of task force, with people coming from several countries - so multi-national – coming from several expertise areas, so there might be one public prosecutor, one coming from the tax authorities, one coming from the customs authorities. These multi-national and multi-expertise teams are very useful, but in all the proposals you see that when it comes to the legal framework for that joint investigation team things are complicated. When it comes to practice this team should have to work in several countries but under the ruling, under the directorship of a national authority of that country, that means changing ruling of the joint investigation team. That's already quite complicated and secondly – even more complicated - is the fact that in every country domestic provisions should apply. So that would mean that for one and the same investigation you could be confronted with very different rules of criminal law and criminal procedure, and certainly criminal procedure. It is astonishing that Member States are insisting that much on the application of their own set of domestic rules. I just made the comparison

with Switzerland – not a very progressive country – and with a very longstanding tradition of autonomy at the *canton* level for criminal procedure. They have accepted meanwhile that the criminal procedural rules of one *canton* can be applied in another one. We are not yet ready for that. And that is astonishing. So that is worrying.
Secondly, Eurojust. My personal opinion on Eurojust is a very positive one in today's setting. I think we need it and it is a very interesting laboratory too, but it has limitations. It has limitations in its competence, defined in the provisional Eurojust unit. In fact, it is a little bit more than oiling the system, because it is not only competent for sustaining the co-operation, but it has also the capacity to request and that is, of course, very important. It can have its own dynamics. But they do not have separate, autonomous, operational judicial powers. That is the limitation, of course. And that is tricky. But under the existing circumstances, I think, it is a very good initiative and we have to stimulate it. But it has limitations because and I am responding or addressing my second question "have we done – we have done a lot within the European Union and we went a lot beyond the classic concept of 1959 of State/State co-operation – but, have we done enough?" And there I think that the concept of Eurojust and of the joint investigation teams as they are spelled out in the provisions today are not enough. I think that we need on the one hand a model of more operational powers and for Europol and for some bodies in the European Commission, certainly Olaf, linked to what is mentioned as judicial control by some form of European public prosecutors. I say some form because you can make many architectures of that. We need more operational powers which can be used in one area, and the area is the European area, the single legal area, so not limited by confinements of national states. We have to break through that concept. Of course, there is the great danger and you see that already with the European arrest warrants – not throwing away all our safeguards. If we make it possible that the European public prosecutor, centralized or a delegated one in the states, can be active all over in Europe, and can arrest people and can make home searches, well, that is a police state. It means we need the procedural safeguards of our classic rule of law. So when we elaborate forms of operational justice in that single European area we have to elaborate at the same time the necessary procedural safeguards, the rights of the defence. What does that mean in practice? It means that if you give powers to supranational bodies like Europol, like Olaf, like a European public prosecutor, you have to take, you have to have in mind that for certain coercive measures - I say for certain coercive measures - you need a warrant of a judge or of the judiciary. In our system we are living in an integrated legal order, we will not create federal agencies tomorrow – that is not our philosophy – so we need a warrant of a national judge if we want to search a home, if we want to do very coercive things. The warrant of a judge, of a national which might be in one country an examining judge. It might be in another country a judge of the judiciary - this belonging to the national procedural autonomy. Such a national warrant must have effect, must have recognition all over Europe. So you combine operational methods of investigation together with mutual recognition of some national decisions. And of course, the judgements, the trial is always at the national level. Personally, I do not believe that in the next decade we will see a model in which we have a European criminal court, in Luxembourg or wherever. The judiciary in criminal matters will remain national and in an integrated legal order there is no objection against it. What we are looking for is the new script, is to find an efficient model of investigation in the European area opening the confinements of the national borders taking into account at the same time the safeguards of our judiciary.

So to conclude, Chairman, we have been very successful in my opinion in extending the forms, the tools and so on of judicial co-operation compared to international judicial co-operation. And Europe in that sense is very unique worldwide. But we have to go beyond that. It is not enough today, if we want to enforce the internal market and to protect common interest defined in the third pillar. I would like to add one recommendation concerning the internal and external criminal policy. We are under great pressure. What we have to do in my opinion, we have to set an

agenda. The Treaty of Amsterdam is an agenda setting, the Tampere conclusions are an agenda setting. But it is not enough. We have to set an agenda in the middle-term and in the long-term. Just something like the single market or the internal market or the European Monetary Union. Don't forget the EMU was an agenda setting of fifteen years. We should do the same. A domestic, I mean a European agenda setting for Justice and Home Affairs. And at the same time we have to negotiate and we have that possibility legally under the Treaty of Amsterdam to negotiate conventions and treaties with third countries, not to mention Switzerland and the United States. This possibility has not been used yet. It is a legal possibility in the Treaty of Amsterdam. Personally, I believe that it is very astonishing - not to say a shame, that the possibilities of the United States - I am not referring to September 11th - before, in getting judicial co-operation with Switzerland, go beyond the possibilities we have, European countries, with Switzerland. So the United States – and I know there is a lot of economic pressure – but the United States have been able to sign bilateral judicial co-operation treaties, very far going judicial bilateral co-operation treaties with Switzerland. We have not yet started this process. We should do so and with Switzerland and the United States and setting the agenda from a domestic point of view. So all that beside the internal reforms we need. The rest I leave for the discussion.

Thank you very much.

Data Protection in the Area of Freedom, Security and Justice

By Prof. Dr. B. De Schutter

1. The scene

1.1. The **internationalization of crime,** particularly organized crime, has been enhanced by the rapid growing mobility of people and the evolution of information technology. More and more crimes evolve either towards a global structure (drugs) or are no longer sensitive to border limitations (telecom or cybercrimes). This leads to more organized crime, with a high level of organizational management.
The interlinkage of different criminal activities (drugs – money-laundering – art theft; today terrorisme and financial crimes) and the complex character of their structure do require an enhanced cross-border, international or supranational scheme of police and judicial cooperation, whether expressed through the inter-linkage of the national authorities or the funcitoning of specific international agencies.

1.2. The europeanisation of police and justice activities as a necessary component in the strife for an area of freedom and security cannot succeed without structural initiatives. Schengen, Europol, Customs Information System may be seen as the police-pillars of the operation, Eurojust as the judicial one, the Council's framework decisions to come on the European arrest warrant or on coping with terrorism being examples of the type of instruments needed for substantive success.

1.3. Central in the maximalisation of the efficiency of these bodies is the regulation of an extensive data-traffic, allowing full and correct information – soft pro-active as well as hard case-related – to be a key contributor in phenomenon analysis, crime prevention or individual case handling.

2. The Framework of data protection

2.1. The right to data protection has been formulated at the international level by different organizations. The search for harmonized rules for privacy protection was part of the agenda of the OECD, the Council of Europe, the United Nations and the European Union. The outcomes are comparable since they are based upon the same fundamental principles, elaborated from the 70's on and leading to the landmark of the OECD Guidelines of 1980.

2.2. To the 3rd pillar area of freedom, security and justice, the key convention remains the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) and its Additional protocol of May 2001, together with the CoE Recommendation R(87)15 regulating the use of personal data in the police sector (1987).
Schengen and Europol refer to both documents and can only be applicable after the incorporation of the principles of Convention 108 into domestic law. It leaves, therefore, no doubt that privacy protection is a fundamental cornerstone of those mechanisms. Interpol to makes international co-operation subject to the Universal Declaration on Human Rights, this being, however, a somewhat softer legal basic.

Without covering the specific provisions on privacy protection in each of these three European structures, an attempt may be made to detect **common features.**

2.3. The concern for the protection of the private sphere of the individual has clearly been addressed. Even if it might be argued that the issue has been addressed more from the perspective of the right to process personal data (regulating the right to information of the dataholder), and less from that of a data protection right (right of informational self-determination of the citizen), the constitutive texts of Schengen, Europol, the Customs Information System and the Rules on internaitonal police co-operation and internal control on archives of Interpol foresee in a number of provisions, which correspond to the basic privacy protective fundamentals such as purpose specification, legality, proportionality, integrity, openness, individual access, security requirements, a.o…
It is, therefore, clear that no initiative in the field of freedom and security is thinkable without precise provisions on data protection, via domestic law or via way of European norm-taking. Any exchange of data to any country is unavoidably linked to this requirement. This is clearly shown in the "Europol Rules governing the transmission of personal data to third Sstates and third bodies""(art.18 of the Europol Convention).

The state of the art on data protection has so far been a central issue in the Europol negotiation on third party agreements with certain Scandinavian or Central European countries and with Interpol. It may very well become a hot item in opening similar negotiations with the United States in the near future. At the general level of data exchange and related protection the issue on data streams toward the US was only settled in the summer of 2000 after lengthy negotiations leading to the so-called "Safe Harbour Agreement" and may not even be enthusiastically received by all European experts on data protection.
But –let it be clear- today the European Union cannot enter any personal data processing agreement without a compulsory data protection chapter, based on our minimum treshold distilled out of the 108 Convention. This is to be considered as an important **"acquis"**.

2.4. Each of the existing mechanisms on data protection foresees in the functioning of a common control authority (the Joint Supervisory Authority of Schengen, the Joint Supervisory Board and the Appeals Committee of Europol, the Common Control Authority of the Customs Agreement).
Their respective competences are not always parallel, e.g. in the possibility to handle individual complaints, but they all have the essential task to be the guardian of the correct application of the constitutive texts or to elaborate harmonized proposals to solve common problems.
Much depends on the correct implementation possibilities granted. In this, problems may arise, not in the qualifications or dedication of the commissioners, but in the organizational relationship between the control bodies and the other organs of the organization, their accepted degree of autonomy and the administrative and financial means allocated within the system.
These by their nature independent authorities **constitute an important added-value, particularly in the light of the sometimes missing judicial or political control.**
While the competences of the national control authorities in each Member State remain essential in a "first-line" responsibility, more directly related to specific individual control actions, these common bodies can play – and more and more do play – a key role
a) in monitoring the data processing proper to the central parts of the set-up (e.g. the C-SIS in Strasbourg ; the Analytical Work Files in Europol ; the 3rd party agreements of Europol, …)
b) in lending support to the national authorities in this area by exchange of information, comparative analysis, often leading to harmonized guidelines and actions at national level.

In the few years of their operational existence all these bodies haven proven to be effective garantors of the privacy of the data subjects.

2.5. Each of the mechanisms pays respect to the **principle of individual participation.** The right to knowledge, access, correction is present in all of them, either via domestic channels, via the so-called forumshopping, or via the joint supervisory organ. This also constitutes a fundamental guarantee.
Even if the extent of it is not equally broad in all countries (e.g. countries with indirect access), this basic right is in no way under discussion. In theory, the choice of country in which the individual wishes to exercise his right can even be seen as a step forward.

3. The critical view

This positive evolution in the recognition of the right to data protection may not lead to the conclusion that the existing mechanisms are without criticism. Limiting ourselves again to common elements, the following considerations can be formulated:

3.1. The European and the international informational cooperation in the police sector –formal and informal- is based upon a great number of disparate arrangements and not only upon the Schengen, Europol, Eurodac or Custom Information System and Interpol systems. A number of other instruments, often of a bilateral character, have no provisions concerning privacy protection. Hopes must be focused on a sufficient national protection system, but privacy protection is not yet a fact in all third countries Europe deals with. On the other hand, when present, the provisions on data protection lead, because of the presence of different texts, to a diversification of applicable rules, coupled with a multiplicity of intervening instances. This **proliferation** in unlucky. The lack of uniformity brings confusion, particularly for the citizen.
Agreed that this diversity is not a conscious "*divide et impera*" technique, but only an intermediate solution awaiting a merger or absorbtion of certain instruments or at least the creation of a structure of concertation and co-operation between control mechanisms. Requests for verification may indeed concern the same person and data. The attempts towards a "horizontal approach" between all third pillar instruments should be encouraged and may lead to a greater professionalization of the control exercise.
The recent creation of a single legal secretariat for the JSA, JSB and Customs Control Authority, with a full-time data protection secretary-general integrated into the General Secretariat of the Council, is certainly an important step forward in organizational harmonization and operational approximation (e.g. using the same audit scheme for the SIS and the Europol Information System).
Initiatives towards an even greater integration of the different control authorities would certainly be welcomed by them.

3.2. A second important criticism concerns the **lack of openness** in the political decision making process, a fundamental requirement for the success of a democratic system. National parliaments are not always called to play their role of democratic controller, whether by excluding their role (e.g. Trevi) or by the "take or leave" technique in the approval of already finalized texts.
The use of the technique of framework decisions (e.g. on the European arrest warrant) eliminates the immediate involvement of national parliaments and limits their democratic role into the implementation phase. Voices suggesting the same instrument to amend the Europol convention (an inter-State instrument) to enlarge the action radius of Europol, do not only challenge legal certainty, but above all disregard the rightful expectations of democratic parliamentary participation.
Recently the European Parliament also expressed its concern about the lack of transparancy and democratic control, complaining e.g. that "documents considered by the Council to

be confidential on the basis of the Schengen rules on confidentiality are not available to the European Parliament or to the public "and further on" the separate development of police cooperation under Europol and the absence of public information result in the role of the police in the area of freedom, security and justice becoming less transparant and more confusing for citizens".
It is time to answer this cry for openess, particularly in the light of the Nice Charter of Fundamental Rights of the European Union (Dec. 2000), where not only privacy is guaranteed but also the right of access to documents. The annual report of the Joint Supervisory Authority of Schengen is the only recent information transmitted to the European Parliament. Its Chairman was called twice into a hearing of the EP. But one call remains clear: "for the Council to provide regular reports on cooperation under the third pillar in accordance with art. 39(2) of the Treaty on European Union" (EP. 20/09/2001).
This lack of democratic transparency should receive early consideration at national and European level.
A large parliamentary debate in the early phases of the elaboration of such agreements deserves preference.

3.3. Equally of importance is the **restricted involvement of the judiciary** in the elaboration and application of international police co-operation. Little or no role is given to the courts in Luxembourg or Strasbourg, even though the declaration made by 14 of the 15 members of Europol towards the use of the Court of Justice for conflict resolution in case of disputes in the interpretation and application of the Convention is a positive evolution. In addition, it is not always clear which measures are taken in the individual countries to assure the judicial control over the way in which police acts in the field of international co-operation and exchange of information.
Even if privacy laws are operational in participating countries, there still is a need for control to ensure uniform guarantees in the implementation of large concepts such as "danger to public security and internal order", "occasional contact", "discrete surveillance".
It is equally noteworthy to mention that many intergovernmental conventions provide for a kind of "executive committee"", with wide competences, including that of interpretation, normally allocated to a judicial body. This has been subject to criticism e.g. in the Convention implementing the Schengen Agreement. The creation of an "Eurojust" may be part of the turnover. But then Eurojust itself should be subject to data protection rules.

3.4. Of great importance is the **information of the citizen**. The proliferation of the processings in which he may be included, the cross-border character of the information stream, the lack of public transparency are all elements which hamper an effective insight. Few are those who have knowledge of the existence of the systems, their aim and possibilities, not to mention the safeguards or the control mechanisms they have at their disposal. Which publicity is given to the individual entering the Schengen territory? Will Europol do better in informing the public about its activities or the right of access of the subject to his data?
The information campaign, decided by the Schengen Common Control Authority, shows how difficult it is to convince certain governments to pay attention to this issue of openness. But, where fully implemented, the number of individuals using their right of access has been at least five-fold.
Citizens do accept that today their security requires a "surveilled freedom" and will live with increased needs for data processings. Provided it is done within the limits of democratic openess and effective control means.

4. Conclusions

A potential field of tension exists between public authorities fighting against rising crime situations and the protection of the citizen's rights against interferences occasioned by these public actions. There is on one hand the need of society to see as many crimes as possible prosecuted and punished, on the other hand the lawful claim by the individual for privacy and non-interference into it through whatever surveillance technique.
It seems, however, that fighting organized crime does not necessarily have to pass through the negation of civil liberties. Both are part of law and order, both belong to the protective function of the law. European informative co-operation in the police field has, therefore, to meet both the requirements of legal order in society (effective and efficient task performance) and those of judicial protection of the individual (lawful task performance).
All of the key texts at stake in international policing and data protection (Interpol, Schengen, Europol, Eurodac, …) have the necessary provisions to find that balance. But, there still are shortcomings.
To be fully successful in dealing with organized crime the means of intergovernmental co-operation must be extended, made more enforceable, but also be made more visible to us.
In this proces, information exchange is essential, but not without the guarantees of privacy protection and the control over the conformity with the latter.
In furthering the network of co-operation towards its globalization, lessons should be drawn from the European experience. The existing frame is a solid canvas with quasi universal operability. But it is –at the same time- not free of criticism.
Improvements might or will be:

4.1. continuous assessment of international police co-operation, particularly at the pre-judicial stage to establish norms of legitimate conduct and admissible evidence. A **network of public prosecutors** across Europe should be a workable –be it regional- solution to this problem. We expect Eurojust to take up this challenge.

4.2. vertical and horizontal guidance of legal action at the national and the European Union levels. In the data protection area this means not only the concordance between domestic and European data protection legal rules, procedures and practices, but also the willingness for horizontal integration, particularly in the common control activity.

4.3. development of intelligence and analytical capacities at the European Union level is necessary for police and law enforcement agencies. To protect the individual, subject of data processing to that effect, **democratic control** must improve through the mechanisms foreseen in the conventions and through national control over intergovernmental matters and European control over E.U. matters.

4.4. much of the success of data protection in the police sector will depend upon the way all actors of both police and control authorities are convinced that their open and fair collaboration brings **added-value for both society and the individual**.

Between those accountable for the data processing and its transborder circulation and those responsible for controlling the legality of the infringement of the individual's privacy there is **no room for a conflictual model**.

Pro-EUROJUST Powerpoint Presentation

By Michèle Coninsx

Pro-Eurojust is "Provisional"

- **Tampere Agreement**
  - to form a Judicial Co-operation Unit
- **Council Decision of 14 December 2000**
- **Work began on 1st March 2001**
- **Council Decision on 20 Sept 2001 - Terrorism**
- **No formal "legal basis" except Council Decisions**
- **Deadline : 31.12.2001**

1

Council Decision - 14 December 2000

- **"Serious crime, particulary when it is organised, and involving two or more Member States"**
- **Began work on 1st March 2001**
- **Co-operation - facilitate and improve**
  - Blockages - identify and help remove
- **Co-ordination - investigations & prosecutions**
- **Legal impediments e.g.**
  - Dual criminality
  - refusal to extradite own nationals

2

PRO-EUROJUST ?

- **A group of 15 prosecutors, judges or policemen**
- **One nominated by each Member State**

AIM: to deal more effectively with serious
cross border crime,
particularly when it is organised

3

EUROJUST - AIMS

- **Centre of expertise for MLA & Extradition**
- **Exchange of information**
- **"CASE CO-ORDINATION CENTER"**
  Co-ordination of cross-border investigations
  and prosecutions

4

Provisional Eurojust - 5 Teams

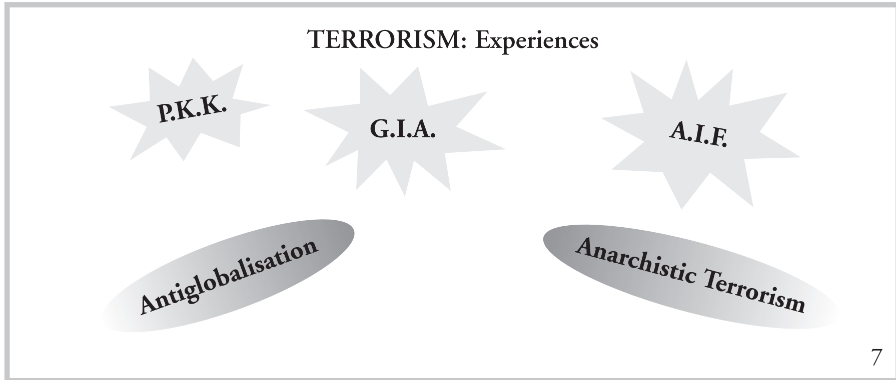
1. **Management of Operational Casework**
2. **Working Group on the Eurojust Instruments**
3. **Relations with European Institutions**
4. **Relations with Law Enforcement Agencies**
5. **Relations Externally**
   - Non EU-Countries
   - Switzerland, Norway
   - USA, Canada, etc.

5

SERIOUS CRIME ?
ORGANISED CRIME ?

- **DEFINITIONS?**
- **Activity Domain:**
  - Terrorism
  - Drug Trafficking
  - Trafficking Human Beings
  - Cyber-crime
  - Corruption and Fraud
  - Money Laundering
  - Serious Theft

6



COMPETENCE

Authority

8

EUROJUST - JHA COUNCIL DECISION
20 September 2001

- **Reconvene Anti-Terrorist Meeting**
  - Co-ordinate investigations and prosecutions
- **Joint Investigation Teams on Terrorism**
- INTERACTION:
  - Eurojust, Europol, Police Chiefs Task Force
- **Authority to meet with USA on Terrorism**
- **Work to complete Legal Instrument for the definitive Eurojust**

9

WORKING PARTY

EUROJUST

INSTRUMENTS

10

ARTICLES 1 - 5

- **Art 1 - Establishment**
- **Art 2 - Composition**
- **Art 3 -**
- **Art 4 - Objectives**
  - Stimulate co-ordination
  - Improve co-operation (MLA + extradition
  - Support competent authorities in member states
- **Art 5 - Competence : Serious crime**

11

ARTICLES 6 - 9

- **Art 6 - Tasks and Powers**
- **Art 7 - National members**
- **Art 8 - National Correspondents - home based**
- **Art 9 - Exchange of information**

12

ARTICLES 10 – 15

- **Art 10 - Processing Personal Data**
- **Art 11 - Access to Personal Data**
- **Art 12 - Amendment of Personal Data**
- **Art 13 - Confidentiality**
- **Art 14 - Time Limits - storage of Personal Data**
- **Art 15a - Joint Supervisory Body**
  - including liability for unauthorised access to PD

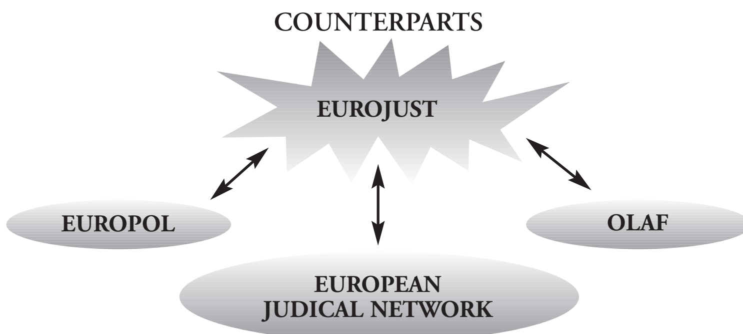
13

ARTICLES 16 - 22

- **Art 16a - Relations with Partners**
- **Art 17 - Legal Personality**
- **Art 18 - Organisation**
  - Administrative Director, Staff
- **Art 19 - Languages, translation etc.**
- **Art 20 - Annual Report by President**
- **Art 21 - Budget & Finance**
- **Art 22 - Location**

14

COUNTERPARTS



15

OBSTACLES

TWILIGHT ZONES

16

EUROJUST-RELATIONS WITH NON-EU COUNTRIES

- Which are those Countries?
- The Draft Instrument creating Eurojust
- What is being done in Pro-Eurojust?
- What can be done ?

17

NON-EU COUNTRIES

- Norway
- Switzerland
- USA
- CANADA
- -
- -

18

CANDIDATE COUNTRIES

- Poland
- Hungary
- Cyprus
- Slovenia
- Czech Republic
- Estonia
- Bulgaria
- Malta
- Slovak Republic
- Latvia
- Lithuania
- Romania

19

WHAT CAN BE DONE ?

- Look at the draft Instrument creating Eurojust
- Identify "Contact Points" ?
- Regular meetings with Eurojust in Brussels ?
- Information on cases which involve non-EU Countries
- Eurojust offers assistance to non-EU Countries
- Understanding Legal Systems
- Understanding and improving Mutual Legal Assistance arrangements
- Any suggestions … ??

20

Identify "Contact Points"

- Identify one person in each non-EU Country responsible for liaison with Eurojust
- Must have a good internal network of Contacts
- Preferably fully aware of MLA arrangements
- All information through that person

  - both to and from Eurojust and the non-EU Countries

21

Regular Meetings with Eurojust

- Crucial to understand how Eurojust is developing
- Build confidence and trust
- Regular meetings - every 3/6 months ?
- Encourage visits from senior prosecutors and JHA Ministers
- Ask non-EU Countries in cases conferences where they are involved

22

Information for non-EU Countries

- Eurojust should provide information about its structure and progress to non-EU Countries
- When cases involve a non-EU Country, they should be informed, invited to attend co-ordination meetings

23

Eurojust offers Assistance to non-EU Countries

- Where difficulties arise in execution of MLA requests in the EU
- Co-ordination
- General assistance

24

Understanding Legal Systems

- **Need to understand**
  - Criminal Justice Systems
  - Responsibilities locally & nationally
  - Procedures and requirements

- **Need to know**
  - Lead agencies for Prosecutions & Investigations
    - Terrorism & Organised Crime
    - Fraud, Money Laundering
    - Trafficking in Drugs and Human Beings

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CONTACT INFORMATION

Provisional Eurojust
Justus Lipsius Building
Rue de la Loi 175
B-1048 Brussels

Tel. 00 32 2 285 94 27
Fax 00 32 2 285 94 32
E-mail : isabelle.arnal@consilium.eu.int

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How can Europol assist in the effective organisation of measures against transnational European crime?

By Dr. Willy Bruggeman

This speech seeks to provide an overview of recent trends in organised crime and the counter-measures taken against it, especially highlighting the role of Europol and with a special focus on the financial aspects of organised crime.
In the context, several initiatives merit special attention. The political declaration and global action plan against organised transnational crime adopted at the World Ministerial Conference on Organised Transnational Crime held in Naples, Italy, on 21-23 November 1994 has to be taken as the basic framework.

Also recent international initiatives taken against organised transnational crime by both governmental and non-governmental organisations (the United Nations, the Council of Europe, the G7/P8, the European Union/including Europol), the organisation for Economic Co-operation and Development, the organisation of American States, Interpol), as well as other forms of action such as bilateral agreements form also the basis of this study, although a special focus is given to European developments.
Fortunately more and more European member states have initiated studies on transnational crime. Based on these studies, as well as intelligence analysed by Interpol and especially by Europol, I will try to provide an accurate assessment of the current registered and perceived situation.

Towards a common definition of organised crime

Defining the concept of organised crime has long been a source of controversy and contention, probably because of differences in the way different persons and countries approach various aspects of the problems[1]. Nevertheless there has often been a need for an unequivocal, common definition of organised crime that, due to the cross-border character this form of crime has assumed, could make co-operation amongst different countries easier. It is vital for the understanding of the organised crime issue to decide whether or not a certain category of crime should be determined to be "organised crime" and then to decide how to delineate that category[2], and finally to decide how resources should be allocated and assess how effectively they have been used in preceding and controlling it[3].
The essential characteristic of the term "organised crime" is that it denotes a process or method of committing crimes, not a destined type of crime itself, nor even a destined type of criminal. The "process" is what adds the additional levels of danger and social threat.
Several countries, such as United States, Canada and Germany have adopted their own definitions. With the EU framework preference was given to a selection of criteria.
In fact, since 1994, the European Council has required annual reports on the scope of and trends in international organised crime. The mechanism introduced to this end focuses on collecting and analysing information on the international criminal organisations known to the competent authorities in the Member States. This focus was prompted by the difficulty of establishing agreement on a common definition of the phenomenon and by the need for reliable data on trends in international organised crime.
Selection of criminal organisations for analysis purposes is based on a set of (11) criteria. To be selected, an organisation must meet at least six of these criteria, four of which (nos. 1, 3, 5 and 11) are mandatory. These criteria include the following:

1 *Adanoli, S., Dr. Hiola, A., Savona, E., Zofi, P., Organised Crime around the World, Trento/HEUNI, Tammer-Paino, Tampere, 1998, 117 (p4).*
2 *Beare, M.C., Criminal Conspiracies, Organised crime in Canada, Nelson Canada, 1996, p. 219.*
3 *Maltz, M.D., Measuring the effectiveness of organised crime control effort, Monograph 9, University of Illinois and Chicago, The office of International Criminal Justice, 1990.*

1. The organisation consists of more than 2 members.
2. Each member is entrusted with a specific task.
3. The members have worked together for a considerable or undetermined period of time.
4. The organisation's activities are performed according to an established set of rules.
5. The organisation is suspected of serious offences.
6. The organisation's operations span more than one country.
7. The use of violence or intimidation comprises part of the organisation's regular working methods.
8. The organisation employs commercial or commercial-like structures to control its profits.
9. The organisation engages in money laundering activities.
10. The organisation works to influence politicians, the media, public administrations, and the legal community of the country's economy.
11. The organisation's activities focus on gaining profit or power.

The United Nations Convention against transnational organised crime (May 1999) states (art. 2) that for the purpose of this Convention:

- organised crime group means a structured group of three or more persons, existing for a period of time and having the aim of committing a serious transnational crime through concerted actions by using intimidation, violence, corruption or other means, in order to obtain directly or indirectly, a financial or other material benefit;
- "serious crime" means conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least (…) years or a more serious penalty;
- "structured group" means a group that is not randomly formed for the immediate commission of a crime and that needs not have formally defined roles for its participants, the continuity of its membership or a developed structure;
- "existing for a period of time", means being of sufficient duration for the formation of an agreement or plan to commit a criminal act.

Also within the EU framework a definition was adopted, by deciding upon making it a criminal offence to participate in a criminal organisation in the Member States of the EU. Within the meaning of this joint action, a criminal organisation shall mean a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits, and, where appropriate of improperly influencing the operation of public authorities.
All legal and international definitions of organised crime tend (internationally or not) to converge, so that the term denotes a method of conducting criminal operations which is a distinct from other forms of criminal behaviour. Its features are violence, corruption, ongoing criminal activity and the precedence of the group over any single member.

The 2000 Situation Report concerning organised crime (OC) in the European Union

OC has, in various forms, permeated virtually every part of the world. Its visibility on political agendas across the globe contrasts with its invisibility as a phenomenon. Not only is OC difficult to capture theoretically or within a stringent methodological shroud; it is also difficult to portray due to its inherent flexibility and adaptability in both organisation and action. Flexibility and entrepreneurialism seem to be the functional corner stones of modern OC, resulting in large, monolithic groups being increasingly replaced by smaller, more accommodating networks.
Because of the inherent flexibility of OC, it is on many occasions difficult to isolate to what

extent certain nationalities are involved in specific OC groups or particular types of crime. However, what is evident is that both indigenous and non-indigenous OC groups – together with mixed or heterogeneous groups – increasingly span the whole of the EU in their criminal activities. Many OC groups consist of vast, European-wide networks with links to countries outside the EU. For instance, Albanian, Turkish and Colombian OC groups span the whole of the EU whilst remaining strong links with their home countries.

OC groups increasingly move their criminal activities to an international level, either in isolation or in co-operation with other groups. Co-operation is even growing between formerly insular and self-sufficient groups such as Albanian, Chinese and Turkish groups. In fact, an increasing number of groups are heterogeneous, composed of nationals from many Member States or ethnic groups. The fact that cross-border co-operation between OC groups is growing is a matter of great concern, not only because it provides the groups with new criminal opportunities but also because it makes law enforcement action more difficult.

It is still the case that one of the principal obstacles to efficient law enforcement action against OC is judicial limitations. Border-less crime cannot efficiently be fought by law enforcement agencies whose reach stays within national borders. OC has shown its readiness to exploit this weakness, for instance by residing in one Member State and committing crime in another, or by moving regularly between Member States in their criminal pursuit. Many criminals are also known to take refuge in other Member States. These trends are expected to continue.

What is described above often results in target unfamiliarity. Such unfamiliarity is compounded by the trend towards multi-crime and poly-drug activities. In short, national law enforcement organisations applying a crime area approach may face problems confronted with international criminals moving between types of crime.

Concerning multi-crime, it is noticeable that several OC groups increasingly seem to mix low and high risk activities, for instance drug trafficking alongside cigarette smuggling. To some extent, this is the result of the move towards multi-crime involvement, where many OC groups are specialising in one certain part of a whole criminal chain, for instance transport. A group specialised in transport will ship whatever there is to smuggle, including drugs, people and guns. Some OC groups even give their members special training, such as groups committed to ram-raids.

This specialisation is part of the overall pattern towards business-like behaviour displayed by most OC groups. Like any international business, OC groups tend to build up networks throughout the EU and elsewhere, with suppliers, transporters and other specialists linked along the way. This requires a great deal of management and cunning business skills where conscious calculation of risks and profit forms the basis for future operations.

OC groups are using IT tools to an increasing extent to commit their crimes, and as a means to cover up their actions or criminal proceeds. In their business, OC groups to an increasing extent also hire specialists for specific purposes, for instance solicitors, computer experts or economists, to enhance both the safety of their criminal operations and the profits to be made. In the search for profit, money is invested in legal or semi-legal businesses, which blurs the distinction between criminal and legal activities of the groups. The mixing of legal and illegal activities is a trademark of OC groups.

Partly as a result of this, OC groups – or at least the leading levels of such groups – tend to be increasingly well integrated into the societies, in which they live and act. They also try to keep a lower profile to detract law enforcement attention. This is so for both indigenous and non-indigenous criminals.

Corruption is also used in many cases for similar purposes. Corruption is an efficient way of obtaining, hindering access to or thwarting the use of information, either to conceal or facilitate crime. Corruption is often aimed at the business community, but also the public sector including police officers and other law enforcement officials. Corruption will continue to be an important tool for OC.

Not all OC groups strive for a low profile and respectability. Some groups still see the advantage in a reputation for violence, and frequently display their detachment from society. In addition, the activities of certain, if not all, OC groups provide compelling evidence that OC as a whole has not turned into business as it is traditionally understood. The violence directed at victims of trafficking in human beings, many times in the form of systematic and collective rape; the degradation of children preyed on by paedophiles; the pain of innocent targets of robberies and burglaries, and the distress of intimidated witnesses, also facing threats to their families – all of these factors vehemently oppose the idea of the gentleman thief.
In the end, profit is the driving force behind most OC engagement in criminal activities. Profit, defined as the accumulation of wealth, would probably better describe the basis and outcome of their activities. On a low level, any profit will of course do, but it is the accumulation of all this money, which drives OC groups and also makes them the threat they are. Although it is difficult to properly assess the amounts of money generated by OC, it is a safe assumption to view it in terms of billions of Euros annually.
Against the background of some of the factors described above, it is safe to say that the problem of OC is a considerable threat to the EU, and that it is growing.

Concerning the types of crime the criminal groups are involved in, some patterns are clearly discernible.
Drugs are still attracting the overwhelming interest of most OC groups, and the involvement by OC in drug trafficking is growing. As noted above, within the drug filed, there is a continuing trend towards 'cocktail' or poly-drug trafficking rather than a focus on only one drug. The one drug, which seems to attract an ever-larger interest, is synthetic drugs in all its forms, mainly ecstasy.
Illegal immigration and trafficking in human beings are both increasing. There is little evidence supporting the view that the increase will not continue in the future. As long as poverty, social and political instability and other push factors do not change substantially, together with pull factors such as employment opportunities and perceived safety in the EU, people will continue to be moved into the EU, either willingly or as victims of trafficking in human beings.

OC finally seems to have moved into child pornography, not necessarily because they are themselves paedophiles but because of the profits they see can be made through the distribution of child pornographic material. On the basis of the limited amounts of information available, it is difficult to ascertain the thrust of this development. However, if substantial profits can be expected in this area, OC groups will continue to provide such material to prospective buyers.

Some countries in Central Europe, notably Poland, have moved away from being solely transit countries of stolen vehicles to become destination countries. Otherwise, trafficking in stolen vehicles seem to be a fairly stable phenomenon, together with theft. The same cannot be said about other forms of commodity smuggling which, following the abolition of Community borders in January 1993, has grown exponentially throughout the EU. Commodity smuggling, in particular alcohol and tobacco, attracts increasing attention from a large number of OC groups throughout the EU.
Financial crime – especially fraud and money laundering – is also attracting an increased interest from OC groups. Money laundering is an integral part of OC, however it seems that after drug trafficking, fraud is the one area, which attracts most OC groups. VAT fraud, excise fraud, customs fraud and Community budget fraud seem to be particularly appealing. Counterfeiting is also likely to increase.
The introduction of the Euro in 2002 will present criminals with new opportunities. Money laundering will be facilitated by the Euro 500 note, which will enable the movement of large amounts of money in fairly small physical batches. The Euro 500 note is set to become a

favourite denomination for counterfeiters.
Forgery of documents continues to be a problem, especially in conjunction with other types of crime. Intellectual property theft, however, is set to explode following technological developments and the ease with which digital reproductions in particular can be moved throughout the world. Technological developments also account for rising levels of high technology crime.

Environmental crime attracts only marginal attention from OC, and the trafficking in radioactive waste even more so. The demand for endangered species seems to be at a stable level, and companies wanting to cut corners by dumping hazardous waste do not seem to require any substantial OC support.
Concerning other key OC features, it seems that the threat or use of violence is increasing in some Member States. This will probably be the case also in the future, however whether or not the witnessed trend of violence in connection with financial crime continues remains to be seen. Corruption is also witnessed in many Member States, however the level of undue influence seems to be quite stable. Nonetheless, corruption will continue to be a key instrument for OC groups. No particular trends can be discerned concerning resources and the use of commercial structures. This is to a large extent due to the problems of reporting on damages caused by OC and the vast variety of companies, which are used by criminals in their activities.

The role of Europol within the EU context

Europol is a relatively young intelligence agency supporting the EU Member States and it took and will take more time to be fully recognised within the sphere of international co-operation.
Strictly speaking, the idea of a European drugs unit was first brought up long before Maastricht in the Trevi meetings. However, I would like to begin immediately with Article K.1(9) of the Maastricht Treaty. This article forms part of what is termed the Third Pillar, i.e. intergovernmental co-operation in the field of Justice and Home Affairs.
Putting the Third Pillar in place was proving to be a slow and painstaking task. There are a number of possible explanations for this, such as the principle of sovereignty, national (often different) penal laws and the fact that provisions for international co-operation originate mainly from the 1950s. Nevertheless, it has had an undeniable effect on the dynamism of Europol.
Article K.1(9) of the Maastricht Treaty provided for the establishment of Europol. This was the first organisation to be created within the Third Pillar, in which the police, and, if necessary, customs can co-operate for the purposes of preventing and combating crime in fields such as terrorism, drugs trafficking and other serious forms of international crime, chiefly through the central exchange and analysis of information and intelligence. This certainly does not extend to executive powers by a long shot, although the supplementary declaration appended to the Treaty refers to support, analysis of national prevention programmes, training and research and development. What this actually entails in practical terms is now defined by the Europol Convention (signed July 1995, and entered into force October 1998), which also defines in concrete terms the parameters of Europol's competencies.[4] Europol officials and analysts and liaison officers from the various Member States perform the tasks listed. Data will be stored centrally in the Europol (EIS) data bank (2002). Another core task of Europol is to perform analytical activities (strategic and operational). It has been decided who should have access to what information, both 'hard' and 'soft', and which restrictions based on the 'need to know' and 'right to use' principles and/or other criteria have to be respected. The liaison officers also provide co-operation support and co-ordinate activities (Article 5). Every country is obliged to set up a national intelligence

4 The text describes Europol's tasks as follows (Articles 3 and 5):
- the exchange of information;
- analysis;
- facilitating the co-ordination of ongoing investigations;
- increasing expertise;
- training.

service (the Europol National Unit). While this does not pose any problems for the United Kingdom and the Netherlands, which already have a National Criminal Intelligence Division, it may create difficulties for other EU Member States.
A great deal of thought was also given to define Europol's mandate (now including terrorism), data protection, political accountability (to the ministers via the management board), democratic control, budgetary control and judicial control. A protocol allows the Member States to opt in with respect to the jurisdiction of the European Court of Justice.
Two other new articles draw attention because they are drafted taking into account the fight against organised crime. Article 30 deals with Europol and enlarges the tasks of Europol in comparison with the Treaty of Maastricht. Europol may support investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity. In other words, Europol gets the possibility to join operational actions of Member States and the Member States are invited to accept the participation of Europol. This needed some extra regulation because the question arises under which regime Europol personnel falls when performing this function especially if this means they could support f.e. search and questioning of suspects.
Next to this Europol may ask the Member States to conduct and co-ordinate their investigations in specific cases. Member States are not obliged to comply with the request, which is logical because there is no political body to which Europol is responsible for questions relating to a policy conducting investigations in one field of crime or another or individual cases.
Especially the creation of the Europol information system, Europol's role when dealing with the EURO currency (in close co-operation with the ECB and Interpol) and the prevention and combat against terrorism illustrates the fact that 2002 is becoming a key year in Europol's future developments.
The creation of a team of counter-terrorism specialists (Council decision, 25 September 2001) for which the Member States are invited to appoint liaison officers from police and intelligence services specialised in the fight against terrorism without prejudice to the legislation by which they are governed, is an important new step. Its remit includes the following tasks:

- To collect in a timely manner all relevant information and intelligence concerning the current threat;
- To analyse the collective information and undertake operational and strategic analysis;
- To draft a threat assessment document based on information received;
- To update the Directory of specialised counter-terrorism competencies, skills and expertise (Joint Action 15 October 1996).

The Chiefs of Police Task Force are invited to consider the missions to be entrusted to the team of counter-terrorism specialist at Europol.
Also other recent development show the high political interest in the further development of Europol.
In October 2000, the Council adopted a decision to create a single secretariat for the data protection authorities set up in three conventions, namely Europol, Schengen and Customs (not yet Eurojust?). This secretariat and the co-ordination entail a becoming a more efficient data protection instrument.
The fight against organised crime is also enhanced by the co-operation agreement signed between Europol and third countries (Norway, Iceland, Hungary, Poland, Estonia, Czech Republic) and organisations (Interpol, European Central Bank, EMCDDA, to be signed in 2001) and the Commission (to be further developed).
The widening of Europol's mandate to cover all forms of serious crime (01 January 2002) will not necessarily increase the number of tasks of Europol but will allow greater flexibility in using data relevant to organised crime groups, which may have to be included under the current mandate.

Actually a draft legal instrument containing possible amendments to the Europol Convention is in discussion. This draft Council Act and Protocol amending the Europol Convention in respect of Europol's participation in joint investigation teams, Europol's possibility to ask Member States to start investigation and the competencies of Europol, should be accepted at Council level before the end of 2001. The same is valid for a Council decision extending Europol's competencies to all forms of crime mentioned into the Annex of the Europol Convention.
Europol will have to closely co-operate with Eurojust. The Council decision of 20th September 2001 tasked the Article 36 Committee, among other things, to ensure the closest possible co-ordination between Europol, Pro-Eurojust and the Police Chiefs Task Force.
One should define the extent to which Eurojust should benefit from Europol's work. Certain subjects should be decided together, at least by prior opinions without prejudicing the prerogatives of the national authorities.
All parliaments from the EU Member States have met for the second time in Brussels (15-16 October 2001). Again it was stated that more Parliamentary Control is necessary and a small (TROIKA) group will prepare a PARLOPOL initiative in order to prepare concretely an additional convention change on this subject, to be confirmed under Spanish Presidency (2002).

Conclusions

5.1. The globalisation ("global village") of many sectors of social life is one of the characteristics of our modern world. Considering that this globalisation concerns many sectors of our economic and social life, it is evident that it also affects the world of crime. In the European and Mediterranean areas (but this phenomenon concerns the whole world), criminal organisations are joining to do businesses in the field of drugs, arms, prostitution, trafficking in stolen cars, and trafficking in human beings and to invest the proceeds of crime where it is more convenient. Hence, the extreme danger of a global criminal system for the economic systems, the financial markets, our public institutions and the people.

5.2. If this is true, then no one can say that organised crime does not exist in one's country. Modern organised crime is present everywhere, although under different forms, according to traditions, social, economic and political circles and type of business handled. One must not confuse the presence of criminal organisations which the manifestation of serious crimes against assets (burglaries and extortion) or against individuals (murders, kidnappings); consequently it is wrong to say that organised crime does not exist in a country when no Mafia-style murders are committed there. Many crimes committed by organised crime are in fact committed for the survival itself of criminal organisations (intimidation, corruption, money laundering, and investment of criminal profits), and many of these crimes are not "visible". I would like to make it clear that this is not solely an Italian point of view, but it is shared by many States who are in the forefront in the fight against organised crime or in the development of appropriate instruments to combat it (as is the case of the United States, Germany, the Netherlands, Belgium and Spain). I would also like to remind you that in 1993, the French National Assembly approved a report stating that: "Three levels of activities in the Mafia industry have been established by the experts: the first concerns violent exactions and traffic that ensure the Mafia's control over a territory and the production of proceeds; the second is constituted by money laundering; the third is the investment of laundered capital in legal activities".

5.3. The main instrument through which organised crime associations and Mafia-type organisations operate is not violence but corruption and intimidation. Corruption and intimidation are directed towards individuals and both private and public institutions. Criminal organisations resort to violence only as a last resort, because through violence they make

themselves visible, they show their danger, they generate concern within the public opinion, and oblige to accomplish the same results with less risk, and it threatens the public institutions from within.

5.4. Today, organised crime tends to expand at an international level and engages in any traffic or business that can boost its profits. The main objective or organised crime is to make Profits and to acquire as much power as possible.

5.5. It should be underscored that the internationalisation of the major criminal organisations has come about regardless of the treaties on the free movement of goods and persons. They have been helped in this internationalisation process by the gaps in, and inadequacy of, international treaty rules and by the difference in national legislation and by the gaps in, and incompleteness of, the criminal laws of many countries. Europe is fighting against a unified organised crime in its objectives and *modus operandi* with forty different criminal codes and as many police and judicial authorities as there are countries. And it is this difference which nurtures organised crime. Experience, in fact, has shown that organised crime is attracted both by countries where investments are convenient, those that lack or do not have strong rules regarding the financial world, and by countries lacking strict laws against organised crime.

5.6. International co-operation is essential in order to prevent and combat organised crime. It might be expected that especially with the EU framework the abolition of border control remain the main reason for the creation of EU police and justice co-operation, Schengen, Europol, Pro-Eurojust, the Chiefs of Police Task Force and CEPOL are becoming important instruments in order to implement the new strategies and policies. Also legal instruments (mutual legal assistance, European warrant of arrest,…) are created or discussed in order to improve the situation. Nevertheless, European Union Member States are not prepared to provide European Bodies with the possibility of carrying out cross-border operations and vesting them with supra-national power.

Committee P., External Supervision over the Police Forces

By Dr. Hugo Coveliers

I. The History of the Development of the Act of 18 July 1991

In 1988, the Belgian Parliament decided to set up a special investigation commission in charge of investigating the means by which banditry and terrorism are suppressed in Belgium. The immediate cause of this investigation commission lies in a number of unsolved crimes in which 28 people have been killed. Subsequently, these crimes have been attributed to the so-called “Bende van Nijvel”.

Quite early on, it became clear that if the police forces were to maintain a democratic structure, internally as well as externally, supervision would be necessary.

It has been stated as follows: “the legislator has a duty to supervise the functioning of the police forces. This supervision can only be exercised by establishing an independent supervisory element reporting directly to a Parliamentary Commission or to the Minister of Internal Affairs and/or Justice. The supervisory service must be entitled to inspect all decisions, to enter all rooms; in other words, the police forces may have no secrets from this service. When the police forces are supervised efficiently, the supervisory service in turn will be supervised by the police forces.” (translation) (Hugo Coveliers, Securitas Belgica, De Rijkswacht is overbodig, Antwerpen, 1989, pag. 131).

Based on the conclusions of the above mentioned investigation committee, the government of that time launched its “Pinksterplan” on 5 June 1990.

This plan contained a number of measures, meant to prevent the dysfunctions which had been revealed by the parliamentary commission. One of the suggested measures was to introduce external supervision.

The starting point were wider parliamentary supervision and two commissions of ‘wise men’ that must eradicate all abuse. The government hoped the commissions would end the conflict between the police forces. Not all points of discussion were resolved; a number of sticking points were left to the judgment of the House of Representatives.

II. The Act of 18 July 1991

On 17 October 1990, the bill relating to the regulation of the supervision of the police and intelligence services was introduced in the House by the Minister of Justice, the Minister of Defense and the Minister of Internal Affairs; in those days, these ministers were in charge of the police forces.

In its note of memorandum, the bill states: “Successive allegations and rumors have led to questions about the appropriate behavior of the police and intelligence services in our country and have affected the confidence the population should have in these services. If these allegations are legitimate, it is of crucial importance to the citizens and the democracy itself that they are thoroughly investigated in order to be able to take measures to eradicate any lacks and errors in the future. If the allegations are not legitimate, it is just as crucial to the citizens and democracy that this is established by an independent and influential authority so that the confidence of the people in our police and intelligence services can be restored. Hence, the government suggests

the creation and independent supervisory system into the work carried out by the police and intelligence forces, especially in order to safeguard the fundamental rights and liberties of the citizens and to promote the efficiency and co-ordination of these services."

The supervisory organ that was created by law did not replace parliamentary supervision nor supervision by the ministers responsible together with the relevant legislative and judicial institutions, but they were independent. It is an institution with its own character that is as useful and necessary complement to the existing forms of parliamentary and hierarchical checks. In order to be able to fulfill its mission, 6 criteria were put forward:

1. Independence: supervision must be carried out by institutions outside the police and intelligence services themselves;
2. Continuity: supervision must be performed continuously in order to integrate it into the practice of these services. There must also be supervision over the required adjustments following previous checks;
3. Efficiency: members of the supervisory organ must have sufficient authority and must possess sufficient means and expertise in order to be able to organize thorough investigations. Supervision must be credible to the police and intelligence services. They may expect the members of the supervisory organ to understand their mission fully and to advise and make recommendations from a positive starting point;
4. Public character: supervision must be performed in an atmosphere that is as open as possible where the results of complaints from private persons as well as general conclusions are concerned. The confidence of the population will also be strengthened when complaints are announced that proved to be ill-founded, so an end can be put to rumors that these services are in default;
5. Specificity: each supervisory organ must be solely responsible for the supervision of the police and intelligence services and must be completely dedicated to its mission. The new system of checks may not take place of the existing inspections and checks, introduced by hierarchical authorities and judicial authorities;
6. Legality: the supervision system will be introduced by an Act regulating its working methods;

(Belgian House of Representatives, ordinary session 1990-91, Bill for the regulation of the supervision over police and intelligence services, 1305/1-1990-91, pag. 6).

The Vast Comité van toezicht of the police services was created by the act of 18 July 1991, together with an investigative service, the Fixed Committee has five members, appointed by a 2/3 majority of the House of Representatives; it can call on some 30 investigators working under supervision of the head of the investigation service.

All mandates of the members of the Fixed Committee are temporary, for five years, and can be renewed twice.

It is the task of the Committee to discover flaws and errors in the system and to make suggestions for methods of safeguarding the rights of individuals in their relations with the police services and to promote the efficiency and the co-ordination of the functioning of this service. (Controle op de geïntegreerde politie een uitdaging? Lode Van Outrive, Custodes, 2/2001, pag. 24).

The debates in the Belgian House of Representatives (Report on behalf of the Joint Committee for Justice and Internal Affairs, General Affairs, Education and Public Office, given by Mrs Onkelinx and Mr. Bourgeois, Belgian House of Representatives, session 1990-1991, document 1 305/8) show the interpretation of the legislator of the notion of external supervision.

Contrary to internal supervision, aimed at enabling the head of an organization, in casu the police, to verify whether and how their directions and/or orders are put into practice, external supervision investigates the position of the police as a means of formal social control in a wider social spectrum. In other words, the supervision will be aimed at two complementary objectives that are difficult to separate, i.e. on the one hand, guaranteeing the respect for the constitutional rights and fundamental liberties of the citizens and on the other, handling the efficiency and coordination of the police services. (See report o.c.pag. 6). This means that supervision will be implemented in five ways:

1. Parliament is better able to execute its powers in relation to the supervision over the executive branch and over safety policy in general.
2. The local, regional, judicial and administrative authorities are given the means to better develop the activities of the services.
3. The public at large should have more confidence in the police and intelligence services. This aspiration is demonstrated by attempts to give the public the real impression that their objections, complaints and desires will be acknowledged.
4. It will ensure that the police and intelligence services will be supported as much as possible technically and materially as well as morally as good as possible in the fulfillment of their duties.
5. Modern equipment should be made available in order to guarantee the fundamental rights of the citizens in their relationships with the police services.

Repeatedly, the legislator emphasizes that the new supervision system may not take the place of the existing inspections and controls, organized by hierarchical authorities or judicial laws, but that there is a specific mission for this supervisory organ. However, it is sometimes stated that the investigating services, which should be the police force of the police services, should also work on behalf of the judicial authorities when investigating crimes committed by police officers. In this instance, the service operates under the authority of the judicial authorities.

The "Comité P" can act on its own initiative, following a complaint from a private person as well on the request of parliament.

As such the "Comité P", together with the Committee for the supervision of the intelligence services, derives its legitimacy mainly from its function as an executor of the supervisory tasks of the legislative branch.

This dependence is emphasized by the fact that the budget of the Comité P is guaranteed by the House of Representatives by means of dotation. That same House also appoints the members of the committee with a 2/3 majority and has the power to dismiss them.

In addition, the "Comité P" reports first and foremost to Parliament, and more specifically to the House of Representatives via the special accompanying commission that was created for that purpose in the House of Representatives, if necessary it also reports to the competent minister or the assigning authority.

The sanction for not acting on the advice given by the above-mentioned "Comité P" lies mainly in the deposition of the report with the House of Representatives, by which a Minister who does not implement the formulated recommendations is parliamentary responsible.
In order to guarantee the fundamental democratic rights of the citizens, it is clearly stipulated that all citizens may contact the Comité with complete anonymity.

II. First Repair: the Act of 1 April 1999

After fairly long discussions, on 9 February 1996 the parliamentary accompanying commission announced a report in which the problems, which had arisen since the act of 1991, were clearly formulated. Fourteen recommendations were made, twelve of which were incorporated and approved in the later act.

(Documents of the Belgian House of Representatives 437/1, Belgian Senate 1, 258/1, session 195-96: Evaluatie van de werking van de vaste comités van toezicht op de politie- en inlichtingendiensten)

Eventually, the Act of 1 April 1999 ensured that when a minister is in charge of the committee, he or she will receive reports in advance and will be given the opportunity to formulate considerations. The minister can block or object to the report of the investigation in relation to the publication of the report. The power and the right of initiative of the committee were somewhat restricted; the supervision by the parliamentary accompanying commission was strengthened. Finally, over use of the committee, by the Public Prosecutors and also duplication of the tasks of other inspection services was avoided.

In 1998, the committee had already noted in its annual report that the supervision by an organ functioning within the structure, police policies and the implementations thereof, did not have the necessary independence to correctly investigate complaints and to formulate neutral and constructive conclusions.

It was stated that is would be beneficial for the "comité P" to investigate the internal inspection services also.

The Act of 7 December 1998 concerning police reforms on two levels

In December 1998, the evolution towards a complete reform of the Belgian police establishment, which had been started more than ten years earlier, was finalized. Instead of different police services, operating next to even against each other, the 'Rijkswacht', the Judicial Police and the different municipal bodies, the complete police system was divided into two levels. On the one hand, the federal police, operating on a federal Belgian level and comprised of 1/4 of 40,000 men, while the local police, structured into 196 local zones, would handle global local police care within the framework of a broader application of community policing.

This reform was accompanied by the Fixed Comité P which also needed to ensure that its tasks were not taken over by the internal inspection services of the federal police, which of course wanted to expand their powers. Mainly because of the supporting function vis-à-vis the House of Representatives, the "Comité P" survived the reform and continues to fulfill its tasks as an external supervisory organ for the entire police apparatus.

A few remarks

"In a democratic society, protection by, as well as protection from, police is needed. Earlier, this dilemma was attributed to the inherently problematic nature of police duties." (Cachet A. "Het problematische karakter van de politietaak" Sociologische gids, 1978, nr. 6 pag. 449).

The "Comité P" was founded explicitly to offer protection against police forces should they overstep their proverbial boundaries. Of course, the Comité can only act and signal dysfunctions

within the police apparatus to the legislator when all information is handed over to it. Sometimes, this is quite problematic, because information about judicial procedures and/or disciplinary measures is not always fully submitted to the supervisory service.

Furthermore, it should be investigated whether the supervisory activities of the "Comité P" should be restricted to the activities of regular police services. Many officials sometimes perform police duties (customs, social inspections, economic inspections, etc.). Often, these officials adopt a more authoritarian attitude than the uniformed regular police services. Perhaps supervision by the "Comité P" would be appropriate here?

Private security services as well as private investigators need similar external supervision; in this instance too, external checks would be appropriate.

The democratic character and perception thereof by the citizens will largely be determined by openness. The work of the supervision organ, the "Comité P", must be public to a great extent, but a balance should be preserved between transparency and confidentiality.

However, even in confidential matters, the parliamentary supervision should remain a possibility since confidentiality can only be acceptable for a certain period of time. True democracy requires true openness.

Democratic Control by the European Parliament in relation to Control of Justice and Home Affairs

By Dr. Steve Peers

I. Introduction

This paper first outlines the position of the European Parliament in several respects. First of all, what are the Parliament's general objectives as regards decision-making in policing and criminal law co-operation? Secondly, what are its more specific objectives in relation to Europol in particular, and also, what recommendations has it made in its recent inquiry in the Echelon intelligence system?

Next, the paper reprises several recommendations concerning the European Parliament's role that follow from a report prepared for the Parliament two years ago about development of Justice and Home Affairs within the EU after the Treaty of Amsterdam.[1] These recommendations concern in particular the Parliament's decision-making control and scrutiny of operational action at the European Union level. Then the paper updates these recommendations, making additional recommendations about the issues that arise in relation to the creation of Eurojust, the amendment of the Europol Convention and the creation of other more informal bodies at the European level in the last two years.

II. Position of the European Parliament

There are two aspects of democratic control. The first aspect is democratic control over legislative aspects of decision-making. To what is extent is there democratic control at European level over negotiation of formal instruments dealing with policing and criminal law: framework decisions, decisions, conventions and measures implementing them?

The second aspect is scrutiny of operational issues. To what extent does the European Parliament have the ability to scrutinize operational aspects of policing co-operation at European level? Does it want to develop the ability, and how should it develop the ability? The same issue now arises regarding judicial co-operation in the form of Eurojust.

On the first point, it should be emphasised that the position of the European Parliament as regards decision-making has changed dramatically compared to the position ten years ago. When the initial 'Third Pillar', dealing originally with immigration, asylum, policing and criminal law, was created by the 1992 Treaty on European Union, the European Parliament had a relatively subsidiary role. Its role was merely to be informed regularly of discussions and to be consulted about the principal aspects of activities.[2] For about four years from 1993 when that Treaty entered into force, and 1997, when the Treaty of Amsterdam was signed, the Member States and the Council generally took a conservative interpretation of those principles. It is true to say that the European Parliament was regularly informed, but it is harder to say that it was in fact consulted on the principal aspects of activities. So for example, the Convention establishing Europol was not sent to the European Parliament before agreement. Similarly the Conventions on extradition and establishing a customs information system were not sent to the European Parliament before their agreement. So the Parliament was not consulted prior to adoption of those measures, even though, by any plausible interpretation of the TEU, the establishment of Europol was one of the principal aspects of activities during that period. Furthermore, the Parliament was not during this period consulted on the measures implementing the Europol Convention, which were agreed several years before Europol actually began operations.

1 *The Impact of the Amsterdam Treaty on Justice and Home Affairs Issues.*
2 *Former Article K.6 TEU.*

As a reaction, the EP expressed this disappointment in a number of resolutions on the functioning of JHA, and made a number of demands. One of its key demands was to move all of the JHA issues into the European Community framework. That would mean, of course, that all proposals would have to be made by the Commission, there would be a Parliament argued majority votes, a qualified majority vote in the Council to adopt all measures, and the Parliament would have a much greater legislative role by means of the co-decision process. The Treaty of Amsterdam accomplished that with regards to immigration, asylum and civil law, but it did not accomplish that with regards to policing and criminal law.[3] What the Treaty of Amsterdam did instead was to amend the provisions of the EU Treaty dealing with the position of the EP.

As a result of the amendments in the Treaty of Amsterdam, the EU Treaty now requires the Council to consult the EP on conventions, framework decisions and decisions, and apparently on measures implementing these instruments, but not on common positions which are adopted within international bodies.[4] How have those obligations been implemented in practice? First of all, to some extent they were implemented in advance. Over the two year period from the agreement on the Treaty of Amsterdam in June 1997 until its entry into force of May 1999, the EP was in fact consulted on a large number of the measures that were adopted during that time. It was not quite consulted for all of them: for example, it was not consulted on the Customs Cooperation Co-operation Convention (generally known as the Naples II Convention), which gives important powers for customs administrations. However, it was consulted on the large majority of other measures, although not, at this point, measures implementing the Europol Convention. Following that, after the Treaty of Amsterdam entered into force the EP has indeed been consulted on every formal measure since, except for one measure, a decision implementing a previous joint action dealing with synthetic drugs.

Despite these improvements, the Parliament is consistently concerned by certain aspects of this consultation. One of its chief concerns is the possibility in the EU Treaty for the Council to insist upon a time limit for consultation of the Parliament. That time limit can be no shorter than three months. However, there are a large number of measures being proposed in this area, many of which are quite complex, and the Parliamentary Committee that deals with these issues (the 'Civil Liberties Committee' for short) also has to deal with issues such as immigration, asylum and data protection. So given this workload, it is proving difficult for that Committee to find the time and the expertise within the time limit to assess and properly examine the legislative proposals before it.

Additionally the Parliament was concerned by what happened to the so-called Schengen acquis. According to the Treaty of Amsterdam, the Schengen Convention and all the many measures implementing it were to be brought into the framework of the European Union legal system.[5] That was to be accomplished by decisions of the Council which were adopted only a few weeks after the deadline in May of 1999. But the Council did not consult the Parliament at all on these decisions. While it is true that the Council had no legal obligation to consult the EP according to the Treaty of Amsterdam, there are many cases where the Council does regularly consult the Parliament even where it has no legal obligation to do so. In the Parliament's view this was a particularly strong case for consultation of the EP, because the effect of those Council decisions on the Schengen acquis was to bring a huge list of legislative acts within the framework of the European Union law. Similarly, as regards subsequent developments relating to Schengen, such as the applications to join part of the Schengen co-operation by the UK and Ireland, and the treaties associating Norway and Iceland with Schengen cooperation, there has been no consultation of the EP either.

3 *See Title IV of Part Three of the EC Treaty (Articles 61-69).*
4 *Article 39 EU.*
5 *See the Protocol concerning the Schengen acquis, attached to the EC and EU Treaties by the Treaty of Amsterdam.*

In addition, the Parliament has expressed its concern that it has not been given any information on assessments of applicant countries' readiness to apply JHA obligations. The EP wants the information on those assessments in order to be able to scrutinize whether applicant countries are ready to join the EU. This is particularly relevant given the Parliament's veto over any new accessions to the Union; obviously those assessments are directly relevant to the EP's ultimate decision on whether or not the European Union should be enlarged.

In addition the EP has been arguing regularly, even following the Treaty of Amsterdam, for annual written reports on policing and criminal law and for additional exchange of information. It wants the latest version of the Council documents rather than the initial version when it takes its decisions.

The Parliament's agenda at the moment is to press for the full application of Community methods to all JHA matters, entailing the co-decision of the Parliament, qualified majority voting, the stronger role of the Court of Justice, and the stronger role of the European Commission, to be agreed by the next Intergovernmental Conference due to start in 2003. Undoubtedly that will be one of the Parliament's biggest demands in that Conference. Also, the Parliament has pressed forward for an early move to such a type of Community method as regards criminal law, particularly criminal law related to Community law such as the Community's financial interests and such as environmental law, where the EP has great legal doubts about treating such matters within the framework of policing and criminal law.

The Parliament has also made a number of more specific demands in relation to Europol. It has asked in resolutions dating back to 1996 to be able to receive reports from the management board of Europol. Furthermore, it has asked for a role in the appointment of the Director and the Deputy Directors of Europol. It wants the Europol Convention to be amended to specify that its opinions should be taken into account when it responds to reports from Europol. It also wants to specify that the Special Report to the EP which is provided for in the Europol Convention which should cover all aspects of Europol co-operation and all activities within the framework of Europol. Later on in 1999, the Parliament repeated the same demands. It is also in addition argued that Europol should be funded from the European Union budget which would as a result, of course, give the EP a great deal more control over the funding and by extension the activities of Europol. It also asked for quarterly information from the Council as regards the activities of Europol, and has argued for the establishment of a complaints authority wherever Europol is involved in investigations in connection with national authorities.

More recently the EP has made certain demands in relation to the Echelon system. It has argued that there should be a system for democratic control and monitoring of any autonomous EU intelligence capability and that the EP should play an important role in that. It is also argued in this recent report that there should be a European platform of representatives of national bodies which are involved in enforcing human rights obligations and that this European platform should exist to scrutinize the compatibility of national law on intelligence agencies with the European Convention on Human Rights and the EU Charter on Fundamental Rights.

Additional Recommendations

First of all, the report to the Parliament in 1999 made a number of recommendations regarding the European Parliament's role in JHA matters. One issue raised there was that the process for decision-making as regards EU policing and criminal law has a lot less democratic involvement right from the outset. Compared to other areas of law within the EU, there is usually some form of Green Paper, or White Paper, or communication from the Commission before legislation is

proposed. It is true that the Commission increasingly published those types of papers within the area of policing and criminal law and in such cases, the Parliament has an opportunity to express its views before the formulation of draft legislation. But in addition to the Commission's role in producing these papers, there are, of course, similar discussion papers, strategy papers, and discussions being launched at the initiative of the Member States. In those cases, the EP is not given the possibility to participate in decision-making at the early stages. Similarly, when strategies are adopted, such as the organized crime strategy of spring 2000 and the programme on mutual recognition in criminal matters adopted in late 2000, the EP then has the opportunity to respond to that, but only after that strategy or programme has already been adopted. So it is not being asked at an early stage what direction it thinks EU policing and criminal law should take. Instead, the EP only has the chance to comment after the strategy or programme has already been agreed. As a result, the EP's opinion is obviously going to have far less effect.

Another recommendation made in the report was that there should be an annual report within the EU on data protection, which should cover not just Community legislation, such as the data protection directives and now the Regulations on data protection in the Community institutions, but also data protection issues within EU bodies, such as Europol, Eurodac, the Schengen and Customs Information Systems, and in future Eurojust. In order to carry out this role, the European Parliament should also make links with joint supervisory bodies at EU level.

Additionally, the report argued that any treaties with third states or third bodies within the framework of policing and criminal law co-operation should be subject to consultation of the EP.[6] It is arguable whether or not the Treaty actually requires this; the issue will have to be addressed soon because the first of these treaties is now being negotiated.[7] But beyond simple consultation before conclusion of those Treaties the report argues that there should be equivalent arrangements during the negotiation, the preparation and conclusion of third pillar treaties, that apply to treaties signed by the European Community. In the latter case, the European Parliament has a framework agreement with the Commission, which contains a number of detailed obligations in an annex, relating to treaties negotiated between the Community and third states or bodies.

Similarly, the report argued that treaties with third states or third bodies within the framework of EU measures signed by Europol (and in future Eurojust, as regards access to Schengen Information System data) should also be subject to consultation arrangements. Europol has already signed or included a number of such agreements and negotiations are on the way for a number of others, and the European Parliament was not consulted before the Council agreed to the conclusion for such agreements. To give an example of the need for parliamentary scrutiny of such treaties, the United Kingdom House of Commons European Scrutiny Committee expressed its concern that it was not consulted in any due time, on the proposed agreement between Europol and Interpol. In particular, that committee was very concerned because it turned out that the joint supervisory board of Europol had expressed a number of concerns about this draft agreement. Although the UK Government argued that these concerns were not well founded or had been dealt with, there was no opportunity for the national parliament or the European Parliament to assess in advance which side was right in that argument. It is obviously preferable that any concerns that the data protection bodies may have, can be addressed by means of public discussion of those issues.

Additionally the report suggested that the European Parliament should receive not only the full Annual Report, rather than a Special Annual Report in relation to Europol, and that it should also receive the six-month work programme of Europol, along with regular testimony from the Director and the Chair of the Management Board of Europol as regards its operations. That

6 For the procedure to negotiate and conclude such treaties, see Article 38 TEU, which also refers back to Article 24 TEU.
7 The Council has given the Council Presidency a mandate to negotiate treaties on mutual assistance and extradition with Norway and Iceland.

would allow any concerns and issues to be raised at a parliamentary level. Similarly as regards the Customs Information System and the Schengen Information System, the report recommended that there should be similar arrangements for annual reports on the activity of those systems of a responsible official on a regular basis regarding the activities of those systems.

Similarly the report argued that the European Parliament should conduct a survey, and then following that arrange for regular reporting regarding the involvement of EU and the connection between any EU measures and any bodies outside the EU. It gave as a particular example ILETS (International Law Enforcement Telecommunication Seminar), because there are indications that ILETS affects policy development within the EU and makes recommendations and discusses policies which are then implemented to one extent to another by means of EU measures. So the European Parliament should take a regular view of the discussions in such bodies.

To update the report, it would today be necessary to suggest recommendations regarding Eurojust. The draft decision establishing Eurojust does not have any provisions on regular testimony by Eurojust staff, or the European Parliament's involvement in appointments. Also, Article 20 of the draft Eurojust decision provides that there should be an Annual Report to the Council on the activities of Eurojust and its budget, including proposals on criminal matters, that Eurojust should make other reports to the Council as the Council requires. But Article 20 goes on to provide that there should only be an annual Special Report for the Parliament. These provisions could be improved, particularly because, unlike Europol, Eurojust would be funded from the Community budget, which the EP has a huge role in adopting. As regards budgetary matters, as regards the Annual Report, and as regards the Special Reports on particular matters, it obviously frustrates the goal of democratic scrutiny if those reports are not also sent to the EP.

As far as other new bodies are concerned, the Tampere European Council called for a Task Force of European Police Chiefs to be set up. That body does not have any sort of official rules of procedure or official arrangements for accountability by informing the EP on the topics on its agenda, the topics discussed, any decisions taken or policies developed at those meetings. Similarly following the events of 11 September the European Council called for other new informal bodies to be set up such as regular meetings between the chiefs of the EU intelligence agencies, so there will be similar concerns about the need for scrutiny of those meetings. The need for information about the topics and decisions taken also applies equally here.

Finally, several points should be made regarding the planned amendments to the Europol Convention. First of all, it is obviously a matter for great parliamentary concern that two measures which seem to expand the scope of Europol's activities were adopted in the form of recommendations rather than in the form of amendments, as the Europol Convention clearly requires. These two measures were the recommendations on Europol's involvement in joint investigation teams, and its involvement in requesting Member States to begin investigations. Now it appears that these two issues, along with some other issues, will be included very shortly in an official amendment to the Europol Convention. So the two issues here are: to what extent has the European Parliament been involved in the amendments to the Convention, and to what extent will the amendments to the Convention address parliamentary control.

On the first issue, so far the European Parliament has not been involved in amendments to the Convention. Of course, any amendment, once made formally, will have to be submitted to the European Parliament for consultation, but there have been discussions on the basis of an unofficial draft since March 2001 within the Council working party on Europol. But there has been no attempt to involve the EP, for example by means of a discussion paper to consult it at an early stage on at least the general orientations for the amendment of the Convention.

On the second issue, there was a paper from the Swedish Presidency on a particular issue of democratic control over Europol back in May 2001, which not only listed areas where the Convention could be amended, but also listed areas where practice could be changed even without amendment, to allow for greater parliamentary supervision. It listed quite a number of areas where the European Parliament could be involved without amending the Europol Convention or the EU Treaty. But it seems that those proposals have not been taken up and have been taken any further. While the JHA Council in September did decide that the possible amendments to the Europol Convention should include amendments relating to democratic control, the later draft of possible amendments under discussion by the Council working party did not include any significant provisions concerning an extension of parliamentary control. The only relevant provision was an Article stating that the reports to the Council on Europol's activities should subsequently be sent to the EP for information. This is a long way short of the requests that the European Parliament has been making since 1996 and in particular it is a long way short of the measures of parliamentary oversight that would be desirable in light of the significant extension of the tasks of Europol that would result from the negotiation of the amendments to the Europol Convention.

So in conclusion, we have seen that the position of the EP as regards decision-making has improved dramatically over the last ten years. But having said that there are still deficiencies. It is still only a consultative role and it is still subject to limits that do not exist where the European Parliament is only being consulted on other areas of Community law. Additionally the scrutiny of operational activity is very limited so far, and it seems to be foreseen that it will remain extremely limited, even as the EU's bodies gain operational powers to add to the powers concerning exchanges of intelligence and analysis that they have enjoyed up to now. So while there has been some welcome movement as regards European parliamentary control, there is still a long way to go.

National Parliamentary Control on Justice and Home Affairs Policy Making

By Prof. Dr. Erik Jurgens

I have no set speech and the reason is that today the Justice and Home Affairs Council is meeting. I think it is the 6th meeting under the Belgian Presidency already (which is unusual) and it will be discussing especially two framework decisions - one of them is European arrest warrants; the other combating terrorism.
What we see are Ministers of Justice, the executive branch of government, coming together as a legislature to regulate very basic matters regarding the penal law system of countries, and therefore, very much pertaining to the rule of law (Rechtsstaat). Previous speakers have already pointed out how small the influence is of the European Parliament on this legislating activity within the EU.

Before going through with you the nine central points of my contribution which I have prepared, I would first like to give you an idea of how all this is experienced by a Member of Parliament of a Member State of the European Union. In the case of the Netherlands, the Parliament has decided that our Ministers are not allowed to take part in decision-making in the JHA-Council if those decisions are binding for the Netherlands, unless they have the approval of both Chambers of the States General, i.e. of Parliament. That situation obliges the Government to send us, at least 15 days before the decision is going to be taken in the JHA-Council of Ministers, the text of the decisions to be taken there. This has been going on for nine years now. I have had a long experience as to the sort of documents you get. You can see how practically up to the last moment the working parties of the Council of Ministers and COREPER are preparing texts for the Council of Ministers, even on very important issues. The Ministers sometimes get these texts when getting on the aeroplane for Brussels or wherever the meeting is taking place.

That is a way of legislating which is not acceptable. I want to use much stronger words than the previous speaker. The fact that no Parliament is in fact involved in the decisions taken by the Council of Ministers as such is just not right, especially if we are talking about sensitive matters in the field of Justice and Home Affairs. I think that this sort of decision-making will backfire sooner or later on the whole of the European Union. These matters are more sensitive than many other directives which have been taken in the field of the Common Market. In every national parliament there is always some problem on the agenda around the penal law, justice or police.
These matters are politically very sensitive indeed. As a proof of how sensitive they are, alas, a Third Pillar was created in Maastricht to show that it was something different to what the rest of the European integration was about. And the very slow build up of Europol also shows how sensitive these issues are. I am very much in favour of giving Europol and Eurojust more competences. I even want to give Europol operational competences. It will take some years before we get that far, I think. So I am not someone who is against further integration in this field, but it would be completely unacceptable if any further integration was made without proper parliamentary and judicial supervision. It started with Schengen. Then it was the Dutch Parliament which told its Ministers that, if there was no role for the Court in Luxembourg within the new Schengen Treaty, there would be no agreement from the Dutch Parliament. A political battle had been fought during the treaty negotiations about letting the European Court of Justice have this normal role in the Third Pillar. So it is Parliament and the judiciary which together must see to it that these especially sensitive issues in the field of rule of law are covered by good supervision.

Today the Ministers are meeting in Brussels and are trying to make framework decisions, among others, one on the European arrest warrant and the other on combating terrorism. I have with me the papers which I received in September and October, licitly and illicitly, as to the texts being

negotiated. The last one that I received from my government on the arrest warrant was of 31 October - but my spies in Brussels sent me a fax of a later text of 7 November - that is already the 5th text, and that since 19 September when the Commission proposal was published.
We are now two months later and six different texts have been circulating since then. And we are talking of something which is the very essence of all our democracies. In all constitutions there will be something saying that nationals of the country cannot be extradited unless certain conditions are met. There is almost always a paragraph stating “only extradition of a national, if the crime for which he is extradited, is also punishable in the same way by the national law”; the principle of double incrimination. Equally, there is always the necessity of the national judge making a decision if extradition is legally justified. If you make a European arrest warrant and these two elements are taken out then basically you are changing the legal systems of the 15 Member States. I am not in principle against that. It is quite possible that it would be much better if you have a federal system of legislation governing the matter. Federal legislation I define as legislation which applies not only to the Member States but also to the subjects of those states. And if you have federal legislation which has rules which needs sanctions, then it is perfectly normal that there are also federal rules which sanction those obligations. If you do not have federal rules sanctioning those obligations, those rules will not be followed as we see in the big frauds being committed against the European Union and the great difficulty of getting national governments to really do something about it.

So at some moment we have to start being wise. In the American constitution, which originally had not foreseen such matters, it later became possible to institute a Federal Bureau of Investigation, the FBI, just as Germany as a federal state has the Bundeskriminalamt. So it would be normal to have federal institutions operational to see to it that those regulations which are made at that level are also executed. That is normal in any democratic system.

But again, if you have such systems there should be oversight by judges and by Parliament. That is the big problem we are talking about. Coming back to these two packets of documents of the JHA-Council which - if I start talking about the contents then we are going on until this afternoon - but, it is quite clear there are big difficulties. Not only in the European arrest warrant but also in trying to formulate into national penal law the concept of terrorism. Terrorism is difficult to define in the sense of penal law.

What is terrorism? It can be described by all the things which terrorists do, which are illegal and in all aspects punishable by law, often with very high punishments. There is nothing extra in calling it terrorism (intimidation of governments or societies). If somebody blows up an aeroplane that is a very serious criminal act and can be punished under normal criminal law. What is happening after 11 September? There is a call that now something should be seen to be done by governments. They are now formulating a definition of terrorism so that this can be used to make stronger the punishments in the national legal systems. I think that it is a dangerous thing to do in this moment of strong emotions, to take too many sweeping decisions which should be taken at a more calm moment, and especially when we are talking about matters as these. If we know that in the international discussion on the International Criminal Court there was a great difficulty in finding a good definition of what terrorism is, then it would be peculiar if the European Union was able to do so within two months. So what is happening? In reaction to what has happened on 11 September decisions are being pushed through. The difficulty is how can we have oversight as to what is going on. As I said I am lucky, at least compared with my colleagues in other Parliaments, that I get these texts from my government. Because the government knows that if they do not send the texts we will just say no. A couple of years ago we would as a principle have said no, without even looking at the papers, because it is an idiocy to be asked to study legislative texts which have to be decided while you do not even get two weeks time to

look at them. Normal legislation passing any of our legal systems in the whole of Europe takes a year and often longer before it has passed through all the stages of consultation and advice by the Council of State, the First and Second Chamber of Parliament. That means no hasty decisions can be taken. This way of legislating by Framework Decision in the JHA-Council is very hasty. Of course, it is possible that it is necessary, but then there should be a good parliamentary oversight, such as by the European Parliament.
The situation is typically illustrated by an item from *Agence Europe* of 13 November about the European Parliament Committee on Civil Liberties. They have adopted a report by its chairman Graham Watson, marking its backing for the European Commission's plans to create a European arrest warrant and align the definitions and sanctions against terrorism. They have accepted this report already, while the definite text they are talking about is not even there. They will be debating this on the 28 and 29 of November. This is unavoidable, because they just do not get the texts in time to be able to debate about them. But it shows that we should bring the whole Third Pillar into the First Pillar. The whole of the Third Pillar should be abolished and brought into the First Pillar. Then of course the European Parliament gets its normal rights of co-decision on the matter, and they will have to do a better job than debating texts which have not yet been decided upon. The best way would be that the JHA-Council publishes the text as soon as agreement in the Council has been reached, but to wait for, say, six weeks before a definite decision is taken, so as to give the European Parliament, NGO's and the press time to comment on the result.

The Committee of Civil Liberties of the EP has a second problem - it is not taken seriously by the national parliaments, parliamentarians whose daily work it is to have oversight of Police and Justice matters. They cannot help that. But most of them have no experience in having oversight of what is going on in the Justice and Police Affairs because there are no European justice and police affairs. There is no European Minister who is responsible to the European Parliament and who can be called upon to explain what is going on in Europol, or whatever. There are no decisions of a European Court make rulings on what is going on, so the European Parliament has no way of thinking, no tradition as to scrutiny of justice and home affairs matters. So that is a vicious circle: because there are no competences within the European executive for the European justice system there are therefore no possibilities for the Parliament to gain the expertise and to have this oversight. Not only do they not have the competence, they do not even get the texts. So that is the gap into which the national parliaments are stepping. You heard Mr Coveliers on how the Belgian Parliament has a special way of exercising oversight over the police. We must, of course, create that sort of oversight on Europol and Eurojust if they are to become operational institutions, which I very much hope they will. In the meantime however, we must find a way of doing that by making national parliaments active.
The only option now is to hold your own minister, a member of the JHA-council, to account. In the Third Pillar decisions have to be taken in unanimity. This means that if the majority of my parliament says to our Ministers of Justice and Home Affairs "You may go to Brussels, but there you may not agree on the text which is before you", then he has to say in the meeting "I have a parliamentary problem". Then the Council cannot take that decision. And if we go on saying "no" there will be no decision in the matter at hand.
This means that, if national parliaments are willing to take their jobs seriously, we really could stop things being decided too quickly or without enough quality. But that is not what national parliaments are doing now. There is hardly any concerted action of national parliaments to tell their ministers that they may not, or should, take a certain binding decision in the Justice and Home Affairs Council.
It is for that reason that we met the first time in June in The Hague and in October again in Brussels to set up a system which we want to call PARLOPOL. PARLOPOL is a parliamentary form of supervision on Europol. And how do we want to do that? Not by setting up a new institution but by trying to find a network, much like Eurojust is being set up as a network of nation-

al magistrates, having good contact with each other, passing on matters to each other, which are necessary for them to be able to do their jobs.
In the same way we would like to have two members of parliament or at least one from each Chamber of each of the Parliaments to whom - say, in the case the European search warrant - I can send that to all the others and say look, the double incrimination is being taken out, or notice, they are abolishing the rights of a person to appeal to a national judge. Do you agree with that? And if it turns out that quite a lot of us do not agree and say in 7 countries of the 15 the national Parliamentarians express themselves in the national Parliament towards their Minister, then of course a form of supervision has been created by the national Parliaments, because those ministers will be more critical in the JHA-council in the matter concerned. We are doing this together with the Committee on Civil Liberties of the EP, of course, - together and not independently - but of course the formal powers remain with us. We can tell our Minister, a national Minister, what he should or should not do, but the EP can do nothing. It can just advise. So working together as parliamentarians with good information from the side of the European Parliament, plus the internal powers of the separate national Parliaments towards their own ministers, together could build a countervailing power. As long as there is no competence with the EP this could be a way to ensure that decisions are taken with enough supervision from Parliament.

Now I come to the nine debating propositions:

(Proposition 1) Such decision making in the Third Pillar of the EU-Treaty as has the effect of legally binding Member States to change their policies or legislation is - by the absence of parliamentary supervision - not compatible with basic notions of the European Union as regards transparency and democratic legitimacy in its suggested "area of freedom, security and justice".
I sometimes feel ashamed when I am in the Council of Europe talking to my colleagues from Central and Eastern European countries which are building up new democracies. In the discussions we have while monitoring their countries, I have to tell them that the powers of such and such an institution within their countries are excessive according to European standards and that there should be checks and balances, that the judges should be independent, all that sort of thing. These discussions we have are very open discussions between the members of parliaments of those countries and of the older democracies. At the same moment I have to realise I am telling my new colleagues from Central and Eastern European Countries about standards which should be upheld and which the European Union itself is not upholding. So to the colleagues from Central and Eastern European present here: if you have these idiots from the EU telling you what to do please tell them to give a good example first. You must tell the EU before the accession of the new members the EU must have a new Nice in which decent decisions are taken as to parliamentary supervision and not this growing strength of the executive within the European Union.
So that was the first proposition: the absence of supervision is not acceptable.

(Proposition 2) In all democratic societies under the rule of law much attention is given to parliamentary and judicial supervision in matters of penal law, penal procedure and police powers. Changes of national legislation in this area are therefore subject to especially intensive scrutiny. In the JHA-Council, however, decisions in this area are formulated with undue haste, lack of transparency and absence of democratic scrutiny.
Justice and Home Affairs are very sensitive issues, like Defence is also, that is why there is a second pillar. If you do silly things in this field it could backfire on the acceptance of the EU. This point I stress again in number three.

(Proposition 3) EU-decisions, especially also those relating to essential elements of Justice and Home Affairs, which are not based on a broad and informed consensus among the citizens run the risk of backfiring and upsetting the acquis of the EU.
Lack of consensus and acceptance is a big danger which I think our governments do not see enough. The way Nice became watered down, shows clearly that some of the governments of Europe do not understand what the problem is.

(Proposition 4) It is clear that in a union of states which enforces "federal" legislation (i.e. common legislation binding on those states, but also on its citizens) some harmonisation is necessary of penal law and procedure, especially in those fields where EU-law or values should be upheld or where the common values to be protected are especially sensitive (Art.29 EU-Treaty).
In the fourth proposition I use the word federal and I am consistent in that. Especially in those fields where EU law or values should be upheld or where the common values to protected are especially sensitive, as enumerated in Art. 29 of the EU-Treaty.

(Proposition 5) When it comes to harmonisation of policy and legislation in the field of JHA, intergovernmental cooperation is a too weak a form of European integration. Europol and Eurojust should evolve quickly into agencies with some operational powers. This development should be accompanied by a parallel integration of JHA affairs into the First Pillar, thus making sure that effectivity in decision making, legitimacy and parliamentary scrutiny are guaranteed.
The problem of intergovernmental co-operation, which is the reality at the moment in the Third Pillar. My point is that this is too weak a form of European integration.

And then comes proposition 6, which is of course, the biggest point:
(Proposition 6) As long as the Third Pillar has not been integrated into the First Pillar and to support the development of parliamentary scrutiny in JHA affairs, national parliaments should be given the power (as in the Netherlands) to decide which position their governments take in the JHA Council insofar the Council takes decisions that are binding on Member States.
I personally have a feeling that what we should do in the Netherlands - and possibly we already have - is to block those two framework decisions I mentioned, if only to show where the power is. And that is with the national parliaments. And to force them to change the European Treaty because there is no European Parliament which is scrutinizing the Third Pillar, having supervision. If we, the majority of my Parliament, blocks them, then the Dutch Government will have to vote against them in Laken in December. I do not think terrible things would happen because most what is regulated in the framework decisions on terrorism and on the European search warrant is already part of our national laws. Power for Parliament, that is maybe a reason why we should say no.

I will go on to the next proposition:
(Proposition 7) Cooperation between JHA-specialists in national parliaments and in the Committee on Public Liberties of the European Parliament in the form of PARLOPOL (instituted in the Hague on 7 June 2001) - a network of individual parliamentarians to coordinate the scrutiny in national parliaments of decisions of the JHA-Council - should be stimulated. PARLOPOL can fill up the gap between the absence of competence of the Europarliament in the Third Pillar and the lack of coordination by national parliaments when scrutinizing the decisions of the JHA-Council.
That is a description of Parlopol, as it was started in June and not really getting going yet because it takes a lot of trouble to convince national parliaments that something worthwhile is going on. In parliaments only a small group of members is doing the work, and they have to convince the others that is a very useful way of scrutinising EU-decision making.

(Proposition 8) The Europol treaty should be revised to give Europol operational competences and to integrate it, in due time, into the First Pillar. Eurojust should be given a similar treaty basis. That the Bundeskriminalamt and the FBI can be examples for European integration should no longer be anathema.

Number 8 is about operational competence in the Europol Treaty. We should not be afraid of using the FBI as an example, because the United States went through completely the same problem in its beginning, the Constitution not allowing much co-operation between the states on the federal level in police and justice affairs. But very creative thinking about that constitution made it possible to make instruments like the FBI.

And the 9th and last proposition is that the terrible events of 11 September 2001 must stimulate us not only to co-operate in the field of JHA but also to shed our diffidence as to parliamentary scrutiny of such integration, by national parliaments and the European Parliament.

I hope that I have impressed on you that we have really come to a decisive moment in JHA affairs, because of the two framework decisions lying before us. Unless we decide to create this parliamentary supervision there will be a tremendous problem with further integration in JHA affairs which is so fully necessary.

The Relevance of the ECHR and the Charter of Fundamental Rights of the EU for the Area of Freedom, Security and Justice

By Prof. Dr. Stefan Trechsel

I. Introduction

The Creation of an 'Area of Freedom, Security and Justice' in the Treaty of Amsterdam represents an attempt to re-organise the much criticised[1] structure of the so-called 'third pillar' aspects (Justice and Homes Affairs) of the Maastricht Treaty. The changes made by the Amsterdam treaty are a complex series of measures designed to bring matters relating to Justice and Home Affairs within the jurisdiction of the European Court of Justice (ECJ)[2]. This is achieved by alterations to Title VI of the EU treaty (the 'third pillar') and the creation of a new Title IV of Chapter 3 of the EC Treaty - each with a separate ECJ supervisory mechanism[3]. The result is that matters such as visas, immigration and asylum have now been moved to title IV EC. One of the most important consequences of these developments is that the ECJ's human rights jurisdiction is now applicable to these aspects, and both EC law in this area and mechanisms employed by member states to interpret and apply these laws must comply with EC human rights principles. Of particular importance in determining these principles, is the European Convention on Human Rights (ECHR).

In this paper I want first to address the general relationship between human rights and security. I then plan to touch upon a number of specific issues such as data protection, freedom of movement including asylum, co-operation in criminal matters and the protection of personal liberty. I shall end with a few observations on the jurisdictional protection of fundamental rights and freedoms.

As Article 6 of the Union Treaty expressly refers to the European Convention on Human Rights with its considerable body of case-law, I shall refer to this law rather than to the Charter, the practical impact of which cannot be reliably evaluated, particularly in view of the fact that it is not a legally binding text[4]. Let me just recall in passing that the Member States of the Union are also bound by the ICCPR, which has, however, only a very limited role to play in Europe.

II. Security and Human Rights

A. General Observations

At first sight security and human rights appear as opposing values, at least if one confuses human rights with unlimited freedom. Total freedom means total insecurity, total security means total lack of freedom. However, the concept of «human rights», even if the title of the European Convention refers to «fundamental freedoms», is not the same as that of «freedom» - it is mainly a method of balancing the interests of the individual against those of other individuals and of society. In the Convention we find both, liberty and security. "Security" for the purposes of Article 5 is concerned with "security of person" in the sense of protection against arbitrary interference with liberty of person[5]. The case-law so far has shown that the term has hardly any

1 *See e.g. Guild, ‚The Constitutional Consequences of Lawmaking in the Third Pillar of the European Union' in Craig and Harlow (eds.), Lawmaking in the European Union (Kluwer, 1998): O'Keeffe, ‚Recasting the Third Pillar', (1995) 32 CMLRev. 893.*

2 *For an examination of these developments see: Peers, S., ‚Who's Judging the Watchmen? The Judicial System of the ‚Area of Freedom Security and Justice', Yearbook of European Law, 1998, vol. 18, 337; Fennelly, N., , The Area of „Freedom Security and Justice" and the European Court of Justice – A Personal View', ICLQ 2000, vol 49, 1.*

3 *OJ 1997 C340/1, in force 1 May 1999.*

4 *It is rather surprising to read the Charter, in particular Chapter VI and Article 52, where „rights" are guaranteed, and keep in mind, at the same time, that there is actually no „right" to those „rights", because the Charter itself is not a legally binding document; on reasons for the lack of legally binding force see, e.g., Siegbert Alber, Die Selbstbindung der europäischen Organe an die EU-Charta der Grundrechte, in Europäische Grundrechte Zeitschrift 28 (2001) 349 ss.*

5 *See e.g. East African Asians v. UK 3 EHRR 76,89 (1973); CM Res DH (77) 2.*

specific meaning – it might as well not be mentioned in Article 5 para. 1 ECHR at all, an opinion which is also shared by a majority of scholars[6]. As such, security in this sense ought to be distinguished from the meaning of security in the sense of Article 2 TEU.

1. Security in the Sense of Article 2 TEU

Although the text of Article 2 TEU is rather broad, some clarification of the term «security» can be reached by examining the text of the "Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice"[7].The Action plan states that the aim of the Treaty is not to create a European security area in the sense of a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters. Nor are the new provisions intended to affect the exercise of the responsibilities incumbent on the Member States to maintain law and order and safeguard internal security. Rather the Treaty aims to provide "an institutional framework to develop common action among the Member States in the indissociable fields of police cooperation and judicial cooperation in criminal matters and thus not only to offer enhanced security to their citizens but also to defend the Union's interests, including its financial interests"[8].

2. "Security" as a Legitimate aim of Interference with Human Rights under the ECHR

Thus it is clear that the notion of "security" in the treaty is more closely related to the aims of national security than to liberty of person. In fact security in the sense of the Treaty of Amsterdam is less explicitly but just as importantly included in the ECHR in a number of Articles, most notably in paras 2 of Articles 8-11. «(N)ational security»[9] and «public safety»[10] come up regularly when the Convention describes the cases where interference with fundamental freedoms can be justified. In Art. 15 it even allows for partial suspension of the Convention to the degree it appears necessary in order to face certain dangers. In all these instances, one could say, the Court is called upon to weigh the interests of individual freedom against those of (public and individual) security.

3. «Justice» in the context of «Security» - an Important Development in the Strasbourg Case-Law

In addition, the case-law of the Strasbourg Court has also given to the element of «justice» a special meaning which one could perceive as relating to security. It is often in the context of security operations that very serious interferences with individual rights occur. In a number of cases concerning ill-treatment or unlawful killing such as Assenov v. Bulgaria[11] or Ergi and Yasa v. Turkey[12] the Court has given a broad interpretation to the rights under Article 2 (life) and 3 (prohibition of torture, inhuman and degrading treatment) of the Convention: Whenever there are arguable allegations that there was a violation of one of those fundamental rights, particularly in the course of activities of state agents, there is an obligation on the authorities to conduct a speedy and effective investigation. A failure to comply with that obligation can lead to a finding

6 *See, e.g., Bozano v. France, judgment of 16 February1986, Series A N° 111; Stefan Trechsel, 'Liberty and Security of Person', in R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), The European System for the Protection of Human Rights, Deventer, 1993, p. 227, 282ss. Some authors simply omit any reference to the notion of "security" in Article 5 ECHR, see e.g. A. H. Robertson, J. G. Merrills., Human rights in the world an introduction to the study of the international protection of human rights, Fourth ed., Manchester, 1996. L. Charrier, Code de la Convention Européenne des droits de l'homme, Paris 2000; Jean-François Renucci, Droit Européen des droits de l'homme , Paris LGDJ, 1999; on the other hand, some authors advocate a more effective interpretation of the term «security» in Article 5, e.g. P. VAN DIJK / G.J.H. VAN HOOF, Theory and Practice of the European Convention on Human Rights, Third Edition, The Hague, London, Boston 1998, p. 344 s.*

7 *OJ No. C 19/1 of 23 January 1999.*

8 *Ibid. Paras 10 and 11.*

9 *Para. 2 of Arts. 8, 10, 11 of the Convention, Para. 3 of Art. 2 of Prot.4, par. 2 Art. 1 Prot. 7.*

10 *Para. 2 of Arts. 8, 9, 10, 11 of the Convention, Para. 3 of Art. 2 of Prot.4.*

11 *ECtHR, Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII,3264.*

12 *EctHR, Ergi v. Turkey, judgment of 28 July 1998, Reports 1998-IV, 1751; Yasa v. Turkey, judgment of 2 September 1998, Reports 1998-VI, 2411.*

that the rights have been violated, even if it is not actually established that the victim was tortured or killed by persons acting for the respondent State.

B. Data Protection

1. Introduction

One of the basic instruments for the protection of security consists of the collection, storage and exchange of personal data. It can be anticipated that as a consequence of the terrible events of September 11th there will be an increased demand for data–collection, storage but also cross-references between different databanks. Actually, in a number of Member States such as France and Germany legislation is pushed at accelerated speed in that direction. It would not be surprising, e.g., if the limitations on the use of the SIS data stored in Strasbourg were curtailed. Human rights' activists dread such developments.

To the extent that institutions such as EUROPOL limit their functions to facilitating the exchange of personal data, "in accordance with national law" between liaison officers dispatched to it[13], there is no need for special protection in the Union as it will not actually exercise any jurisdiction. However, EUROPOL also has its own "computerised system of collected data"[14], in addition to SIS and Eurodac.

According to the Strasbourg case-law, the storage of personal data constitutes an interference with the right of the individual concerned to respect for her or his private life under Article 8 ECHR. While the Commission was originally hesitant to accept that there was such an interference, leaving the issue open[15], the Amann vs. Switzerland judgment of 16 February 2000 removes all doubt in this matter. In this context the Court also refers to the Council of Europe Convention of 28 January 1981 for the processing of personal data[16].

While the definition of the notion of "private life" is broad, so is the interpretation of the exceptions. Three conditions must be met: The interference must have a basis in law, it must serve one of the purposes very broadly referred to in Article 8 para. 2 and it must respond to a pressing social need. In practice, it was often the first of these criteria which the Court focussed upon[17].

2. The Requirement of a Basis in Law

The term «law» has been given a substantive rather than a formal interpretation. This means that the method by which the normative text was set up is not decisive; in other words: not only legislative acts of parliament can serve as «law», but also decrees issued by the Government or by branches of the administration. Transposed to the Union, this means that, inter alia, directives would be regarded as "law".

The interference is "in accordance with the law" if there is a basis in law which is accessible to the person concerned and if the norm is "foreseeable". This means that it must be "formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct"[18]. In the cases of Huvig and Kruslin the Court gave rather detailed indications as to which questions ought to be answered by the legislator in the context of wire-tapping[19].

13 EUROPOL, The European Police Office – Fact Sheet No. 3, January 2000.
14 Europol Convention Art. 3 para. 12 (5).
15 Cf. e.g. Applications No. 8022/77, 8025/77 and 8027/77, McVeigh, O'Neill and Evans v. UK, Report of 18 March 1981, DR 25 p. 15, 50, para. 226s.
16 Loc. cit. para. 65, 69 .
17 See, e.g., the judgments in Malone vs. UK, Huvig v. France, Kruslin v. France and Amann v. Switzerland, judgment of 16 February 2000.
18 See, e.g., Amann v. Switzerland, judgment of 16 February 2000, para. 56, Sunday Times v. UK, judgment of 26 April 1979, Series A N° 30, para. 49.

Whenever a measure is undertaken in secret, and this is the case in respect of police data banks, the law must provide special safeguards because the individual concerned does not have the possibility to seek any remedies. In an early judgment, Klass v. Germany, the Court determined that, as a matter of principle, the person must be informed, at least retrospectively, of such an interference. But it also accepted that the information can, in certain cases, be withheld indefinitely, because otherwise the efficacy of the interference could be jeopardised[20]. As this makes the recourse to remedies practically inoperative, other effective means of surveillance must, in such a case, be instituted by the relevant legislation.

As far as the storage of personal data is concerned, the corresponding problems were addressed in Leander v. Sweden, where the applicant was denied a job due to lack of security clearance and complained of the fact that he was not informed of the information held by the secret service[21].

So far, the Court has not yet given any indications as to the details which ought to be regulated by law in the field of personal data stored by the police.

As to the formal requirement of an accessible and sufficiently specific legal basis, it was not possible, in the context of this presentation, to come to a definite conclusion. Even the very thorough study of Harris, O'Boyle and Warbrick admits that «[t]he complexity of data protection issues requires regulation of a more sophisticated kind than can be derived from the simple standards of the Convention»[22].

It seems, however, safe to stress that a number of issues must be clearly regulated in a text which could be regarded as "Law" within the meaning of the Convention. It should state:

- under which conditions information may be stored
- the kind of information to be stored
- the source of such information
- the use of the information
  - = by whom
  - = for what purpose
  - = under what conditions
  - = in which forms of combination with other data
- access to the data by the person concerned
- control mechanisms

3. Conditions of Substance for the Justification of the Interference

While the aims of national security and public safety are clearly in line with the Convention, there remains the question of whether the interference can be regarded as "necessary in a democratic society", in other words, as corresponding to a "pressing social need".

In Friedl v. Austria, a case which was settled before the Court, the applicant complained of the fact that his photograph and fingerprints which had been taken in an unauthorised manner were kept in a file. The Commission in its Report said this:

> «As regards the retention of the information thus obtained in the administrative file on the manifestation, the Commission recalls that the keeping of records relating to criminal cases

19 Huvig v. France, judgment of 24 April 1990, Series A N°176-B; Kruslin v. France, judgment of 24 April 1990, Series A N° 176-A; see also Malone v. UK, judgment of 2 August 1984, Series A N° 82.

20 ECtHR, Klass v. Germany, judgment of 6 September 1978, Series A N° 28, para. 58; when the Court addresses the issue of Article 13, loc. cit. para. 68, it expresses „its regret" at having to put up with the absence of later revelation – a rather surprising formula!

21 Leander v. Sweden, judgment of 26 March 1987, Series A N°116.

22 Loc. cit. p. 310 fn. 7; other authors are also vague, e.g. J. L. Charrier, Code de la Convention Européenne des droits de l'homme, Paris 2000, Art. 8 N 21, p. 152

of the past can be regarded as necessary in a modern democratic society for the prevention of crime[23], and that even if no criminal proceedings are subsequently brought and there is no reasonable suspicion against the individual concerned in relation to any specific offence, special considerations, such as combating organised terrorism, can justify the retention of the material concerned[24]. In the present case, the competent authorities established the applicant's and other participants' identity for the purposes of an ensuing prosecution for road traffic offences. This prosecution was not pursued in view of the trivial nature of the offences. However, the information obtained was only kept in a general administrative file recording the events in question. Moreover, this information was not entered into a data processing system. For these reasons, taking into account the margin of appreciation afforded to the Contracting Parties in such matters, the Commission finds that the relatively slight interference with the applicant's right to respect for his private life can reasonably be considered as necessary in a democratic society for the prevention of disorder and crime»[25].

It can be assumed that the activities of the Union and its institutions in the field of data storage is, as far as the substance is concerned, compatible with the Convention law.

It must be anticipated that, on a broad scale and in a large number of countries, there will be a tendency to increase surveillance including the storage of data in view of terrorist threats after the attack on the World Trace Centre[26]. The legitimacy of extraordinary measures has been confirmed in a recent judgment of the European Court of Human Rights, Erdem v. Germany[27]. This case concerns a prominent member of the PKK, *ergo* suspected of being involved in a terrorist criminal organisation. He was detained on remand in Germany and complained of the fact that the correspondence with his defence counsel was monitored. As this is a rather recent judgment, it seems justified to quote *in extenso* the relevant passages. No English version of the judgment being so far available, I shall reproduce the text in the original French:

«La Cour note qu'en l'espèce l'article 148 § 2 du code de procédure pénale se situe dans un contexte bien précis, celui de la lutte contre le terrorisme, et a pour objectif, selon la jurisprudence de la Cour fédérale de justice, d'empêcher qu'un détenu soupçonné d'avoir commis une infraction au sens de l'article 129a du code pénal continue à œuvrer pour l'organisation terroriste dont il serait membre et contribue à sa pérennité (paragraphe 33 ci-dessus).
63. Cette exception à la règle générale de la confidentialité de la correspondance entre un détenu et son défenseur avait été adoptée en Allemagne dans les années 70, alors que la société était traumatisée par la vague d'attentats sanglants de la Fraction Armée Rouge.
64. Dans son arrêt Klass et autres c. Allemagne du 18 novembre 1978 (série A n° 78, p. 23, § 48), relative à une loi autorisant des restrictions au secret de la correspondance, des envois postaux et de la télécommunication, la Cour avait énoncé les principes suivants en matière de lutte contre le terrorisme :
« (...) Les sociétés démocratiques se trouvent menacées de nos jours par des formes très complexes d'espionnage et par le terrorisme, de sorte que l'Etat doit être capable, pour combattre efficacement ces menaces, de surveiller en secret les éléments subversifs opérant sur son territoire. La Cour doit donc admettre que l'existence de dispositions législatives accordant des pouvoirs de surveillance secrète de la correspondance, des envois postaux et des télécommunications est, devant une situation exceptionnelle, nécessaire dans une société démocratique à la sécurité nationale et/ou à la défense de l'ordre et à la prévention des infractions pénales. »

23 See application no. 1307/61, decision of 4 October 1962, CD 9 p. 53.
24 See McVeigh, O'Neill and Evans v. United Kingdom, Commission's Report, DR 25, p. 49 ff., paras. 229-231; commenting this Report Keir Stammer, European Human Rights Law, London 2000, p. 426, concludes that information can only be kept «as long as it served the legitimate purpose of the prevention of terrorism», not a very precise criterion.
25 See Annex to ECtHR Friedl v. Austria, judgment of 31 January 1995, Series A N° 305-B, para. 67, p. 23 s.
26 For German plans see, e.g., Der Spiegel, Nr. 41/2001, p. 26 ss.
27 ECtHR, Erdem v. Germany, judgment of 5 July 2001, partly reported in Österreichisches Institut für Menschenrechte, Newsletter 2001/4, p. 144 ss.

65. Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exceptionnels et doit s'entourer de garanties adéquates et suffisantes contre les abus (voir aussi, mutatis mutandis, l'arrêt Klass précité, *ibidem*).
66. Or le procès contre des cadres du PKK se situe dans le contexte exceptionnel de la lutte contre le terrorisme sous toutes ses formes. Par ailleurs, il paraissait légitime pour les autorités allemandes de veiller à ce que le procès se déroule dans les meilleures conditions de sécurité, compte tenu de l'importante communauté turque, dont beaucoup de membres sont d'origine kurde, résidant en Allemagne.
67. La Cour relève ensuite que la disposition en question est rédigée de manière très précise, puisqu'elle spécifie la catégorie de personnes dont la correspondance doit être soumise à contrôle, à savoir les détenus soupçonnés d'appartenir à une organisation terroriste au sens de l'article 129a du code pénal. De plus, cette mesure, à caractère exceptionnel puisqu'elle déroge à la règle générale de la confidentialité de la correspondance entre un détenu et son défenseur, est assortie d'un certain nombre de garanties : contrairement à d'autres affaires devant la Cour, où l'ouverture du courrier était effectuée par les autorités pénitentiaires (voir notamment les arrêts Campbell, et Fell et Campbell précités), en l'espèce, le pouvoir de contrôle est exercé par un magistrat indépendant, qui ne doit avoir aucun lien avec l'instruction, et qui doit garder le secret sur les informations dont il prend ainsi connaissance. Enfin, il ne s'agit que d'un contrôle restreint, puisque le détenu peut librement s'entretenir oralement avec son défenseur ; certes, ce dernier ne peut lui remettre des pièces écrites ou d'autres objets, mais il peut porter à la connaissance du détenu les informations contenues dans les documents écrits.
68. Par ailleurs, la Cour rappelle qu'une certaine forme de conciliation entre les impératifs de la défense de la société démocratique et ceux de la sauvegarde des droits individuels est inhérente au système de la Convention (voir, mutatis mutandis, l'arrêt Klass précité, p. 28, § 59).
69. Eu égard à la menace présentée par le terrorisme sous toutes ses formes (voir la décision de la Commission dans l'affaire Bader, Meins, Meinhof et Grundmann c. Allemagne du 30 mai 1975, n° 6166/75), des garanties dont est entouré le contrôle de la correspondance en l'espèce et de la marge d'appréciation dont dispose l'Etat, la Cour conclut que l'ingérence litigieuse n'était pas disproportionnée par rapport aux buts légitimes poursuivis.

The Court's finding may be summarised as follows: In the context of the fight against terrorism an interference which is normally quite unacceptable may be considered as corresponding to a pressing social need; however, it must be accompanied by certain safeguards. In that case the scope of application of the exception was drafted in precise terms, the control of the correspondence was operated by an independent magistrate who was not involved in the investigation and the oral contact between the applicant and counsel was not restricted.

Analogous rules must be established in the area of data protection and the respect for private life in general including data protection in particular.

4. The Control Mechanism

Perhaps the most important of the elements listed above is the one mentioned last: the control mechanism. As virtually everybody might be registered and there is normally no way to find out whether this is the case, everyone is a possible victim of a violation of his or her rights and has an arguable claim under Article 8 of the Convention. This triggers off the application of Article 13, the right to an «effective remedy before a national authority».

The effectiveness of such a remedy is, of course, rather limited in a situation where the interference itself is secret. "Effective" therefore must be interpreted as meaning «as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance»[28]. In the Klass case, the Court accepted a system where the person could complain to the parliamentary G 10 Commission and to the Constitutional Court. With some resignation the Strasbourg Court accepts that the effectiveness of this remedy is limited and admits that «in the circumstances of the present proceedings it is hard to conceive of more effective remedies being possible»[29]. I find this less objectionable than the solution in Leander where the Court refers to several remedies, each one of them ineffective, but concludes «that the aggregate of the remedies ... satisfies the conditions of Article 13 in the present case»[30]. I fail to see the logic of this magically healing process – if one connects Article 13 with the issue of exhaustion of domestic remedies, one cannot help finding that if a potential applicant is faced with five ineffective remedies she or he is certainly not required to try all of them.

III. Freedom of Movement and Asylum

A Freedom of Movement

1. General observations

In the area of free movement and asylum, the general tendency is towards an opening of the borders within the Union combined with improved and coordinated control of the outside border[31]. The treaty of Amsterdam also aims to give "freedom " a meaning beyond free movement of people across internal borders, protecting also the freedom to live in a law abiding environment where the authorities are doing everything in their power to "combat and contain" all those who seek to "deny or abuse" that freedom[32]. We will not address this very broad aspect which is closely linked to security in the present context.

In the first place the freedom to travel and choose one's residence within the Union is an improvement on the Convention protection which, in Art. 2 of the fourth Protocol guarantees freedom of movement and residence only within the territory of one State; it is Article 45 of the Charter which gives to all Union Citizens the "right" to move freely within the Member States.

2. Discrimination?

Freedom of movement within the EU will eventually benefit citizens of Member States as well as non-citizens[33]. In the interval, and according to the Charter, it is only for citizens of the

28 Klass v. Germany, judgment of 6 September 1978, Series A N° 28, para 69.
29 Loc. cit.
30 Leander, 26 March 1987, Series A N° 116, para 86.
31 For a recent discussion of the subject see Michael Wollenschläger, Das Asyl- und Einwanderungsrecht der EU, in Europäische Grundrechte-Zeitschrift 28 (2001) 354 ss.
32 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amserdam on an area of freedom, security and justice. OJ. No. C 19/1 of 23 January 1999 para 6.
33 Art. 62 Amsterdam.

Communities[34]. One may object that the European Union is not a State and that, therefore, the guarantee of Article 2 of Protocol No. 4 does not apply. However, Article 14 ECHR has been interpreted in such a way that it may even be applied with regard to rights which are not as such guaranteed by the Convention[35]. Let us assume that it applies. Does the privilege amount to a discrimination of other nationals which is contrary to Article 14 of the Convention or Articles 20 and 21 of the Charter?

For the latter, the answer is easy: Para. 2 of Article 21 states that *«without prejudice to the special provisions of [the] Treaties*[36] [establishing the Communities and the Union], any discrimination on grounds of nationality shall be prohibited». The exception is therefore clearly lawful.

As to the Convention, «Article 14 will be breached where, without objective and reasonable justification, persons in "relevantly" similar situations are treated differently»[37]. It is obvious that nationality is a very relevant «situation» as far as immigration is concerned. The Convention does not, in principle, limit the sovereign right of States to decide whether they want to permit entry to a foreign national or not. In my view, therefore, the differentiation made by the EU between citizens of Member States – citizens of the Union – and other persons in the area of free movement within the EU is therefore not discriminatory.

There is also specific case-law which confirms this view, a judgment C. v. Belgium[38], where the Court accepted that in Member States of the EU there is a legitimate purpose in granting to citizens of other Member States a preferential treatment as far as expulsion is concerned: «[T]he Court considers that such preferential treatment is based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has, in addition, established its own citizenship». These arguments, in my view, also cover freedom of movement between Member States of the Union.

B. Asylum

1. "Safe Countries"

The first issue I wish to comment upon is this: The «Protocol on asylum for nationals of Member States of the European Union» to the TEU states that Member States are to be regarded as safe countries. This is a logical consequence, *inter alia*, of Article 30 of the TEU which expressly refers to the protection offered by the Convention to persons persecuted for political reasons. A safety valve must, however exist. The Protocol itself contains a number of specifications.

It comes as a slight surprise that the first exception concerns the case of a State which has invoked Art. 15 of the Convention. While this article allows for derogations from the application of the rights and freedoms guaranteed therein, an express exception is made i. a. for the prohibition of torture, inhuman and degrading treatment. Therefore, the mere application of Art. 15 as such could hardly be regarded as a ground to grant asylum to persons who would otherwise be returned under that state's jurisdiction. The rule can be interpreted in two ways: On the one hand it may be inferred that the state where the person is located does not trust the state which has applied Art. 15 and fears that ill-treatment may be applied contrary to the ECHR law. On the other hand the idea may be to provide for increased protection and to exclude expulsion even in cases where fundamental freedoms are curtailed. Probably this would be the official explanation. It is based on the assumption that the ECHR-guarantees are fully respected at all times unless

34 *Treaty on the Communities, Maastricht version Art. 8a.*
35 *See, e.g., ECtHR, Petrovic v. Austria, judgment of 27 March 1998, Reports 1998-II p. 581, 586s.*
36 *Emphasis added.*
37 *ECtHR, Spadea and Scalabrino v. Italy, judgment of 28 September 1995, Series A N° 315-B, para. 45 – constant jurisprudence.*
38 *ECtHR, C. v. Belgium, judgment of 7 August 1996, Reports 1996-III, 915.*

Art. 15 has been invoked. It may be doubted, however, whether equally high standards are to be applied in a case where a person falls to be deported to a state outside the Union.

2. Non-refoulement

As far as the exterior border of the EU is concerned – if it is at all correct to use such language – it may be justified to recall that the law of the Convention differs clearly from that of the Geneva Convention in the area of non-refoulement. On the one hand, it is narrower: there is a ban on expulsion only if the person concerned is at risk, in the receiving country, of treatment which would lead to the expulsion amounting to treatment in violation of Art. 3, i.e. torture or inhuman or degrading treatment. Persecution on the basis of religious or political beliefs will not, as a rule, be sufficient. On the other hand, it is more stringent in that no exception whatsoever is accepted, if those conditions prevail. Even the most hideous crimes will not make the expulsion legal.

> On the other hand, there is the aspect of family life. Expulsion, even of a foreigner having committed a serious offence, will as a rule be in violation of Art. 8 if the person concerned is married and one partner cannot reasonably be expected to follow the other to the receiving State. In one of the most recent judgments on this issue, Boultif v. Switzerland of 2 August 2001, the Court framed the relevant criteria in the following terms:
> «[T]he Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.»[39]

When I expose this in the present context, however, I begin to wonder what the relevance of this information actually might be. Expulsion would still be the exercise of its jurisdiction by a member State. That State has ratified the Convention and has submitted to the jurisdiction of the Strasbourg Court. The question is not really that of the possible relevance of the Convention in the «area of freedom, security and justice» - it retains all its force and it may be expected that in this respect there will be no change. Member States will not be able, as it were, to hide behind the regulations adopted by the Union.

IV. Justice

The Amsterdam Treaty aims to create a "genuine European Area of justice" whereby individuals and businesses are not "discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States"[40]. This implies a need for co-operation in a number of areas, including in criminal matters. I shall limit myself to dealing with these.

39 ECtHR, Boultif v. Switzerland, judgment of 2 August 2001, para 48.
40 Presidency Conclusions of the Tampere European Council, Council Document SN 200/99 para 28.

A. Substantive Law

Cooperation in criminal matters faces an impressive array of problems. Some of them have their source in the differences between the substantive law in different States. It is therefore understandable if not downright inevitable that the Union attempts to achieve a certain unification of substantive criminal law, including a harmonisation of sanctions. Here, the influence of human rights is minimal. The freedom accorded to the legislator is very broad. The most important issue is that crimes must be defined with sufficient precision. As far as sanctions are concerned, so far even a life sentence is not incompatible with the Convention. I would however be inclined to find such a sentence inhuman if any release on probation were excluded from the outset.

B. Extradition, European Arrest Warrant and Recognition of Decisions

The efforts at facilitating extradition and mutual assistance in criminal matters are not as such associated to any serious danger of conflict with human rights. Let me recall that traditionally this is a matter between governments where the interests of the individual are only marginal. It is true that over the last decades a growing interest has been focussed on human rights in this area[41]. More recent statutes expressly refer to the respect of human rights in the requesting state as a prerequisite for the granting of assistance[42].

For the purposes of this paper it seems appropriate to deal with the issue of extradition and of the European Arrest Warrant together, while the other forms of mutual assistance in criminal matters such as letters rogatory etc. can be neglected[43].

1. Issues Related to Extradition

As far as extradition is concerned[44], the same considerations apply as with expulsion: There must be no danger of ill-treatment in the requesting State[45]. Within the Union this question ought not to arise, although it was discussed in the context of the extradition of suspected members of the ETA to Spain[46]. If Turkey were to become a Member – for some political reason – before the human rights' situation has dramatically improved, there might be very considerable problems.

If extradition is abolished for the benefit of a European Arrest Warrant[47], a direct power of arrest, the arrest and detention of the applicant might fall under Article 5 paras. 1 (a) or (c) depending upon whether the person sought has been finally convicted and sanctioned to a deprivation of liberty or whether that person is under a suspicion of having committed an offence.

Again, the question arises as to which jurisdiction is being exercised in the operation of such an arrest. It appears, for the time being, that it will be primarily the jurisdiction of the Member State whose police make the arrest. One day, it may be EUROPOL or perhaps a special force under the authority of EUROJUST. To the extent that it is the jurisdiction of a Member State, the latter will be bound by the Convention. It will have to respect the conditions set by Article 5. In

41 *See, e.g., Stefan Trechsel, Grundrechtsschutz bei der internationalen Zusammenarbeit in Strafsachen, EuGRZ 14 (1987) 69; Albin Eser/Otto Lagodny (Eds.), Principles and Procedures for a New Transnational Criminal Law, Documentation of an International Workshop 1991, Freiburg i. Br. 1992, 633.*

42 *Linke, R., 'Leitende Grundsätze der Reform des Auslieferungs- und Rechtshilferechts', ÖJZ 35 (1980), 365; Trechsel, S., 'Grundrechtsschutz bei der internationalen Zusammenarbeit in Strafsachen', EuGRZ 14 (1987) 69.*

43 *According to the report of 1 August 2001, approved by the Council of 28 May 2001, (2001/C 216/01), it works better than is commonly assumed.*

44 *For a recent discussion see Stefan Heimgartner, Das nahende Ende der Auslieferung in Europa, in Benjamin Schindler/Regula Schlauri (Eds.), Auf dem Weg zu einem einheitlichen Verfahren, Zurich 2001, p. 261 ss.*

45 *Cf., e.g., ECtHR, Soering v. UK, judgment of 7 July 1989. Series A N°161; Chahal v. UK, judgment of 15 November 1996, Reports 1996-V, 1831.*

46 *See, e.g., Application Nr. 32829/96, Iruretagoyena v. France, Decision of 12 January 1998.*

47 *See the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, Com (2001) 522, 25/9/2001.*

the light of the case-law discussed later on, reference to EU regulations will not be accepted as a justification. If the Union envisaged exercising the jurisdiction of their own organs in the field of criminal proceedings, it would have to establish its own judiciary like a State, if it wished to maintain the acquis in the field of human rights.

2. More particularly: Issues Related to Arrest

Extradition is always associated with a deprivation of liberty. The Convention is not very strict in this respect: According to Article 5 para. 1 (f) ECHR detention with a view to extradition is justified as long as there is a genuine intention to proceed with the extradition[48].

An interesting theoretical question arises in this context which is not without practical relevance. If "extradition" is practically automatic within the Union, and if arrest warrants can be executed immediately in every Member State, is there still such a thing as extradition at all?

If one were to answer in the affirmative, it would probably mean that any arrest with a purpose of extraditing the person concerned would fall under letter f) of Article 5 para. 1, arrest and detention of a person «against whom action is taken with a view to ... extradition". In this case, judicial control is reduced to a minimum – it suffices that there is a genuine intention to go forward with extradition proceedings. However, this hypothesis is not convincing. The "eurowarrant" will partially, as far as the power of arrest is concerned, create one European jurisdiction. Therefore, we have to ask what the conditions for arrest and detention are with regard to the execution of a sentence or to detention on remand.

What, then, are the conditions under which an interference with the right to personal liberty would be compatible with the ECHR?

First, there must be a legal basis for the deprivation of liberty. Domestic legislation must therefore be amended to cover rules for the execution of a European Arrest Warrant, unless there is sufficiently precise EU "law" which is of immediate application and thereby has become domestic law in the State concerned.

Next, a "procedure prescribed by law" must be respected – the same observations apply.

If the person concerned has been convicted and the judgment is final, the exception set out in Article 5 para. 1 (a) will apply[49], we will be faced with detention «after conviction by a competent court». In this area the protection granted by the Convention is rather weak for at least two reasons: The Court will hardly scrutinise the judgment in question. In the case of Drozd and Janousek[50] the applicants complained against France because it executed a sentence passed by the *«Tribunal de Corts»* of Andorra, a tribunal which lacked independence. The Court found no violation. It considered that

> «France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the prin-

48 *See, e.g., ECtHR, Quinn v. France, judgment of 22 March 1995, Series A N° 311, Chahal v. UK, judgment of 15 November 1996, Reports 1996-V, 1831, 1863 para. 113. Trechsel, Liberty and Security, loc.cit. p. 292 sas..*

49 *Unfortunately, the Court insists in regarding detention as falling under Article 5 para. 1 (a) after the judgment of first instance, even if, under domestic law, it could not lawfully be executed, cf. ECtHR, B. v. Austria, judgment of 28 March 1990, Series A N° 175, para. 34 ss.; see also dissenting opinions joined to the Report of the Commission, loc.cit. p. 29 ss.; confirmed in I.A. v. France, judgment of 23 September 1998, Reports 1998-VII, 2961, 2976, para. 98; Labita v. Italy, judgment of 6 April 2000, para. 147; Punzelt v. Czeck Republic, judgment of 25 April 2000 para. 70; Cesky v. Czech Republic, judgment of 06 June 2000 para. 71; Trzaska v. Poland,judgment of 11 July 2000; Vaccaro v. Italy, judgment of 16 November. 2000 para. 31; and Szeloch v. Poland, judgment of 22 February 2001, para. 79.*

50 *ECtHR, Drozd and Janousek, judgment of 6 June 1992, Series A N° 240.*

> ciples enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.»

This passage is not very convincing – in fact, the judgment was adopted by a small majority of twelve votes to eleven; in the Commission the casting vote of the President had lead to the same result.

On the one hand, it would be wrong to say that any execution of a judgment constitutes an unlawful deprivation of liberty unless all guarantees of Art. 6 have been respected[51]. However, the situation is different if the judgment is one that has been passed under the jurisdiction of another State. The obligation to verify whether a judgment is compatible with Article 6 of the Convention ought to exist even in cases where the judgment was passed by the courts of a State which has ratified the Convention – after all, it is not seldom that the Court in Strasbourg finds that that guarantee was violated. It is all right to stress the importance of international cooperation in criminal matters, but why should the price for such cooperation be paid by the persons concerned? Why should they put up with violations of their fundamental rights?[52] As far as the specific case was concerned, there had not been an impartial tribunal: How could this not amount to a «flagrant denial of justice»?

On the other hand, it will not be necessary to examine in every detail the proceedings which led to the sentence. E.g., it would hardly be justified to refuse execution just because, contrary to Article 6 par. 3 (e) interpreters' costs were imposed upon the accused[53]. Thus, even within this organisation and between Member States of the Union it cannot be taken for granted that proceedings always respect the requirements of a fair trial. A recent example which illustrates the case for scepticism is Krombach[54]. A girl of French nationality died in Germany where she spent a holiday with the applicant. He was charged and tried in absentia in France, in a clear violation of the Convention – France had refused to comply with the Strasbourg case-law, in particular the Court's finding in Poitrimol, according to which even in the absence of the accused the defence must be given an opportunity to plead[55]. When the civil plaintiff tried to have the judgment regarding damages executed in Germany, the German Supreme Court, the Bundesgerichtshof, admitted the applicant's appeal against the enforcement order of a lower court because the rights of the defence had been violated in the French proceedings. Finally, the European Court of Justice ruled that the German Courts were entitled, under the Brussels Convention, to refuse the execution of the judgment because it contravened their "public policy", their *ordre public*[56]. It is difficult to deny that there is, then, a genuine need for the possibility of verifying whether a judgment can in fact be executed, in other words, whether the European Arrest Warrant can justify an arrest.

3. Habeas Corpus Proceedings

The second difficulty with deprivation of liberty "after conviction by a competent court" lies in the case-law of the Strasbourg Court on Article 5 para. 4 ECHR which concerns the right to habeas corpus proceedings. According to the so-called «Vagrancy»-judgment[57] this guarantee does

51 See Trechsel, Liberty and Security of Person, loc.cit., p. 298 s.
52 The Court has many times stressed the importance of the right to a fair trial, see, e.g., Artico v. Italy, judgment of 13 May 1980, Series A N°37, para. 33.
53 See ECtHR, Luedicke, Belkaçem and Koc v. Germany, judgment of 28 November 1978, Series A N° A29.
54 ECtHR, Krombach v. France, judgment of 13 February 2001.
55 ECtHR, Poitrimol v. France, judgment of 23 November 1993, Series A N° 277-A; see also Lala and Pellandoah v. The Netherlands, judgments of 22 September 1994, Series A N° 297 A and B; Van Geyseghem v. Berlgium, of 21 January 1999, Reports 1999-I, 127.
56 C-7/98, Judgment of 28 March 2000, Krombach (Rec.2000,p.I-1935).
57 ECtHR, De Wilde, Ooms and Versyp v. Belgium, judgment of 18 June 1971, Series A N° 12, para. 76.

not apply to deprivation of liberty justified under para. 1 (a)[58]. The Court had considered that the judicial control of the detention was "incorporated" in the judgment «on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question». This is far from satisfactory and today, thirty years later, the Court might review the issue[59]. At any rate, it is recommended that the institution of a European Arrest Warrant for the purpose of arresting persons finally convicted and sentenced to deprivation of liberty be regulated in a way which secures to the arrestee the possibility to appeal to a court which will decide speedily on the lawfulness of such detention and order his or her release if the detention is not lawful.

Such regulation ought to consider the problem which arose in the case of RMD v. Switzerland[60]. The facts of this case sound like a bad joke. The applicant was suspected of having committed burglary in various Swiss Cantons. He was first arrested in Zurich, then transferred successively to Lucerne, Berne, Glarus, St. Gall, Schwyz, Zurich, Aarau and back again to Zurich. Almost every time he arrived, he immediately initiated habeas corpus proceedings. However, before the competent court could decide, R.M.D. had already left the jurisdiction. His detention in the various cantons was, in this respect, not too long but too short. The Court in Strasbourg, like the Commission, came to the conclusion that there had been a violation of Article 5 para. 4.

The best solution to this problem would be the creation of a remedy to a European jurisdiction, the court of first instance or a criminal tribunal.

4. The Special Rights of Persons Arrested under Suspicion

If the warrant concerns a person suspected of having committed an offence, Article 5 para. 1 (c) applies. This entails, furthermore, the rights set out under Article 5 para. 3. The arrestee must be «brought promptly before a judge or other officer authorised by law to exercise judicial power». This right does not apply in extradition proceedings, but if extradition is replaced by arrest based on a European Arrest Warrant concerning a person who has not yet been finally convicted and sentenced, it must be ensured that the presentation before the judge takes place. In fact, the plan is to have a slimmed down extradition hearing before a district judge which could serve that purpose.

However, the simplification is not without problems. Let us assume that an investigation in Belgium is directed, inter alia, against a person who is arrested, by virtue of a European Arrest Warrant, in Portugal. The Portuguese judge will find it difficult to determine whether such an arrest is lawful and justified – her or his control will have to be limited to formal aspects. However, it may take some time to bring the person concerned to Belgium; thus, the judge competent on the merits may only see the person when the period described by the word «promptly» in Art. 5 para. 3 ECHR[61] has expired. It would also be rather uneconomical if the person were first transported across the Continent only to be released there. One would at least expect the authorities of the locus ad quem to pay for the fare back. Probably the solution should consist of two such interventions, one at the place of arrest and another one at the place where the further detention is to take place as the case may be.

58 An exception applies in cases where the imprisonment is not of a purely retributive nature but to some extent also based on a specific condition of the detainee which is subject to change – e.g. mental illness or dangerousness, see, e.g. ECtHR judgments X. v. UK, judgment of 5 November 1981, Series A N°46; Van Droogenbroeck v. Belgium, judgment of 24 June 1982, Series A N°50; Weeks v. UK, judgment of 2 March 1987, Series A N° 114; Thynne, Wilson and Gunnell vs. UK, 25 October 1990, Series A N° 190-A;Singh v. UK, 21 February 1996, Reports 1996-I, 280; Hussain v. UK, judgment of 21 February 1996, Reports 1996-I, 252.

59 For detailed criticism see, e.g., Stefan Trechsel, Die Europäische Menschenrechtskonvention, ihr Schutz der persönlichen Freiheit und die Schweizerischen Strafprozessrechte, Berne 1974, 232 ss., id., Personal Liberty and Security loc.cit. p. 320 ss.

60 ECtHR, R.M.D. v. Switzerland, judgment of 26 September 1997, Reports 1977-VI, 2003.

61 Certainly not more than four days, cf. ECtHR, Brogan and others v. UK, judgment of 29 November 1988, Series A N°. 145-B, para. 59; for a discussion of this judgment see, e.g., Trechsel, Liberty and Security of Person, loc.cit. p. 336.

C. Recognition of Decisions

A very important issue is the recognition of judgments and other decisions. This would lead to a considerable improvement of the protection of an important human right, namely the protection against double jeopardy, the right *ne bis in idem*. Art. 4 of the 7th Protocol to the Convention limits this right to «the jurisdiction of the same State», while Article 50 of the Charter refers to "the Union". This would, in a way, lead to regarding the EU as one jurisdiction.

As far as «decisions» are concerned, they would include the arrest warrant, but also search warrants, orders to freeze assets and so forth.

The human rights' issues arising in this area have already been dealt with: There is a need for precise legislation and for effective remedies. I see no interest in pursuing this any further. Nor is it necessary to insist on the fact that recognition still raises a considerable number of particularly tricky questions.

V. Jurisdictional Issues

A. Judicial Control of the Respect for Human Rights in the European Union

1. Ratification of the ECHR by the Union

It is one thing to define human rights. In fact, it is relatively easy as there is, from the outset, a limited choice. Much must be left to the practical application. What is difficult is to secure their respect. The issue of human rights' protection with regard to the European Communities and the European Union has been the subject of discussions for quite a number of decades[62]. Although the treaty of Amsterdam has strengthened the Court of Justice[63], the problem has still not been resolved. I shall begin by setting out a few of the arguments which support the argument for the ratification of the ECHR by the Union. According to the Court of Justice this requires an amendment of the TEU. I am sadly aware of the fact that at the present point in time some Governments of Member Sates are not yet ready to support such an amendment. Still, one must keep the pot boiling. I shall briefly say why I regard any alternatives as highly undesirable.

Why is it that this ratification did not happen years ago? This is, of course, a matter of speculation. I would suggest that it is not really due to the negative attitude of Brussels towards human rights. In verbal declarations practically everyone is deeply devoted to this issue, but although the Charter, drafted in an elaborate manner, was finally not given the prominent place in the Treaty which had been hoped for by some, nor even given the weight of a legal document, I believe that the real problem lies elsewhere. It is linked to the pride of a rich and powerful organisation which is not prepared to accept the authority of the Strasbourg Court, the organ of a rather weak and economically very poor organisation. This is also what transpires from the advisory opinion of the Court of Justice[64].

62 *See e. g. Bultrini, 'L'interaction entre le Système de la CEDH et le Système Communautaire', Zeitschrift für Europarechtliche Studien, Universität des Saarlandes, Heft 4, 1998, 493-504; Clapham, 'Human Rights and the European Community: A Critical Overview 1991', in European Union: The Human Rights Challenge, vol. 1 (nomos, 1991);; Drzemczewski, 'The Internal Application of the European Human Rights Convention as European Community Law', 30 International and Comparative Law Quarterly (1981) 118; Jacque, 'The Convention and the European Communities' in Macdonald, Matscher and Petzold (eds.) The European System for the Protection of Human Rights, Dordrecht, 1993; Kutscher, Rogge, Matscher, Der Grundrechtsschutz im Europäischen Gemeinschaftsrecht, Heidelberg, 1982: Leclerc, Akandji-Kombé, Redor, L'Union Européenne et Les Droit Fondamentaux, Brussels, 1999; Mendelson, 'The Impact of European Community Law on the Implementation of the European Convention on Human Rights', Files on Human Rights no. 6, Council of Europe no. 4; Mendelson, 'The European Court of Justice and Human Rights', Yearbook of European Law (1981) 121; Mosler, Berhardt, Hilf (hrsg), Grundrechtsschutz in Europa, Heidelberg, 1976; Kedzia, Leuprecht, Nowak (eds.), 'Perspectives of an All-European System of Human Rights Protection: The Role of the Council of Europe, the CSCE, and the European Communities', All-European Human Rights Yearbook Vol. 1 (1991); Tavernier, Quelle Europe Pour Les Droits De L'homme? La Cour de Strasbourg et la réalisation d'une "union plus étroit" (35 années de jurisprudence: 1959-1994), Brussels 1996; Weiler and Lockhart, 'Taking rights seriously: The European Union and Human Rights, The way forward', [1997] CML Rev. 51.*

63 *Renucci, Droit Européen des Droits De L'Homme, Paris, 1999 20 ff.*

64 *Renucci, ibid.; Advisory opinion of2/94, 28 March 1996.*

According to what one regularly hears in corridors but never openly stated, this reluctance may be explained by a relatively recent additional argument; the fact that close to half of the Member States are former communist countries without a tradition of democracy and the rule of law comparable to that of the Member States of the Union. It may be regarded as particularly risky to accept the authority of a Court where there is a possibility that the majority of a chamber might be composed of judges coming from those countries.

However, so far there is no evidence whatsoever of any specific negative influences of such judges on the jurisprudence of the Court. Furthermore, the Union could be expected to demonstrate, particularly in connection with the planned expansion, a spirit of pan-European solidarity. Human rights ought to be regarded as universal – at least for the whole of Europe. The EU should welcome this opportunity to contribute, by adhering to the Strasbourg system of implementation, to the development of human rights law throughout the Continent. Let me add that not the least the financial contribution which the Union could furnish would be more than welcome.

In fact, one of the arguments against the step for which I argue might be the difficulties the Strasbourg Court has in order to cope with an ever increasing case-load. It is true that the backlog of cases is approaching 19'000. Year by year there has been an increase of 25 % and more. Three years after the coming into force of Protocol No. 11 another reform is being discussed[65]. However, it is rather obvious that so far the bottleneck does not lie with the judges but with the Registry. The unfortunate policy of employing part-time lawyers to deal with cases has not given optimal results. Once the new staff members have been trained and begin to do the job efficiently, their contract often expires. With the necessary additional economic means a lot could be achieved. If the Union were to engage in this direction it would really contribute in a practical way to the protection of human rights in Europe.

I am well aware of the fact that a number of rather difficult problems would have to be solved, if the EU were to ratify the ECHR. One of them concerns the representation of the Union in the Court. One could imagine a special formula for the chamber dealing with cases brought against the Union as an alternative to special "Union-judges". Possibly a number of substantive provisions would call for reservations or declarations, in particular those which refer to territoriality and jurisdiction[66].

It is rather obvious that under the present system, despite the efforts made by the ECJ, to which I pay tribute, the protection of human rights for all those who find themselves under the jurisdiction of the Union has not yet found a fully satisfactory solution. The fact that the Charter was not given the status of a quasi-constitutional guarantee of human rights cannot be brushed aside. However, if I imagine the alternatives to the ratification, I am not really that unhappy with the state of affairs. The alternative could have consisted of a mechanism of implementation paralleling that of Strasbourg. This would have created a considerable danger of the development of divergent case-law[67]. Conflict of competence between the European Courts would arise. An effective EU-mechanism could weaken the Convention system. The rapid expansion of the competencies of the Union in the field of criminal law would also increase the interest in the protection machinery. Non-EU-Member-States would realise that the Strasbourg system had lost importance for those High Contracting Parties which are Member States of the Union. They could start feeling discriminated against and could be tempted to lose interest in and respect for a system to which the big European powers would increasingly turn their backs.

65 These discussions are held in the Steering Committee on Human Rights and in specialised sub-committees; the minutes are not public.
66 Cf. Art. 2 of Prot. Nr. 4, Arti. 4 of Prot. 7.
67 E.g.– Niemietz v. Germany, judgment of 16 December 1992, Series A N° 251-B.

2. The Strasbourg Court and the Europe of Brussels

In the meantime, one can observe a development in Strasbourg which, personally, I do not find entirely positive. The Commission had, in earlier years, a clear attitude which accepted the European Communities as an entity which was not bound by the Convention. In it's C.F.D.T. decision it left open the question whether the Member States were responsible severally[68]. This principle was confirmed in a case of M. & Co. v. Germany[69], but the findings are more precise. The applicant was a German limited partnership and had been fined by the European Communities; it complained against the execution of the sentence. The Commission said that « the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection». The Commission goes on to affirm that the Communities in fact do protect human rights effectively and concludes by adding « that it would be contrary to the very idea of transferring powers to an international organisation to hold the member States responsible for examining, in each individual case before issuing a writ of execution for a judgment of the European Court of Justice, whether Article 6 of the Convention was respected in the underlying proceedings».

The Court has followed this line in four cases against Germany in which employees of the ESA complained that they were denied access to court in Darmstadt, «The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial»[70].

The risk that the Strasbourg Court arrogates itself with authority over EU-affairs is evidenced by the judgment of Matthews v. UK[71]. The applicant complained of a violation of Article 3, Protocol 1, because she did not have the right to vote in elections to the European Parliament. Here, the Court observed «that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer». What this means, in fact, is this: If a country has relinquished jurisdiction for the benefit of the Union, there are two possibilities: Either, the guarantees of Article 6 are guaranteed in the «Union proceedings»; in this case, there is no problem – this was what the Commission assumed in the M. & Co. case. Or, the EU proceedings are deficient. In this case the State retains responsibility. The underlying idea is that nobody in Europe should be deprived of the protection offered by the Convention[72].

This is illustrated by a case which is pending before the Court and has been communicated to each and every one of the 15 Member States, DSR-Senator Lines GmbH[73]. A fine of over 10 Mio €

68 Application no. 8030/77, Confédération Française démocratique du Travail v. the European Communities, alternatively: their Member States, a) jointly, b) severally, decision of 10 July 1978, DR 13 p. 231, 240; see also Application No. 13539/88, Dufay v. European Communities, decision of 19 January 1989, unreported.

69 Application No. 13258/87, decision of 9 February 1990, DR 64. 138, 145 & 146.

70 ECtHR, Beer and Regan v. Germany, judgment of 18 January 1999, para 57.

71 ECtHR, Matthews v. UK, judgment of 18 February 1999, Reports 1999-I, 251 Para. 32.

72 See also, Winkler, 'Der Europäische Gerichtshof für Menschenrechte, das Europäische Parlament und der Schutz der Konventionsgrundrechte im Europäischen Gemeinschaftsrecht' EuGRZ 2001 s. 18; Krüger und Polakiewicz, 'Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa/ Europäische Menschenrechtskonvention un Eu-Grundrechtecharta' EuGRZ 2001 s. 92; Antonio Bultrini, La responsabilité des Etats Membres de l'Union Européenne pour des violations de la Convention européenne des droits de l'homme imputables au système communautaire, à paraître dans Revue Trimestrielle des droits de l'homme 2002 N° 1.

73 Application Nr. 56672/00.

had been imposed on the Company by the EC Commission under the competition rules. It was not, however, in a position, financially, to pay this sum or to provide a bank guarantee. Its appeal, therefore, had no suspensory effect. So far, to my knowledge, the admissibility of this application has not yet been decided. Still, the very fact that it was communicated to the 15 Member States bears witness to the problems I mention.

The attitude which aims to provide human rights' protection against the acts of a regional organisation is certainly a manifestation of the very best of intentions. However, I have doubts whether the road on which the Strasbourg Court has embarked upon is the right answer– on a merely technical level the task of examining applications directed against 15 states is already rather formidable and will not make the work of the Court any easier.

It would also be very regrettable if a conflict were to arise between the two Courts of the European Organisations.

B. The Need for a European Criminal Court

However, I wonder whether the ratification of the European Convention of Human Rights would bring a solution to all the problems the Union as an entity approaching statehood faces in the area of the protection of human rights. I have, in particular, some doubts as to whether the proceedings in which the Commission pronounces fines of astronomical dimensions, in particular in the area of competition, on corporations are entirely compatible with Art. 6 ECHR.

1. The Commission Acting as a Criminal Tribunal

Whatever the label given to those fines by legal experts, they are genuine punishments within the meaning of Article 6 ECHR. When it is said that they do not constitute a punishment but only an administrative misdemeanour, a "regulatory offence", this must be, with due respect, called label-fraud. The consequence of such labelling would be that the sanction could be ordered by an administrative authority; there would be no "criminal charge" within the meaning of Article 6 ECHR. By the way: Article 47 para. 2 of the Charter gives a generalised right of access to court – it does not provide an argument which could justify an exception! While the Charter proclaims that «[e]veryone is entitled to a fair and public hearing ... by an independent and impartial tribunal», the executive of the Union pronounces draconic sanctions in proceedings which do not satisfy in any way the exigencies of the Union's own Charter because the Commission is not an independent and impartial tribunal established by law.

According to the case-law of the Strasbourg organs, in particular the Öztürk v. Germany judgment[74], there cannot be the slightest doubt that also under the Convention, the guarantees of fair trial would apply[75].

In my view it is incompatible with the concept of justice for criminal charges to be determined by an administrative authority[76]. Of course, there is a right to appeal, but it is only an appeal, not a full first instance trial. This is hardly sufficient to heal the defect which was evident in the first instance before the Commission. The European Court of Human Rights was faced with a similar situation in De Cubber v. Belgium. The applicant had been convicted in first instance by a judge who had also functioned as investigating judge and could therefore not be regarded as impartial. The Belgian Government pointed out that there had been a full possibility of appeal, but the Court did not accept this as a fact which remedied the original violation[77].

74 ECtHR, Öztürk v. Germany, judgment of 21 February 1984, Series A N° 73.
75 The Commission said so expressly with regard to anti-trust proceedings in M. & Co. v. Germany, application No. 13258/87, decision of 9 February 1990, DR 64, 138 at 145; see also Jörg Deutscher, Die Kompetenzen der Europäischen Gemeinschaften zur originären Strafgesetzgebung, Frankfurt a.M. et al. 2000, p. 139 ss.
76 The ECJ (C 100-103/80, Musique Diffusion francaise v. Commission [1983] ECR 1825, paras. 7-8) held a different view.
77 ECtHR, DeCubber v. Belgium, judgment of 26 October 1984, Series A Nr. 86.

2. A European Criminal Court

A solution to this problem could consist, in the creation of a European Criminal Court. As a first task, this court would replace the European Commission in adjudicating offences in first instance. There would be, under the Convention, no objection to proceedings in two stages. The first phase could be in the hands of administrative authorities and might lead to a *proposal* for the payment of a fine; it would be a fine «paid by way of composition» and associated with a waiver of the right of access to court – such a method of proceeding was found to be, as such, perfectly compatible with the Convention in the Deweer case[78]. However, the waiver must reflect the true will of the person concerned and there must be the possibility to have fully judicial proceedings.

The idea of a European Criminal Court is by no means a new one. As the Union is expanding into the field of criminal law, creating EUROJUST, expanding the competencies of EUROPOL, strengthening OLAF, intensifying the fight against money-laundering, terrorism and a number of other felonies, struggling for improved protection of its financial interests by working on the *"CODEX JURIS"*, the need for a centralised judiciary will be increasingly felt. As yet, the political will to actually create a criminal jurisdiction on the European level is still lacking[79], but the direction of the development seems to be moving in that direction. A less utopian intermediary solution would be the creation of European Public Prosecutor[80]

Finally, a European Criminal Court should be competent to try civil servants of the Union, e.g. persons working with EUROPOL who exceed their powers. The immunity of such personnel constitutes a serious lacuna in the protection of fundamental rights in the Union.

In conclusion, even if this presentation has remained eclectic and full of gaps, it is safe to say that the European Convention on Human Rights has a considerable and very diverse impact on the European Union and particularly in the Area of Freedom, Security and Justice.

78 *ECt.HR, Deweer v. Belgium, judgment of 27 February 1980, Series A N° 35, para. 49.*
79 *See also the critical discussion in 84, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, Heft 3 (2001).*
80 *On this proposal see van Gerven, W., 'Constitutional Conditions for a Public Prosecutor's Office at the European Level', 8 European Journal of Crime, Criminal Law and Criminal Justice (2000) 269, 307 ss.*

Interactions between Common Foreign- and Security Policy related to Civil Crisis Management[1]

By Mrs Cesira D'Aniello

I. Introduction

Civil crisis management is a challenge to the Union's ability to make decisions and implement them according to criteria of rapidity, effectiveness and overall transparency. Lack of co-ordination or competence disputes within and between EU institutions, and between the EU and Member States' jurisdictions, may result in decisions being taken slowly and implemented inefficiently. The ability to achieve pursued objectives may be compromised. Public and political demands for transparency and accountability may be disregarded, if not circumvented. If the Union is to meet the challenge it has set for itself of developing an autonomous crisis management capability, EU Institutions will have to rise to the task. Treaty reform may turn out to be the indispensable way forward for the EU system to respond to the challenge.

The lessons learned during the post-Maastricht experience of relations between the EU's first and second pillars, respectively corresponding to external economic relations and foreign and security policy, may provide precious material for the development of effective civil crisis management across all pillars.

II. The EU concept of civil crisis management

From a second pillar's perspective, civil crisis management is an essential component of the fast-developing European Security and Defence Policy (ESDP). This approach is clearly stated in all European Council's conclusions, which, since June 1999 in Cologne, have consistently reiterated that ESDP and crisis management include military and civil aspects.

The Union's global view of crisis management is in line with post-cold war security concepts, which emphasise the non-military aspects of security. In practice, recent interventions by the International Community in crisis situations have been characterised by strong, sometimes overwhelming, non-military components, such as humanitarian assistance, reconstruction and rehabilitation, the re-establishment of the rule of law and civil administration, as well as police operations.

How has the EU concept of civil crisis management developed in practice? Its development can be followed through five major steps taken by the European Council, from Cologne to Gothenburg, while waiting for the next essential one to be announced in Laeken.

In Cologne, Heads of State and Governments asked the Council "to deal thoroughly with all discussions on aspects of security, with a view to enhancing and better co-ordinating the Union's and Member States' non-military crisis response tools" thus bringing to the forefront of the EU agenda the essential issue of ensuring co-ordination among the various instruments involved in crisis management.

In Helsinki, in December 1999, they adopted two reports on the "development of the Union's means for military and non-military crisis management within the framework of a strengthened Common European Security and Defence Policy". They added that work on conflict prevention should be pursued, a committee on civil crisis management established, inter-pillar coherence and a rapid reaction capability ensured. The first official inventory of civil crisis management

1 *The views expressed in this paper are solely those of the author*

instruments was adopted. Civil police was singled out as a priority area.

In Santa Maria da Feira, in June 2000, the parallel development of military and civil capabilities was re-iterated and “concrete targets” in the area of police adopted, similarly to what had been done in Helsinki with the adoption of the military Headline Goal. The need for co-ordination and rapid reaction were emphasised again.

The European Council in Nice, in December 2000, added urgency to the EU plans, stating that the EU must become quickly operational at the latest by the European Council in Laeken. It identified the EU’s specificity, or added value, in its ability to mobilise a wide range of means and instruments, civil and military, giving it a global capacity to manage crises and prevent conflicts.

In Gothenburg, in June 2001, concrete targets were extended to additional sectors of civil crisis management – rule of law, civil administration and civil protection. Police-related developments were noted and encouraged across the board, for example with regard to the new Council Secretariat Police Unit, which was asked to develop the capacity to plan and implement police operations in crisis management contexts.

What are the trends detectable from this dense itinerary from Cologne to Gothenburg – and soon Laeken? Firstly, the already noted global view of crisis management, which must rely on military and civil instruments within the ESDP framework. Secondly, the emphasis repeatedly put on the need for co-ordination and rapid reaction, which suggests that these two features of EU crisis management need to be strengthened. Thirdly, the choice in favour of concrete targets for the development of civil capabilities, which reflects the attempt to apply the same quantitative method chosen for the development of military capabilities to the civil side of crisis management.

III. The instruments of EU civil crisis management

The instruments that the Union can use to tackle the non-military components of crises developing in third countries and/or regions belong to either the European Community (first pillar) or the Member States. When they belong to the Member States, their mobilisation can take place either within a second-pillar framework (CFSP) or within a third-pillar framework (JAI). EC instruments rely on financial means within the EC budget. CFSP has only very limited financial resources at its disposal, also within the EC budget, which is managed by the Commission irrespective of pillars. Financing by the Member States is a viable option for both second and third pillar instruments.

The following is a non-exhaustive, indicative list of civil crisis management instruments which the EU can use from all pillars:

- Issue public Declarations to express EU position on specific issue (CFSP)
- Carry out “Demarches” with third country authorities, at all levels (CFSP)
- Organise or suspend “Political dialogue” meetings, at all levels (CFSP)
- Dispatch Presidency, Troika or Secretary General/High Representative for mediation and/or arbitration missions (CFSP)
- Appoint EU Special Representatives to deal with specific crisis, country or region (CFSP)
- Dispatch Fact-Finding Missions to ascertain facts/situation, explore possible solutions (mixed)
- Revise and/or suspend existing agreements with third parties (EC)

- Revise and/or suspend assistance programmes to third countries (EC)
- Enact various types of sanctions: embargo on general trade, arms or specific products such as oil or diamonds; reduction of diplomatic staff; ban on visits by and to third country authorities; suspension of entry visas to designated individuals from crisis country; ban on flights; freezing of assets/funds; ban on investment (mixed);
- Provide financial assistance (mixed)
- Provide and ensure the delivery of humanitarian aid (EC)
- Support the re-establishment of democratic electoral processes (mixed)
- Dispatch missions to strengthen the rule of law (mixed)
- Dispatch human rights observers (mixed)
- Dispatch police forces to train, assist and/or replace local police (mixed)
- Provide demining assistance (mixed)
- Dispatch border control teams (CFSP or mixed)
- Control migration/refugees flows (mixed)
- Carry out evacuation operations (mixed)
- Carry out search and rescue operations (mixed).

EC instruments are powerfully present, in particular whenever substantial financing is involved and when agreements concluded by the EU with third countries provide the basis for action. CFSP instruments, have been consistently and rapidly developed since Maastricht. They are becoming more and more visible, as in the case of missions by the Presidency, the Troika or the High Representative. Whenever instruments are mixed in terms of competence, a trend towards bringing them within the EC framework can be detected from the developments of the last few years. For example, EC Regulations were adopted by the Council in the areas of the rule of law, support for human rights and democratisation processes, as well as de-mining operations. This overall long-term trend is confirmed by the parallel gradual shift of specific sectors from the third towards the first pillar via Treaty reform.

Despite this gradual move towards first pillar competence, grey areas continue to be present and even to increase as the EU expands its action into previously marginal sectors. Police is an obvious example. Training can be organised and financed under EC instruments. For example, the Multinational Advisory Police Element in Albania (MAPE), previously handled within CFSP via a Joint Action, was brought under an EC programme for the Balkans. At the same time, police forces, which may be mobilised for crisis management operations, are firmly under Member States' jurisdictions. Their mobilisation could be made via CFSP legal instruments, for example a Joint Action, either with EC or Member States' financing. Finally, police and judicial co-operation in criminal matters are handled within JAI. In brief, with regard to police, all pillars are quite present and they intersect.

The persistence of grey areas brings us back to the need for co-ordination. When responsibilities are not neatly defined, power struggles among the possible actors are likely. When they occur, they affect negatively the efficiency of the response system, its rapidity and possibly its effectiveness. In this scenario, lack of transparency and accountability are also very probable results.

IV. Weaknesses of EU civil crisis management

They can be summarised as follows: weak co-ordination within and between EU Institutions, as well as between the EU and the Member States.

Within the Commission

The various Directorates-General dealing with external relations may interact, for crisis management purposes, with several other services in areas such as JAI and Environment, which includes Civil protection. The Council, with its multiple sub-structures, would find it more rational to deal with one single counterpart, to which all relevant departments would report. However, this is extremely difficult in particular in areas such as humanitarian assistance, which is not even recognised as a crisis management tool but rather as being neutral and a-political, i.e., independent from the EU's political response to a specific crisis.

The Commission may have to tackle the suitability of its fairly decentralised structure for crisis management purposes and possibly its historical scepticism on the effectiveness of separate CFSP structures. This may take more than mere administrative re-organisation.

Within the Council

The Council is tackling internal co-ordination at three different levels. Firstly, it is proceeding with the reform of its working methods to make them more suitable for an enlarged Union. In this context, co-ordination among the various Council formations is a central issue. Secondly, new Council instances such as committees and working groups created to develop and manage ESDP are learning how to work within the highly complex EU machinery, with its heavy load of rules, practices and subtleties. Thirdly, the new departments recently created within the Council Secretariat to deal with CFSP, ESDP and crisis management, which include an EU military staff of roughly 150 officers, are also going through a learning process.

The mere multiplicity of actors, old and new, compounded by the difference in political and administrative cultures, is sufficient in itself to generate co-ordination problems, at least in the short term.

It is worth noting that the current package of EU action against terrorism following the 11 September events has provided a practical and high-profile testing ground for co-ordination among different Council formations, Committees and Working Groups and relevant Council Secretariat administrative structures. In practice, the Committee of Permanent Representatives is acting as central co-ordinator, in particular when preparing the General Affairs Council.

Commission-Council Relations

With regard to inter-institutional co-ordination, the main problem lies in the apparent contradiction existing between civil crisis management as part of ESDP, and therefore CFSP, and its inherent inter-pillar nature. CFSP structures may appear to be "authorised" to decide on the utilisation of EC instruments, which the Treaties do not allow. EU instruments belong to different pillars within which the Treaties attribute specific powers to the different Institutions. Therefore, CFSP instances cannot initiate the mobilisation or decide the implementation of EC instruments.

EU-Member States Co-ordination

With regard to co-ordination between the EU and the Member States, it is clearly in the Union's interest to contribute its collective resources as a coherent whole rather than bilaterally and in dispersed order.

Where should the co-ordination of Member States' contributions to crisis management operations take place? Again, there are several possibilities. The Commission is an obvious choice, also in view of its resources and experience, at least for the co-ordination of first pillar instruments including those gradually shifting towards the first pillar, such as civil protection.

At the same time, various entities, also mandated to co-ordinate national contributions, have been established within the Council, such as the Political and Security Committee (the focal point of EU crisis management), the Committee for Civilian Aspects of Crisis Management and the Council Secretariat "co-ordinating mechanism" for civil crisis management.

In view of the multiplicity of actors, it is essential to ensure that whoever gets the task, has the authority, the ability and the resources to carry it through.

Similar problems on competence, prerogatives and powers are encountered in the new area of civil-military co-operation in crisis response, which is currently under study. The Union will have to elaborate its own EU-tailored doctrine and practice.

IV. Remedies and perspectives

Against the difficult background described above, the Union must heavily rely on its strong points to meet the challenge, first and foremost on its international profile combined with the magnitude of the means at its disposal. The International Community expects the EU to take the lead in a variety of crisis situations. On the basis of past experience, this type of pressure should yield results. Secondly, the majority of EU civil crisis management tools are already largely used and well tested, which means that the EU is only called to improve its performance rather than to build it from scratch, as in the case of military crisis management. Thirdly, the Union's experience in non-military crisis management is especially suitable to serve the new concept of international security, which is also strongly characterised by a non-military component.

To respond to crises speedily, efficiently and effectively, the EU needs to ensure that all the assets at its disposal, including national ones, are used in synergy. This requires a clear definition of tasks, possibly the development of a "who-does-what" approach, in order to shed light on existing and emerging grey areas. The current elaboration of "crisis management procedures" will make an essential contribution to the clarification of roles and responsibilities to take action. A new culture of openness and transparency within and between Institutions will also be needed. Practical experience shows that many inter-institutional problems could be prevented from rising if relevant information was shared among all actors consistently and timely.

A clear understanding among institutional and state actors on crisis management procedures, accompanied by a new administrative culture of openness and transparency, may well avoid the need to tackle competence issues at the level of Treaty revision. In any case, the discussions about to be opened for the 2004 Inter-Governmental Conference will bring additional pressure in the same direction. These discussions will be, more than at any time in the past, shaped by public demands for transparency and accountability, which also translate in the need for clarity of roles and responsibilities. The next IGC may turn out to be the indispensable pressure tool for EU actors to ensure the much needed co-ordination in crisis management.

Schengen and integration of Schengen in the European Union with a view to Enlargement

By Mr Luc Vandamme

Excellencies, Ladies and Gentlemen,

I am honoured to have the chance to address this audience on a subject, that since the entry into force of the Amsterdam Treaty, followed by the Tampere Summit and unfortunately the events of the 11th September, has become, to say the least, a hot issue, not only for the member states, but also for the process of enlargement. Let me first remind you however that what follows is my personal view. I am therefore speaking in my personal name and not in the name of the institution that employs me, namely the General Secretariat of the Council.

With this proviso in mind, let me now get down to business. I will first tell you where we came from, then what it takes and what is has taken to actually get there and finally, given these troubled times, where I think we should be going.

So, where do we come from?
Drafting EU rules on justice and home affairs matters has never been easy.

Issues such as asylum policy, crime fighting measures or approaches to border control and terrorism were always at the heart of the concept of national sovereignty. Therefore, understandably, the Union's justice and interior ministries have been traditionally rather reluctant to give up any rights that might control how policy on their turf is formulated.

However, member States now accept that common problems need common solutions. For many years, all European policy on justice and home affairs was agreed upon by governments meeting in ad hoc groups outside the European Union's law-making structures.

In those days the governments of Belgium, Germany, France, Luxembourg and the Netherlands decided that they were ready to move forward faster and to bring into force the principles expressed by European Council in Fontainebleau concerning the suppression of border controls at their internal borders.

They were also aware that short and long term measures would be needed in order to guarantee security in the so created zone of free movement. Amongst those short-term measures some of you might remember the visual surveillance of tourism vehicles crossing internal borders at reduced speed. A red or green disc had to be displayed behind the windshield in order to indicate whether one was complying with the border police rules.

But as we all know, colour-blindness, especially of the red-green variety, is mainly a male affliction, and there are quite a lot of males involved in border control. Imagine therefore an epidemic of colour-blindness striking border control personnel. For that seems to me to be the only rational explanation for the fact that in those days displaying a green disc was probably the best guarantee of being most thoroughly checked then and there.

But seriously now, from the very start in 1985 when the concerned Members States signed the Schengen Agreement, they were also convinced that in the long run border checks would need to move from internal borders to the external border of the Schengen zone and that in compensation they would need to harmonise legislation and rules concerning justice, police and immigration.

The path leading from the political agreement to practical implementation was long but in 1990 the Convention implementing the Schengen Agreement on the gradual abolition of checks on the common borders saw the light of day and just a few months later, Italy joined the Agreement followed by Spain, Portugal and Greece in 1991 and Austria in 1995. Sweden, Finland and Denmark in their turn joined in 1996 and at the same time a Co-operation Agreement was signed with Iceland and Norway.

Parallel to all of this, the situation also changed on the part of the European Union. First, in 1986, the Member States decided to co-operate on the entry of third-country nationals into the European Union and on their rights of movement and residence in the EU. Then, in 1992, common rules for citizens of non-EU countries and for immigration policy were written into the Maastricht Treaty, which became operational in 1993.

The Maastricht Treaty therefore formally recognised that justice and home affairs were now of common concern and a special law-making structure to handle legislation linked to these questions was created. This is often called "the third pillar" of the EU, as opposed to the majority of traditional EU responsibilities in the "first pillar" and the common foreign and security policy in the "second pillar". Laws passed under the new rules were, in effect, intergovernmental agreements that were legally binding in the European Union.

The next important step in the evolution of the European Union's justice and home affairs laws, where the above roughly drawn separate roads joined together again, was made on May the 1st 1999, when the Amsterdam Treaty, which updated the Maastricht Treaty, entered into force. The Amsterdam Treaty moved several key policy areas, including asylum and immigration policy and issues concerning co-operation between civil courts, as well as all of the Schengen Acquis, into the EU's normal law-making structures.

Obviously in the course of these negotiations a price had to be paid in order to achieve a consensus and so the integration of the Schengen Acquis only became possible by accepting an opting out of the United Kingdom, Ireland and Denmark for Title IV of the Treaty establishing the European community, topped with the possibility for the United Kingdom and Ireland to keep their internal borders in place.

The Amsterdam Treaty thus created a rather complex, almost hybrid situation where on top of all that a separate agreement with Norway and Iceland needed to be negotiated.

In accordance with the Schengen Protocol annexed to the Amsterdam Treaty, the Agreement defines the appropriate procedures that enable Iceland and Norway to be associated with the application of the Schengen acquis and its further development in the EU, given that in December 1996 in Luxembourg they signed the Co-operation Agreement on the abolition of controls of persons at common borders with the Schengen countries.

This latter Agreement was aimed at combining the free movement of persons within the Schengen countries with the Nordic Passport Union established in 1957 between Denmark, Finland, Iceland, Norway and Sweden.

To ensure Iceland and Norway's association with the ongoing decision making process regarding the Schengen acquis, the Agreement set up a Mixed Committee outside the institutional framework of the EU, composed of representatives of the governments of Iceland and Norway, the members of the Council and the Commission. The Committee may convene at the level of experts, senior officials or Ministers. Meetings of the Mixed Committee at ministerial level will

be prepared by the Committee at the level of senior officials.

The Agreement established that acts or measures which further develop the Schengen acquis once adopted by the EU will enter into force simultaneously for the EU and its Members States concerned and for Iceland and Norway, whereby due account is to be taken of the latter's constitutional requirements. To this end the Agreement set out the procedures to be followed for the notification and acceptation of these acts or measures.

The Agreement also indicated under which conditions (for example, the non-acceptation of an act or measure, the impossibility to settle disputes about the application of the Agreement) this Agreement is considered (terminated) null and void with respect to Iceland and Norway. That is, unless the Mixed Committee decides otherwise within 90 days.

In order to achieve an as uniform as possible application and interpretation of the Schengen acquis provisions, the Agreement established in particular that the Mixed Committee will keep under constant review the development of the case law of the Court of Justice of the European Communities as well as of the case law of the competent courts of Iceland and Norway relating to such provisions.

On top of this, the particular situation concerning the UK and Ireland made it necessary to conclude a second agreement. This was essentially to ensure that Norway and Iceland would be properly consulted before the Council would decide on a request made by Ireland or the United Kingdom. After all, the United Kingdom or Ireland may at any time request to take part in some or all of the provisions of the Schengen acquis, given article 4 of the Schengen Protocol.

Last but not least one should also be aware that the integration of the Schengen acquis brought a set of legal dispositions into the framework of European legislation. But it also allowed for a number of operational decisions which used to be formally decided upon by technical working parties and Committees under rules sometimes referred to as "the democratic deficit of Schengen" to be managed under the orthodox rules of the European institutions.

Some problems of course still persist. As an example I could cite the Schengen Information System which because of its hybrid first and third pillars content could not find a legal basis exclusively in the first or third pillar.

Since the Schengen Protocol explicitly states that proposals and initiatives building upon the Schengen acquis should be subject to the relevant provisions of the Treaties, the Council is currently considering adopting both a Council regulation and a Council decision on the development of SIS II.

Another problem I see for the future is related to the Agreement with Norway and Iceland. As new legislation building upon the Schengen acquis will trickle down into European legislation, it will become more and more difficult to determine whether the new proposals are actually building on the acquis and thus whether Norway and Iceland should be associated with the decision making process.

This is thus a short overview of where we came from. From that, you will easily gather that where enlargement is concerned a long and arduous road will have to be travelled to get there as well. The acceptance and application of the Schengen acquis will have to be a progressive and dynamic process. Given the distinguished audience present today who no doubt have a particular interest in enlargement matters I will therefore now try to go into somewhat more detail as to what it takes to get there.

What does it take to get there?
If one looks at the Schengen acquis, it becomes immediately clear that while some provisions should be applied upon accession, others are intrinsically linked to the lifting of internal border controls and cannot be implemented upon accession but only once internal border controls have been lifted.

Amongst those measures which should be applied upon accession I would cite the provisions concerning the crossing of external borders, the quality of travel documents, police co-operation and co-operation in criminal matters, and protection of personal data.

Measures directly connected to the abolition of internal border controls should be implemented simultaneously with the lifting itself of those internal border controls.

Among such measures we can cite the conditions for entry at the external borders, common visa policy and the Schengen Information System. Given my allotted time, it is simply impossible for me to elaborate on all these issues but let me fill you in more specifically about bilateral and international border co-operation, as an illustration of where we go from here.

Where do we go from here?
International co-operation in the field of border security can be divided into multilateral, bilateral and local cooperation.
For instance, agreements with neighbouring countries towards co-operation in the field of border management are an efficient tool to increase border security. This can be realised by establishing appropriate working mechanisms like an exchange of information, establishing appropriate communication channels, local contact points, procedures for situations of urgency, solving incidents in an objective way in order to avoid political disputes, etc.

Regional cooperation structures across the external borders should also be established at the sea areas. These initiatives then bring together all countries in the region.
Concerning cooperation with adjacent states, it is especially necessary for the transit states to lend their active assistance ensuring that their borders are thoroughly secure but also taking necessary measures away from the border, such as for instance consistent repatriation practice – provided of course that there is no right of abode and there are no impediments based on serious humanitarian grounds or international law (Geneva Convention relating to the Status of Refugees, European Convention on Human Rights).

The backbone of a general border strategy entails a functioning border management consisting of border checks and border surveillance, based on risk analysis. Art. 6 of the Convention implementing the Schengen Agreement sets out the clear framework to be implemented by the Common Handbook, where both this article and this handbook are complementing each other.

Essential to border management is the fact that every single person crossing the external borders is checked systematically and that the effective border surveillance is ensured between border crossing points.
That therefore also signifies that all appropriate measures have to be taken if one is to safeguard internal security and prevent illegal immigration.

First of all, a coherent legislation based on the EU/EC – Schengen requirements in the area of border management is needed (for example: border guard act, penalties for carriers that transport third country nationals without travel documents, data protection rules). With regards to infrastructure, appropriate facilities to carry out border checks and surveillance have to be available.

Officials carrying out these tasks have to be professionals that are specially trained. Sufficient human resources are required. The exact needs will furthermore depend on several factors (geographical situation, volume of border traffic etc.). Moreover a clear concept of training (basic training and further training) is required covering operational skills, knowledge of the legislation, languages etc. Equipment has to be appropriate according to the border situation. A functioning internal co-ordination on all levels is needed (which authorities are competent for which task, no competence vacuums).

Information exchange between competent authorities (border guard, customs, police, judicial authorities) is essential, including a mechanism to solve possible disputes of competences between the authorities. Furthermore operational issues have to be covered (for example use of compatible communication equipment). Agreed international/bilateral co-operation has to be implemented in practice on the spot (Examples: exchange of information, joint controls, handling of readmission situations). The special requirements for the three different types of border (air, sea, land) have to be fulfilled (for example: at the airports a separation of passenger flows - international and internal flights - has to be made physically and structurally).

Measures to prevent illegal immigration and cross-border crime should be pursued inside the territory of the Member States by enhanced search, control and surveillance measures based on national information and in accordance with national law, where possible on the basis of police cooperation agreements pursuant to Article 39 (4) and (5) of the Schengen Convention. Given that the problems of migration and crime are not subject to geographical restrictions, international traffic routes should in future become main areas of activity for national police forces in accordance with domestic law. However, where public policy or national security so require, a Member state may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders.

The last stage in this time-space sequence is the repatriation in accordance with national law (cf Article 23 of the Schengen Convention) of third-country nationals who have entered the Schengen area without authorisation provided no right to stay existed and that there were no obstacles based on compelling humanitarian grounds or international law (Geneva Convention on Refugees, European Convention on Human Rights)

If I have chosen to use border co-operation as an example to illustrate to you what challenges lie ahead of us, it is because that issue is at the core of the Schengen acquis, but also because the Belgian Presidency has made this one of its priorities and as you most certainly know has recently organised the operation called “High Impact Operation”, carried out in collaboration with the candidate Member States.

Let me just note on this occasion the discrete changes in attitude that this operation has had: Whereas in the past Candidate Member States might have been considered to be the opposite party, the “them” out there, now you are considered to be "one of us", part of the family, travelling the same road ahead. If there is a difference it may be in the road that still is to be travelled, or the speed at which you’ll catch up with some of the others, but it is clear at least that we are all in this together. An illustration of this, which I also found most remarkable, was to see how the candidate Member States joined the anti-terrorist effort virtually in perfect synchronisation with the European Council.

In conclusion I would say that with Amsterdam and Tampere, a profound mutation in judicial, institutional and political fields was created. The European market has been a common market since 1958 and a single market since 1992. A single currency will be a fact as of the 1st January

2002, and an area of freedom, security and justice is now being created. We have made a start travelling that road, but of course a lot of work lies ahead. Moreover, given recent events a lot of pressure weighs on the measures implemented by the Schengen acquis. But let us be careful, lest we forget what the initial goals of Schengen were.

It cannot be a coincidence that if we speak of an area of freedom, security and justice, freedom comes first. In fact, in John Rawls magisterial “Theory of Justice”, freedom, or rather the principle of equal liberty, comes, in serial order up as its first principle. So even justice implies freedom and even equality right from the start, followed closely by the too often forgotten principle of fraternity.

Our risk perception however may currently lead us to put somewhat more emphasis on security, building high walls around that so-called fortress Europe. The question though, to conclude, is, “Yes, we could dig ourselves into our trenches, we could dig ourselves into our hills, we could even dig ourselves into our mountain-caves, but how are we going to dig ourselves out?”

FINAL REPORTS

FINAL REPORTS

Session one:
Policy-making in the Area of Freedom, Security and Justice

Chairperson: Dr. Letizia Paoli
Speakers: Prof. Dr. Jörg Monar and Dr. Christoph Ehrentraut
Rapporteur: Ms Christine Stockhammer

A few remarks and recommendations

Having been under the control of national governments for most of the past five decades, the "area of freedom, security and justice" (AFSJ) today has a very relevant place on the policy-making agenda of the European Union. Ten years ago, what was then called "justice and home affairs" did not even exist as a policy-making area within the scope of the European treaties and the limited co-operation that existed between Member States took place in poorly organised and obscure inter-governmental groups. Today, policy-making in the area of justice and home affairs has not only become a fundamental treaty objective, but is also one of the most dynamic and important areas of EU development: the numerous initiatives launched in this area over the past ten years are having a profound impact on European and national actors and produce a range of new institutional structures. Both speakers of the first session "Policy-Making in the Area of Freedom, Security and Justice" —Prof. Dr. Jörg Monar, Co-Director of the European Institute of the University of Sussex and Dr. Christoph Ehrentraut, Senior Principal at the German Federal Ministry of the Interior— as well as most of the participants to the conference on "Integrated Security in Europe" shared this assessment. Indeed, some observers mentioned that the pace of development in the area of freedom, security and justice has surpassed even the most optimistic forecasts which were advanced no longer than ten or fifteen years ago by politicians, European Commission officials and independent observers alike.

Several driving factors were singled out by the two speakers—and in particular by Jörg Monar— to explain the extraordinary development of EU action in this area. EU policy-making in justice and home affairs has significantly benefited from some European co-operation frameworks, which were established outside of the European treaties since the end of the Second World War: without going into detail reference must here be made to the Council of Europe, the Trevi Framework and Schengen. There have also been substantial driving forces: among them, the emergence of new—or the increase of existing—transnational challenges in the area of justice and home affairs (ranging from organised crime and drug trafficking to, most recently, terrorism) has represented a key promoting factor. These challenges have frequently convinced Member States to agree on intensified co-operation and to build up new structures at the European level. A spill-over effect of economic integration has also been at work. The creation of the single market has *de facto* generated a common security zone encompassing all Member States, in which the free movement of persons, goods and capital has increasingly rendered state borders an ineffective instrument of control. EU policy-making on justice and home affairs matters has also occasionally profited from Member States' efforts to "europeanise" certain issues, either in order to provide a more efficient response to them or to "take the heat off" from increasingly acrimonious domestic debates. Finally, policy-making in the area of freedom, security and justice has become a driving force of its own, with its specific legitimising political discourse as is written in the Commission's "Scoreboard" edition for the second half of 2001, "there is indeed widespread

recognition (both public and political) that the most challenging issues facing our society, such as migration and crime, can only be usefully addressed at the level of the Union rather than by Member States acting alone".

Due to its extraordinary pace of development—and on this point there was also wide agreement both on the panel and in the audience—the EU policy-making in the area of freedom, security and justice has grown in a rather unsystematic and inconsequent way and today resembles very much a patchwork construction. An overall road-map or comprehensive strategy has frequently lacked. The EU policy-making bodies have often hurriedly reacted to real or alleged emergencies, all of a sudden launching initiatives that were considered to be "unripe" only a few weeks before. As a result, major leaps forward have been followed by periods of stagnation or even retreat.

Europol represents a good case in point, as Christoph Ehrentraut and even the Senior Deputy Director of Europol, Dr. Willy Bruggeman, pointed out. The decision to establish a European police office was taken in the early 1990s and, according to Ehrentraut, "the essence of this decision surpassed anything which was achieved in the following years in the field of police co-operation". Yet, even the Europol project has been far from being developed consequently. Europol's competencies and resources, which were initially quite limited, have since been expanded slowly and step-by-step and only from January 1, 2002 will Europol finally be allowed to gather intelligence about all forms of international crime. Additionally, for years Europol has not received adequate support and information from national law enforcement agencies and even today it is doubtful whether it has the financial and human resources to properly carry out the tasks that the media and public opinion expects it to fulfil.

Aside from Europol, either one or both speakers more generally singled out the following deficits and "costs of rapid change". Prof. Monar pointed to the predominance of the security rationale vis-à-vis freedom and justice and to an exaggerated tendency towards restriction and exclusion both against third country nationals and applicant countries. The latter, in particular, have too often been threatened with exclusion, if they did not meet the standards of the EU/Schengen *acquis*. There was, moreover, wide agreement that the area of freedom, security and justice still has deficits as regards democratic control. These result from the EU's AFSJ project having grown in an intergovernmental context with little or no involvement of parliaments and dealing with themes which have always belonged to the domain of the executive branch of the state. The judicial control by the European Court of Justice was also considered to be unduly limited: Jörg Monar and some of the conference participants stressed that this lack of control may weaken the overall legitimacy of the AFSJ project in the middle to long-term. The lack of transparency was also widely criticised. This was deemed to be the result of the rapid pace of development, the numerous "murky" compromises that had to be made in order to launch specific initiatives and a rooted culture of secrecy in justice and home affairs matters.

Both speakers, additionally, mentioned deficits in institutional efficiency, specifically in intra- and inter-pillar co-ordination. In particular according to Christoph Ehrentraut, there are still too many decision-making and discussion levels within the EU, even for legally non-binding decisions. Cross-pillar co-operation also needs to be strengthened in order to avoid the duplication of efforts or the development of different procedures for analogous matters (such as the customs treatment of cigarettes and alcohol, which fall under the competence of the Commission, and that of drugs, which are subject to co-operation in the third pillar). More generally, deficiencies were also seen in the preparation and co-ordination of initiatives and meetings as well as in the lack of a prioritisation of objectives and the non-existence of long-term planning.

All conference participants agreed that the political relevance of the area of freedom, security and

justice is not yet matched by an adequate investment of human and financial resources at the European level. According to reliable estimates, in fact, only 0.2 percent of the EU budget is invested in justice and home affairs and, as a result, the European Commission has had difficulties in acquiring the internal competencies it needs to deal with many issues in this area.

A final deficit, which was time and again emphasised during the two-day conference, is the implementation backlog on the parts of many Member States. Conventions are signed, but not ratified. Too often, official decisions are taken, but not put into effect. Some conference participants specifically lamented a high degree of inertia—in some areas, even hostility— in ministries, police forces, the judiciary and the legal professions against changes imposed by European justice and home affairs initiatives.

To cope with these deficits, several recommendations can be made, most of which received the support of both the speakers and the conference participants. These recommendations are here presented in a nutshell, directly stemming from the above-sketched *cahier de doléances*. Despite the shocking events of September 11, 2001, policy-making in the area of freedom, security and justice needs to find the right balance between the partially conflicting aims of security, on the one hand, and freedom and justice on the other. These two values and, above all, the principle of inclusion should inspire—to a wider degree than it has been so far—the EU's attitude and concrete practice vis-à-vis both third country nationals and applicant countries. European and national parliamentary scrutiny and judicial supervision in the area of freedom, security and justice need to be strengthened as well.

There has to be more openness as well as a better and more substantial involvement of the civil society and intermediary bodies at both the policy-making and the implementation stages of this ambitious political project, which affects everybody's lives. The European Union political and executive bodies, in particular, should develop a better information policy on the aims and the benefits of action taken in the area of freedom, security and justice. To cope with the deficits of institutional efficiency, the European Union is also called to reduce decision-making levels, to adopt problem-oriented and horizontal approaches, to prioritise its own objectives better and, as far as possible, to simplify procedures.

A greater amount of resources—not only money, but also human resources—should additionally be invested in the area of freedom, security and justice. In particular, the conclusions reached at the meeting of the European Council in Tampere (Finland) in October 1999 concerning Europol should be swiftly implemented and Europol should be granted the means—and the cooperation—necessary to fulfil its tasks adequately. Last but not least, the Member States are called to fulfil their obligation—in particular, to implement consistently legally as well as non-legally binding decisions taken at the EU level.

If at least some of these recommended steps are not taken soon, the EU faces the concrete risk that the AFSJ project will lack the EU citizens' support and legitimacy, necessary to implement the unprecedented changes fostered by EU policy-making for the internal security and the judicial environment in which we all live. As the Commission itself recognised in its latest "Scoreboard" report, "the ultimate success of the Tampere project will depend on the level of continuing public support which it enjoys; this in turn requires that it be pursued with a maximum degree of visibility and transparency so that citizens can identify with it as a response to their daily concerns". These considerations apply not only to the decisions taken at the Tampere European Council but, more generally, to the whole project of creating an area of freedom, security and justice within the European Union.

FINAL REPORT
Policy-making in the Area of Freedom, Security and Justice

- Dynamic policy area: quantity and quality have developed to an extent which was not foreseeable ten years ago
- JHA/AFSJ are at the heart of the EU policy-making agenda

DRIVING FORCES
- Institutional laboratories (TREVI, Schengen)
- New transnational challenges
- "Spillover" effect from economic integration
- "Europeanisation" of national problems (e.g. asylum seekers)
- AFSJ itself has become a driving-force with its own legitimising political discourse

PRICE THAT HAS TO BE PAID FOR DYNAMIC DEVELOPMENT
1. Security dominates over Freedom
2. Tendency towards restriction and exclusion
3. Democratic and judicial deficit
4. Lack of transparency
5. Lack of institutional efficiency (particularly, intra- and cross-pillar deficits)
6. Scarcity of EU human and financial resources invested in AFSJ
7. National implementation backlog

RECOMMENDATIONS
1. Strike the right balance between freedom, security and justice
2. Strengthen inclusion of legally residing third country nationals and applicant countries
3. Strengthen EP and national Parliaments' scrutiny and judicial supervision
4. Increase openness, raise public awareness and involve civil society
5. Prioritise goals, simplify procedures, reduce number of decision-making levels, and adopt problem-oriented and horizontal approaches
6. Invest more resources in AFSJ
7. Demand consistent implementation of legally binding as well as legally non-binding EU decisions (obligation of Member States)

Session two:
Police and Judicial Co-operation in the European Union

Chairman:	Dr. Otto von der Gablentz
Speakers:	Dr. Monica den Boer, Prof. Dr. John A. E. Vervaele, Prof. Dr. Bart De Schutter, Mrs Michèle Coninsx, Dr. Willy Bruggeman
Rapporteur:	Ms Nadine Thwaites

Different aspects related to police and judicial co-operation in the European Union (hereinafter "EU") were presented during the second session of this conference. Session II dealt, in turn, with reflections on the nature of EU police co-operation and with an evaluation of Justice and Home Affairs (hereinafter "JHA") policy-making[1]; with judicial co-operation in the EU[2]; as well as with data protection in the area of freedom, security and justice[3]. Two presentations were also made: one concerning Pro Eurojust[4] and the other concerning Europol[5].

The EU system of police co-operation as a multi-level governance system

The Conference globally described the EU system of police co-operation as a multi-level governance system, with the existence of overlapping competencies among multiple levels of governments (that is, supra-national, national, sub-central and inter-regional levels) and the dynamic interaction of political actors across those levels. Furthermore, it is possible that the current intergovernmental EU policing governance may slowly be evolving towards a supra-national system which incorporates federalist elements.

Substantial achievements in the field of JHA

While evaluating the JHA field, several observations were set out. In this respect, the Conference agreed on the fact that substantial achievements had been realised in this area.

These achievements were illustrated, *inter alia*, by the expansion of rules, actors, instruments and fields of action in judicial co-operation matters, from the 1959 Convention on mutual assistance (introducing the obligation to co-operate between States, on the multi-lateral level, in the judicial area) to the 2000 Convention on judicial co-operation (re-insisting on direct co-operation, establishing new practices such as spontaneous exchanges of information between judicial authorities, specific forms of investigation, etc.).

Moreover, this was shown by the existing rules on data protection on the international and European levels, both showing a clear concern, while processing data, for the rights of the individual. It is worth mentioning that each of the existing independent mechanisms on data protection (the Joint Supervisory Authority of Schengen, the Joint Supervisory Board and the Appeals Committee of Europol, the Common Authority of the Customs Agreement) constitute an important "added-value", particularly in the light of the occasional lack of judicial or political control in this area.

1 *M. den Boer, "From Networks to Institutions…or Vice Versa? Opportunities for "Good Governance" in EU Police Co-operation", Conference and paper presented on the occasion of the Belgian EU presidency conference on "Integrated Security in Europe: A Democratic Perspective", Bruges, 14-17 November 2001.*
2 *J. A. E. Vervaele, "Judicial Co-operation in the European Union", Conference given on the occasion of the Belgian EU presidency conference on "Integrated Security in Europe: A Democratic Perspective", Bruges, 14-17 November 2001.*
3 *B. De Schutter, "Data Protection in the Area of Freedom, Security and Justice", Conference and paper presented on the occasion of the Belgian EU presidency conference on "Integrated Security in Europe: A Democratic Perspective", Bruges, 14-17 November 2001.*
4 *M. Coninsx, "Presentation of Pro Eurojust", Conference given on the occasion of the Belgian EU presidency conference on "Integrated Security in Europe: A Democratic Perspective", Bruges, 14-17 November 2001.*
5 *W. Bruggeman, "How can Europol assist in the Effective Organisation of Measures against Transnational European Crime", Conference and paper given on the occasion of the Belgian EU presidency conference on "Integrated Security in Europe: A Democratic Perspective", Bruges, 14-17 November 2001.*

These achievements were furthermore illustrated by the creation and development of Europol and by the recent aspects relating to Pro-Eurojust. Both these bodies represent an "added-value" in the JHA field. They act as additional instruments towards further EU police and judicial co-operation in order to implement new strategies and policies, thus fighting an ever changing and unified organised crime and facilitating and improving judicial co-operation, as well as stimulating the co-ordination of criminal investigation and prosecution.

Criticism towards the field of JHA

At the same time, the Conference indicated that the positive evaluation in the expansion of rules in the JHA field and the positive recognition of rights must nevertheless be accompanied by some criticism.

In this respect, the Conference agreed on the fact that there has been a rapid proliferation of policy instruments and legal regulations in the arenas of police and judicial co-operation, as well as of data protection. Consequently, the rules have become dense, complex, entangled, occasionally overlapping and they may, thus, create confusion. In other words, the abundance of instruments does not constitute a guarantee for a coherent and homogeneous co-operation in the European area. Moreover, this rapid succession of agreements and regulations in the field of JHA has resulted in an insufficient exploitation of the existing range of instruments and in the absence of any in-depth assessment of the current JHA *acquis*. As a result, there is a lack of convergence between institutions, instruments and practices.

Furthermore, the Conference expressed a need to go beyond what has been achieved and to further develop the JHA area as it is yet incomplete and insufficient. For example, if the EU has been successful in extending the forms, instruments, fields of action, etc. of judicial co-operation, thus creating a unique system worldwide; there is nonetheless a need for further action and developments in the area. In this light, conventions and treaties should be negotiated with third countries (a possibility not exploited so far). More operational powers should also exist in the single European area, without throwing away national procedural safeguards. To this end, some legal instruments (such as a European Prosecutor, a European arrest warrant, etc.) are being discussed in order to improve the situation and to offer another framework for judicial co-operation in Europe.

In addition, the Conference indicated some of the changes occurring in the EU system and the need to adapt to new realities. An example of this is the current changing nature of Europol as a result of ongoing challenges facing it, such as an ever changing organised crime reality, taking advantage of judicial limitations and Europol's lack of competence to deal with all crimes. In this light, a draft legal instrument containing possible amendments to the Europol Convention is currently under discussion. If accepted, this draft should allow for Europol's participation in joint investigation teams, the possibility for it to start investigations, enlarge its competencies, etc.

Additional criticisms were put forward in the particular field of data protection, such as the lack of openness in the political decision-making process; the restricted involvement of the judiciary in the elaboration and application of international police co-operation; the importance to combat the proliferation of data-processing and the lack of public transparency in relation to informing and giving the citizen an effective insight of the system of data protection, its aims and possibilities; and the fact that the control of international organised crime through data processing should not be to the detriment of civil liberties.

Recommendations

Several recommendations were enunciated at the Conference in order to respond to current concerns regarding the JHA field.

Generally speaking, the Conference agreed on the need to set a European agenda establishing mid- and long-term objectives in the JHA field. It also stated the need for systematic guidelines for future policy action and for an evaluation of the current system.

Furthermore, the Conference indicated that there should be no system of EU police co-operation without a system of judicial co-operation. There should also be no system of executive EU police co-operation without judicial and democratic control (reference was made to the creation of a European Prosecutor and to the possible imminent establishment of Pro-Eurojust). In addition, there should be no system of EU police co-operation without intersection with "horizontal" cross-border police co-operation, and no system of EU police co-operation without the application of a "good governance" criteria" and a "quality label" for legal instruments in the field of criminal justice co-operation.

In the particular field of data protection, it was mentioned that a need exists for a continuous assessment of international police co-operation, particularly at the pre-judicial stage, to establish norms of legitimate conduct and admissible evidence. A network of public prosecutors across Europe was set out as a workable solution to this need. It was also proposed that Pro-Eurojust could take up this challenge. Moreover, vertical and horizontal guidance of legal action at the national and the European Union levels would be needed, as well as an improvement of democratic control through the mechanisms foreseen in the conventions and through national control over intergovernmental matters and European control over EU matters. The Conference also mentioned that an open and fair collaboration of police and control authorities in the area of data protection is necessary for both the society and the individual. It also stated the need for a balance between data processing in a controlled area of freedom, security and justice and the lawful claim to have the rights of the individual respected.

The Conference agreed that Pro-Eurojust should co-operate as closely as possible with Europol and that it should avoid duplication of tasks and obligations. In this respect, it stressed the importance to unite police and justice activities towards a common European objective as a necessary component in the establishment of an area of freedom, security and justice.

FINAL REPORT
Police and Judicial Co-operation in the European Union

CONTENT:
- Reflections on JHA policy-making, with a focus on police and judicial cooperation in criminal matters
- Evolution of mutual legal assistance in the European Union through conventions, actors, changes
- Global picture of data protection in the area of Freedom, Security and Justice
- Nature, objectives, tasks and working methodology concerning Pro-Eurojust
- Nature and role of Europol, as well as challenges facing it

CONCLUSIONS:
- Acceleration of decision-making in the JHA field
- Despite Tampere and Scoreboard, need for end objectives and consistent evaluation
- Proliferation of rules in the JHA field, lack of convergence of these rules (overlap), need for coherence
- Compensation of "backlog" in judicial co-operation process (new actors, forms, tools and fields)
- Several existing rules on data protection, lack of openness, restricted involvement of the citizen
- Pro-Eurojust acts as a provisional body: pragmatic work to facilitate mutual legal assistance
- Challenges for Europol because of new forms of organised crime, inter-institutional complexity, new security arrangements (terrorism, enlargement)

RECOMMENDATIONS:
- Need for a balance between a controlled area of Freedom, Security and Justice and the respect of the rights of the individual
- Improvements needed in the JHA field. Need for systematic guidelines for future policy action in line with blueprint for further integration in Europe
- System of EU police co-operation in parallel with system of judicial co-operation; "vertical" police cooperation (Europol) should interact more with "horizontal" cross-border police co-operation (Schengen, regions)
- Application of "good governance" criteria
- Executive police co-operation to be complemented with appropriate judicial and democratic control
- Need for a reflection on powers linked to a (future) European Prosecutor
- National safeguards in criminal law systems to be maintained
- Continued need to negotiate standards with third countries
- In the field of data protection, establishment of network of prosecutors, democratic control, open and fair collaboration between actors and control authorities
- More flexibility for Europol (response to new realities)

Session three:
Constitutional and ethical principles of democratic control on national and European Institutions

Chairperson: Mr André Vandoren
Speakers: Dr. Hugo Coveliers, Dr. Steve Peers, Prof. Dr. Erik C.M. Jurgens, Prof. Dr. Stefan Trechsel
Rapporteur: Mr Roland Klages

The third session of the conference was dedicated to a topic that currently receives a good deal of attention: how can integrated security in Europe be reconciled with constitutional and ethical principles of democratic control? The following issues were addressed: the local Belgian example of supervising the police forces[1], democratic control in relation to the EU policy on Justice and Home Affairs by the European Parliament on the one hand[2], and national ones on the other[3], and the place of the European Convention on Human Rights (ECHR) in the Area of Freedom, Security and Justice[4].

I. Control over the police forces on the national level: The Belgian experience as a local example

Hugo Coveliers gave an account of how the state of Belgium has reacted to a demand for external control of the police forces from the late 1980s onwards.
The speaker made the point that the underlying challenge of an external supervision system is to strike the right balance between transparency and confidentiality: transparency, in order to provide for accountable decisions taken, and confidentiality in order to protect the rights and interests of those involved as well as to secure a certain degree of efficiency.
Belgium has provided for a system of external supervision over its police forces. It has instituted a standing parliamentary committee for the supervision of the police forces - the so-called "P-Committee" - the main task of which is to detect flaws in the system. This supervision mechanism is based on the criteria of independence, continuity, efficiency, a public character, openness and specificity. The experience made with this is very good so far, as by way of an external supervision a certain social control is guaranteed. It seems that the Belgian system manages to strike the right balance between efficiency and accountability.
The conference agreed on the fundamental importance of an external supervision over the police forces.

II. Parliamentary control in relation to control of Justice and Home Affairs

European level

Peers gave an account of the present level of involvement of the European Parliament in the domain of Justice and Home Affairs. Between 1993 and 1997 (the entry into force of the Treaties of Maastricht and Amsterdam respectively) the European Parliament was regularly informed on principal aspects and activities, but hardly consulted. This was in line with the provisions of the EU Treaty that did not provide for more rights, as by definition the role of the European Parliament in the rather intergovernmental third pillar was very limited.

1 *"The Belgian experience, a local example" by Hugo Coveliers, Member of Parliament, Belgium.*
2 *"Democratic control by the European Parliament in relation to control of Justice and Home Affairs" by Dr. Steeve Peers, Human Rights Centre, University of Essex, England.*
3 *"National Parliamentary control on Justice and Home Affairs policy making" by Prof. Erik C.M. Jurgens, Member of Parliament, The Netherlands.*
4 *"The relevance of the ECHR and the Charter of Fundamental Rights of the EU for the Area of Freedom, Security and Justice" by Prof. Stefan Trechsel, University of Zurich, Switzerland.*

This has changed with Amsterdam in two respects: first, the matters of visas, asylum, immigration and other policies related to the free movement of persons were transferred into the first pillar, placing them into the supranational EC institutional framework favourable to the European Parliament; secondly, in what is now the remaining third pillar (police and judicial cooperation in criminal matters), the Parliament now has a right of consultation on decisions, framework-decisions and conventions.
Peers advanced the view that the wording of the Treaty suggested that this right of consultation extended also to measures implementing those acts.
Peers also pointed to weak points and concerns of the European Parliament under the present system: given the complexity of the issues involved, the (minimum) three month time limit can, depending on the case, be too short; furthermore, it is problematic that the European Parliament has not yet been given any information on assessments of applicant countries' readiness to apply Justice and Home Affairs obligations: this is particularly important as any country that wants to accede to the EU has, inter alia, to receive the assent of the European Parliament.
A number of recommendations having the effect of increasing participation of the European Parliament were made. These included the issuing of an annual report on data protection and the European Parliament receiving a six month work programme from Europol.
Throughout the examination of the role of the European Parliament, the emphasis lay on the question of which rights the Parliament has and should have, rather than how it exercises existing rights and what constructive contributions it has brought in the field of Justice and Home Affairs. Accordingly, the conference felt that although the role of the European Parliament has improved substantially over the past years, the institution still has long way to go.

National level
Speaker Jurgens pointed to the fact that on the national level, there is a big discrepancy between parliamentary control in purely national matters and in matters relating to European issues. While the former are subject to more or less strict democratic scrutiny, there is a lack of transparency, an absence of democratic scrutiny and undue haste as far as decision making in the Justice and Home Affairs Council is concerned.
The point was made that if decisions taken in the sensitive field of Justice and Home Affairs are not based on a broad and informed consensus among the citizens, they run the risk of backfiring and upsetting the acquis of the Union.
It was acknowledged that increasing efforts were being made to render the process of decision making more transparent. In this regard the creation of "Parlopol" in June 2001 was welcomed. "Parlopol" is a network of parliamentarians that seeks to coordinate scrutiny in national Parliaments of decisions of the JHA-Council.
The conference agreed that an increasing effort had to be made to strengthen parliamentary control in this regard. It was suggested that governments should seek to consult their parliaments *ex ante*, before taking decisions on the EC/EU level. Naturally, such mechanisms have an incidence only in the national legal orders of the Member States in that the internal legal order is not a matter of Community law.
Furthermore, the issue was raised by the speaker, and subsequently endorsed by the conference that the whole of the remaining third pillar should be communitarised as the supranational Community framework provides for better procedures, notably regarding the participation of the European Parliament and judicial scrutiny by the Court of Justice.
Finally, speaker Jurgens pleaded for an extension of Europol competences to include operational competences. This be accompanied by the integration of Europol into the first pillar. Eurojust should also be integrated into the first pillar.
The conference received these proposals favourably.

III. Fundamental and Human Rights in the Area of Freedom, Security and Justice

The final intervention was dedicated to the question of fundamental and human rights in the Area of Freedom, Security and Justice.

Speaker Trechsel first gave an account of several concrete examples of problems to be solved such as issues of data protection and problems related to a "Euro-warrant". He then turned to the recurring question of an accession of the EU to the European Convention of Human Rights (ECHR), pleading in favour of an accession, with the argument that this would provide for a more effective and complete protection of fundamental rights. The Union should overcome its doubts and fully integrate itself in the ECHR legal order. This would inevitably have to be accompanied by a clarification of the relationship between the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg in order to eliminate for the future the problem of diverging interpretations of the same fundamental rights.

The other members of the conference seemed to endorse this, however, it was also pointed out that the Luxembourg Court has, over the years, developed a substantive body of case law on Human Rights in the Community context, that is part of the *acquis communautaire*, and that the cases of diverging interpretations have, thus far, in fact been minimal. As for the relationship between the two Courts a clarification was welcomed, as recent cases, notably by the Strasbourg Court, might be interpreted as going into the direction of a conflict, which would, according to the conference, be regrettable.

The conference furthermore seemed to agree that although the EU charter on fundamental rights, adopted at the summit of Nice in the form of an interinstitutional agreement, might be seen as a first step towards a more visible EC/EU human rights policy, it neither in scope nor in form reaches the level of protection guaranteed by the ECHR.

Finally, the conference received favourably the idea of a European Criminal Court, this being necessitated by the Union's expansion into the field of criminal law with the creation of Eurojust and the expansion of competencies of Europol.

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Constitutional and ethical principles of democratic control on national and European Institutions

CONTENT:

- Belgian example: Committee P, external supervision over the police forces, which can be considered as a sound means to maintain balance between transparency and confidentiality.
- Parliamentary control
  - **EC/EU level:** Role of the European Parliament in relation to Justice and Home Affairs (JHA) decision making: increasing due to the communitarisation of the JHA issues, like asylum.
  Growing scrutiny of the European Parliament in the legislative process, but limited scrutiny of operational activity
  - **National level:** Scrutiny by national parliaments is hampered. Area remains predominantly intergovernmental (and dominated by the executive).
- JHA issues very sensitive to human rights – relevance of the European Convention on Human Rights (ECHR)

CONCLUSIONS:

- Good experience with P-Committee
- Lack of control of the JHA-Council both by Legislator (National and European) and Judiciary (mainly European)
- Communitarisation of parts of the third pillar at Amsterdam welcomed
- Intergovernmental form of cooperation in JHA no (longer) adequate form of European integration
- Human Rights control both by European Court of Justice (Luxembourg) and European Court of Human Rights (Strasbourg) – however, delimitation of competences not always clear.

RECOMMENDATIONS:

- External supervision over police forces essential
- More communitarisation required: Supranational Community framework would provide for better procedures, notably regarding the participation of the European Parliament and the Court of Justice
- Europol and Eurojust should be fully integrated into the Community system. Europol should receive operational competences
- EU negotiation with accession countries is a good opportunity to review its own democratic standards
- PARLOPOL (cooperation between European Parliament and national Parliaments in JHA) to be encouraged and stimulated

Session four:
Integrated Security: Cross-Pillar Approach and Enlargement

Chairperson:	Prof. Dr. Dieter Mahncke
Speakers:	Mrs Cesira D'Aniello, Mr Luc Vandamme, Mr Jacek Saryusz-Wolski
Rapporteur:	Mr Christopher Reynolds

The pursuit of an area of freedom, security and justice on the one hand, and the quest for a truly integrated approach to European security on the other remain key challenges for the EU. Indeed, the three speakers in the conference's final session provided ample evidence of the diversity of both the challenges that lie ahead, and of the appropriate responses. Speaking under the heading of *"Cross-Pillar Approach and Enlargement"*, the issue of integrated security was tackled in its broadest sense, examining issues relating to EU civil crisis management, the Schengen Agreement on the abolition of internal EU border controls, and the strategic opportunities presented by Eastern enlargement.

Security was shown to be not simply a question of the internal or the external, but rather a complex concept of interdependency with external and internal dimensions proving mutually reinforcing. Nor was security portrayed as the simple preserve of the nation state. Only through cooperation and action beyond the unit of the nation state, be it intergovernmental or supranational, crisis management or internal policing, could Europe's security and stability be ensured. A common theme equally proved to be the EU's potential strength and influence as a security actor. With a strong international profile and vast resources at its disposal, expectation of the Union is high, yet its capacity to act, particularly in the field of crisis-management, is often undermined by disputes of coordination, competence and jurisdiction both within and between EU institutions and member states. This problem is compounded by both the inherent mixed-pillar nature of the crisis-management "tool-kit", and the stress that the speed of recent developments at the EU level has placed upon the system.

Only a clearer definition of responsibilities in civil crisis management could avoid such problems and power struggles, and serve to overcome the clear contradiction in the need for multi-dimensional, cross-pillar responses from a policy instrument located in the intergovernmental CFSP pillar.

It was further suggested that enlargement could prove seminal in improving the EU's strategy for achieving security and stability and for enhancing European security *per se*, more generally. Thus as threats to security globalise – as has been so poignantly demonstrated since September 11th - then so too must our response to them. Enlargement would, it was argued, strengthen the EU geopolitically, extending an area of freedom, security and justice beyond its current borders.

Indeed, the issue of these borders, and more specifically cooperation regarding their policing, was highlighted as one of the key focuses of the Belgian Presidency's attention, as illustrated by the *"High Impact Operation"* held in collaboration with Candidate countries. Fulfilling Schengen requirements in border management requires both internal *coordination*, and external *cooperation*; such cooperation proving how the EU's "them and us" attitude has simply become one of "us" – an attitude of unity and inclusiveness that is symbolic of the historic imperative to enlarge the Union.

Furthermore, in the same way that the acceptance and application of the Schengen *acquis* is a dynamic and progressive process, so too is the pursuit of true European security. Thus while our "risk perception" may have increased in the wake of September 11th, the walls around Fortress Europe must not. For the EU, the *"New York Effect"* must be a catalyst for enlargement, not an excuse for a "historical abdication". The impetus provided for internal progress in the field of Justice and Home Affairs must spill-over externally, providing a historical momentum for expansion and for exporting stability far beyond the EU's current borders.

Thus while the EU should open itself externally, it should also however reform itself internally. Only by surmounting its institutional weaknesses and differing cultural traditions will it be capable of the rapid and effective crisis management to which it aspires. Only by overcoming the system's current complexity and opacity will questions surrounding both its ability and accountability be answered. Indeed, central to all these questions is the ongoing issue of legitimacy. As EU competence in the field of Justice and Home Affairs grows, maintaining the permissive consensus that characterised European integration until the early 1990s will only be achieved if the EU can become an effective, democratic, transparent and accountable actor. Then, and only then, will the EU ensure the support of the citizens that it ostensibly exists to serve and protect in the years to come.

FINAL REPORT
Integrated Security: Cross-Pillar Approach and Enlargement

KEY POINTS:

- Crisis-management = key challenge for EU: Disputes of co-ordination, competence and jurisdiction. But means at disposal can be used: high international profile and expectation
  - Speed of developments = system is under stress
- Instruments of EU civil crisis-management are by nature mixed-pillar competence:
  - Lack of co-ordination or competence disputes within and between EU institutions, and between the EU and Member States' jurisdictions, may result in slow, inefficient decisions
  - Problems exaggerated by the multiplicity and proliferation of actors, e.g. PSC, COREPER, GAC.
- Schengen: Evolutionary process has led to "hybrid" situation post-Amsterdam, with mutation in judicial, institutional and political fields
  - Acceptance and application of Schengen acquis is dynamic and progressive process
- Border cooperation at core of Schengen acquis, and Belgian Presidency priority: Border management strategy includes measures at borders themselves but equally away from border, e.g. repatriation issues. Importance of facilities, training and equipment, information exchange
- "New York effect" must not divert the EU's attention away from strategic importance of Enlargement, nor be used as reason to increase benchmarks for candidates.

CONCLUSIONS:

- Importance of clear definition of responsibilities in EU civil crisis management – or may lead to power struggles between actors, adversely affecting efficiency of response system, and reduce transparency / accountability
  – necessity of co-ordination both between and within EU institutions, as well as between the EU and Member states. Contradiction between civil crisis management as part of ESDP, and therefore CFSP, and its inherent inter-pillar nature

- As threats to security globalise so must our response: Enlargement can strengthen the EU geo-politically – the Union must avoid "historical abdication'. Impetus given to JHA must be repeated regarding the cross-pillar and multi-dimensional approach to security, and more particularly to enlargement

RECOMMENDATIONS:

- Clear definition of tasks in EU crisis management and "synergy" in their use, supplemented by a culture of openness and transparency within and between institutions
  – co-ordination below GAC must be through body with authority, ability and resources (PSC v Coreper)
- In view of subsidiarity considerations, anti-immigration and cross-border crime measures should primarily be pursued inside MS territory, with enhanced activity. National border controls may need to be maintained for limited period, according to what seems appropriate in a given situation.
- EU must avoid "historical abdication" and focus on long-term strategy for stability - use enlargement as the most basic tool of integrating and ensuring European security.
- Terrorist attacks to be used as catalyst for enlargement and as way for EU to control its own destiny.

Conclusions by Dr. Monica den Boer

Building an Area of Freedom, Security and Justice in the EU: Noises from a Crowded Construction Site

Dynamic Development…At What Price?

Justice and Home Affairs Cooperation in the EU has been characterised as a dynamic and expansionist area of EU-policy making. It now even occupies one of the most prominent places in the Commission's current legislative agenda. The constant generation of policy initiatives and institutional structures has been dictated by the logic of abundant incrementalism, marked by the hurried launch of policy initiatives at very short intervals, though often succeeded by painstaking negotiations on legal instruments within the multilateral Council bureaucracy. An Area of Freedom, Security and Justice is gradually being built, in spite of the absence of a precise description about legal objectives and institutional mandates. The lack of a detailed design has frequently been responsible for causing frictions along the way, which can be illustrated by the numerous scrutiny reservations in draft documents and protocols attached to various legal instruments. That situation has however not prevented Member States from committing themselves to several Action Plans and the Tampere 'Milestones'. Amidst these ambivalent developments, it is difficult to predict how solid the AFSJ construction will be in ten or twenty years' time. More architectural guidance may be required to guarantee more inner- and inter-pillar consistency, and to embed AFSJ in encompassing patterns of European integration.

Laying the Fundament

Several authors in this book have endeavoured to draw a historical construction of the rationales concerning the Area of Freedom, Security and Justice (AFSJ). Except for wanting to create a balance in the political union, the necessity to tackle trans-national security challenges has been at the heart of strategic considerations to anchor Justice and Home Affairs Cooperation (JHA) within the EU. From the mid seventies onwards, terrorism and drugs have dominated the scene, followed later by other phenomena which demand solid international collaboration: a security deficit resulting from the abolition of internal border controls, refugees and asylum-seekers, and internationally active criminal networks. Intricate and volatile security patterns have been paralleled by other developments, such as the spill-over effect from economic integration and the internationalisation of flows of capital and electronic data-processing. Despite the common political will expressed by the government leaders at the Maastricht Summit in 1991, the construction of the 'Third Pillar' has frequently been hampered by national sovereignty instincts of the Member States. But vice versa, Member States are known for their efforts to 'europeanise' their domestic interests, which has occasionally been due to restricted national problem-solving capacities.

Erecting the Walls

The AFSJ, which was established with the adoption of the Amsterdam Treaty on European Union in 1997, may even be regarded as a fundamental Treaty objective. One of the principal rationales to create the AFSJ was to enhance the legitimacy of the EU in the eye of the citizens. In view of this necessity, the Tampere Summit, which was devoted exclusively to JHA-affairs, produced proposals of a high political-symbolic nature. On the other hand however, when we focus on the proposals that were raised in the security domain, the Tampere Conclusions paved the path for further institutionalisation (Eurojust, European Police College, joint investigation

teams, Task Force of Chiefs of Police). The latter can be considered as an attempt to deepen and to consolidate the AFSJ.

Meanwhile, the Justice and Home Affairs arena has gained complexity due to the multiplication of fora which play a role in the decision-making process. On the one hand, the demanding working hierarchy and the wide mandates under Title IV have given rise to the creation of a Strategic Committee for Immigration, Frontiers and Asylum, and to the establishment of a Horizontal Group on Drugs to coordinate the anti-drugs efforts against the pillars. On the other hand, the incorporation of Schengen and the incumbent enlargement process have been responsible for the insertion and creation of more Working Parties and Expert Groups within the Third Pillar.

Judging by the evaluations which are drawn up by the European Commission – in the form of a bi-annual Scoreboard – it appears that Member States seem to resist swift implementation of the legal instruments adopted by the JHA-Council. Hence, the implementation record within the EU is still rather diffuse. Another observation is that the AFSJ has been strongly driven by the security rationale, which may have led to restriction and exclusion of third country nationals and of applicant states.

The Salvation of Scaffolding

Whilst hectic building activities take place at several levels and by numerous actors, the absence of a joint plan occasionally causes trouble. (New) institutions, each of which occupy at least one room within the building, seek to expand their interests and want to gain wider competences, which may be at the expense of other institutions. In this context, it may be instructive to look at the fuzzy demarcation of competences between OLAF and Europol, or between the European Judicial Network (EJN) and (pro-)Eurojust. Meanwhile, other levels of governance are added onto the European layer, and new chores are being added onto the list of mandates. Luckily the scaffolding, which was hastily drawn up around the emerging building, prevents the construction workers from being pushed out.

The construction of the AFSJ seems to be exposed to contrastive dynamics: on the one hand, we witness a process of deepening in the sense of institution-building and consolidation of (binding) regulatory frameworks; on the other hand, we may observe a process of widening in the sense of expansion of mandates, flexible responses to new security challenges, and transposition of normative expectations to candidate countries.

Moving From Loft to Roof?

The ultimate question about the future construction of the AFSJ concerns the direction of progress. Critical observations about the state of affairs at the construction site reveal that we are building without an architectural design: An AFSJ which shows similarities with the Tower of Babylon, or rather with Hieronymus Bosch's famous painting "The Garden of Earthly Delights." Illuminating as these metaphors may be, they fail to do justice to the constant reflections about the working structures and the objectives that are at play.

Time has come to insert the future of AFSJ more firmly into the wider debate about the direction of European integration. Some argue that there is a need for profound benchmarks which function as navigation pointers for the future development of the EU, which may have a strong impact on the development of AFSJ. The latter neo-federalist ideology, which is proclaimed by Fischer, Cohn-Bendit, and several others, presupposes an explicit and constitutionally anchored decision about the division of competences between the different levels of governance and authority. In the eyes of others, however, the need for "end terms" of "finality" within the EU may be a rather pointless exercise, as European integration will follow its own incremental logic: this "Schuman-Monnet" approach views the process of integration as more impor-

tant than the final objective.[1] Whilst we are drifting towards the European Convention, it already becomes patently clear that opinions between Member States differ widely when it concerns blueprints for future European integration.[2]

Placing Panes and Doors

Light is an essential element in every house. If not, the house becomes a fortress… Light and transparency are two related commodities. Yet, the lack of transparency has been the subject of one of the most persistent complaints about the functioning of the JHA decision-making system. This complaint is paralleled by repeated misgivings about the democratic deficit, the judicial deficit, and the fragmented reference to basic principles of human rights.

Several guarantees are thus required for a balanced Area of Freedom, Security and Justice. The following recommendations could be translated into an architectural design for the future establishment of AFSJ:

- The respect for human rights remains the fundamental normative basis for each practice, (legal) instrument, institution and process within AFSJ. The EU Charter on Fundamental Rights ought to become binding in its entirety.
- Participation in the 'risk society' and action upon threat perceptions should not culminate in a European surveillance society and should not be at the expense of fundamental rights and freedoms, and democratic rights. Data protection should be given particular importance as the interference with personal privacy is (likely to be) increased: uniform standards of protection should be introduced throughout countries that participate in international data-exchange systems.
- The AFSJ should beam more inclusiveness: candidate countries should at least be involved in a decision-shaping manner, and third country nationals should be able to benefit more from free movement provisions within the EU.
- Democratic control should be consolidated at all levels, to the extent that:
  - All Parliaments involved acquire adequate and timely information.
  - The European Parliament and the National Parliaments should reinforce interparliamentary cooperation in the form of Parlopol.
  - Despite improvements in the position of the European Parliament with regard to AFSJ-matters since the inception of the Amsterdam Treaty, co-decision should become the general procedure for all matters concerned through further communautarisation.
  - Institutions which exchange sensitive information, such as Europol and Eurojust, should be subject to (more) democratic control. National models for parliamentary control on policing activities could possibly be employed at EU-level.
- Judicial control should be enhanced, e.g. by widening the competences of the European Court of Justice with regard to Title VI matters. Although sensitive in view of the maintenance of national sovereignty, the expansion of EU competences in the field of internal security may be complemented by the gradual establishment of a European Rechtsstaat. This can be done by promoting the construction of a European Judicial Area which includes core elements such as:
  - A European Criminal Court
  - A European Public Prosecutor
  - A European Criminal (Procedure) Law.

These elements may be considered as complementary to a future extension of Europol's mandate with an operational one.

1 *J.Q.Th. Rood, Een einde aan de Europese integratie? Kanttekeningen bij het staatscentrisch paradigma in het integratiedebat, Notitie 16, Instituut Clingendael, The Hague, 2001, p. 14.*
2 *European Voice, 6-12 December 2001, p. 2.*

- Institutions should function effectively and efficiently:
    - Institutional mandates may be subject to gradual convergence;
    - The Council working methods should be revised and/or rationalised (Haga process, Laeken Summit);
    - Inter-pillar cooperation should be further encouraged (e.g. in view of roles and respon sibilities concerning crisis management, drugs and data-protection);
    - Performance indicators should be developed for institutions like Europol and Eurojust, which may enhance their accountability.
- Legal instruments should acquire a higher level of mutual legislative coherence, e.g. in the area of border management and data protection.
- Member States should be encouraged to implement legally binding as well as legally non-binding EU-instruments.
- Mutual trust, the exchange of knowledge about practices, and reciprocity between Member States are crucial preconditions for a well-oiled functioning of judicial and police cooperation.
- More transparency should be introduced at all levels of decision-making, also in early policy-making stages.
- All strata of civil society ought to be encouraged to participate in the debate about the current and future developments with AFSJ: this will enhance a broad and informed consensus amongst citizens and strengthen the social legitimacy of AFSJ.
- Subsidiarity should remain an important rationale for the distribution of competences between EU institutions and national, regional or local law enforcement authorities.

A gradual process of growing Community competence – also in the field of police and judicial cooperation in criminal matters - may help to achieve the transformation of some of these normative cornerstones into reality. Given the importance of free movement of persons, security and justice for citizens' support for the EU-project, there is serious reason to embroider these issues into the wider debate about a possible "constitutionalisation" of the EU, which will follow upon the Laeken Summit declaration of December 2001.

An initiative under the authority of the Belgian EU-Presidency
July – December 2001

Conference

**Integrated security in Europe,
a democratic perspective**

Bruges, 14 - 17 November 2001

PROGRAMME

Thursday 15 November 2001

09.30 - 10.00 Conference-Opening
Mr Antoine Duquesne, Minister of the Interior, Belgium
Mr Patrick Zanders, Chairman of the Scientific Committee
Mr Paul Breyne, Governor of the Province of West Flanders
Mr Charles Elsen, Director General, General Secretariat of the Council of the EU
Dr Otto von der Gablentz, President of EULEC
Dr Marc Vuijlsteke, Director General for Development, College of Europe

Start of the Press Conference (in parallel)

**Morning Session:
Policy-making in the Area of Freedom, Security & Justice**

Chairwoman: *Dr. Letizia Paoli, Department of Criminology, Max Planck Institute for Foreign and International Criminal Law, Freiburg*

Rapporteur: *Ms Christine Stockhammer, Teaching Assistant, College of Europe*

10.00 – 11.00 The Area of Freedom, Security & Justice:
Institutional and Substantial Dynamics in the perspective of the European Union
Prof. Dr. Jörg Monar (University of Sussex/College of Europe)

11.15 – 12.00 The Area of Freedom, Security & Justice in the perspective of Member States
Dr. Christoph Ehrentraut, Senior Principal, Ministry of the Interior, Germany

12.00 – 12.30 DISCUSSION

Afternoon Session: Police and Judicial Co-operation in the European Union

Chairman: *Prof. Dr. Brice De Ruyver, Expert Advisor of the Belgian Prime Minister*

Rapporteur: *Ms Nadine Thwaites, Teaching Assistant, College of Europe*

14.00 – 14.30 From Networks to Institutions? Opportunities for Good Governance in EU Police Co-operation
Dr. Monica den Boer, Associate Professor Public Administration (Tilburg University)/ Policy Director EULEC

14.30 – 15.00 Judicial Co-operation in the European Union
Prof. Dr. John A.E. Vervaele, (University of Utrecht/ College of Europe)

15.30 – 16.00 Data Protection in the Area of Freedom, Security and Justice
Prof. Dr. Bart De Schutter, Chairman of BDS (Schengen Common Control Authority)

16.00 – 16.15 Presentation Pro EUROJUST by Mrs Michèle Coninsx, President of Pro EUROJUST

16.15 – 16.30 Presentation EUROPOL by Dr. Willy Bruggeman, Senior Deputy Director of EUROPOL

16.30 – 18.00 DISCUSSION

Friday 16 November 2001

Morning Session: Constitutional and ethical principles of democratic control on national and European Institutions

Chairman: *André Vandoren, President, Committee Parliamentarian Control on Police, Belgium*

Rapporteur: *Mr Roland Klages, Teaching Assistant, College of Europe*

09.00 – 09.30 The Belgian experience, a local example.
Dr. Hugo Coveliers, Member of Parliament, Belgium

09.30 – 10.00	Democratic Control by the European Parliament in relation to Control of Justice and Home Affairs Dr. Steve Peers, Human Rights Centre, University of Essex
10.30 – 11.00	National Parliamentary Control on Justice and Home Affairs Policy Making Prof. Dr. Erik C.M. Jurgens, Member of Parliament, The Netherlands
11.00 – 11.30	The Relevance of the ECHR and the Charter of Fundamental Rights of the EU for the Area of Freedom, Security and Justice Prof. Dr. Stefan Trechsel (University of Zürich)
11.30 – 12.30	DISCUSSION

Afternoon Session:
Integrated Security : Cross-Pillar Approach and Enlargement

Chairman:	*Prof. Dr. Dieter Mahncke, Director of European Political and Administrative Studies, College of Europe*
Rapporteur:	*Mr Christopher Reynolds, Teaching Assistant, College of Europe*

14.00 – 14.30	Interactions between Common Foreign- and Security Policy related to Civil Crisis Management Mrs Cesira D'Aniello, EU Situation Centre/ Crisis Cell – Policy Planning and Early Warning Unit, Secretariat General of the Council of the EU
14.30 – 15.00	Schengen and Integration of Schengen in the EU with a View to the Enlargement Process Mr Luc Vandamme, Head of Division, Council of the EU
15.00 – 15.30	Integrated Security and Enlargement Mr. M.Jacek Saryusz-Wolski, Former Secretary of State, Poland; Chairman of the College of Europe Foundation, Natolin, Poland
16.00 – 17.30	DISCUSSION and CONCLUSIONS: Forum of the 4 Session Chairmen; Presided by Dr. Piet W. Akkermans, Rector of the College of Europe

CURRICULUM VITAE

OF THE SPEAKERS, CHAIRPERSONS AND RAPPORTEURS

Since July 2001 **Dr. Piet Akkermans** has been Rector of the College of Europe. From September 1993 till September 2001 he was Rector of the Erasmus University Rotterdam, the Netherlands, an institute with about 20.000 students. Dr. P. Akkermans put an emphasis on quality assessment and broadening the scope of that university: some new departments and disciplines have been added. Being a Professor of constitutional law P. Akkermans has also been Dean of the law faculty of his university (1986 till 1993, with an interruption of 2 years). In his scientific work he concentrated on human rights, constitutional models and educational law. The last subject interested him because he has been a teacher of classics in secondary education in Rotterdam. In fact, his Ph.D.-thesis was on the constitutional right to education in the Dutch Constitution (Utrecht 1979). He has also been a member of the Dutch Advisory Council on Education, the main advisory body on education for the Dutch government. Since 1993 Dr. P. Akkermans has been Secretary-General of the International Association of Constitutional Law, a worldwide network of constitutionalists. He is a member of the board of editors of several scientific reviews, such as the European Journal of Public Law.

Dr. Willy Bruggeman: Military Academy, Gendarmerie Academy, Doctor in Criminology, Commander of the region of the Gendarmerie for Flanders Gent (1993). From 1972 to 1993, he has been responsible for several positions in the Gendarmerie: Director of the Judicial Direction General Staff of the Gendarmerie in Brussels within the national responsibilities of police anti-drugs activities (1972-1975), Director of the Central Bureau of the Belgian Gendarmerie including the National Drugs Bureau (1975-1987), Director General of the operational division of the staff of the Gendarmerie in Brussels (1988-1993), etc. In 1994, he was appointed to the position of Assistant Co-ordinator of the Europol Drugs Unit in The Hague (Netherlands). After having been appointed as acting Deputy Director of Europol in 1998, he has been appointed as Deputy Director of Europol in 1999.

Michèle Coninsx holds a Bachelor's degree in law, a Bachelor's degree in Criminology and also an Upper secondary school teaching degree (law) (Vrije Universiteit Brussel, Belgium). She has been instructor-expert with the Civil Aviation Administration Belgium (Ministry of Transport) in the fields of civil, judicial, constitutional, penal, criminal procedure, air law and aviation security. She has also been anti-terrorism instructor in the air with the National Aviation Security Committee (CAA). She has been Deputy (Substitute) Public Prosecutor at the Prosecutor's Office of the Court of First Instance of Brussels (Belgium). She has been a member of the organised crime, serious larceny and anti-terrorist unit, responsible for armed robbery cases, terrorism, aviation crime, forgery and the application of the Schengen Agreement, etc. She has been - and is still - guest speaker at several international conferences. She has given courses on combating terrorism in the air and aviation security abroad at official aviation bodies, in the framework of the International Civil Aviation Organisation. She acts presently as national magistrate specialised in terrorism (since November 1997). She is also Belgian Representative of Pro-Eurojust (since March 2001) as well as Chairman of Pro-Eurojust (since July 2001).

Dr. Hugo Coveliers holds a Doctor of Law and a Master of Criminology from the University of Ghent. He is a lawyer at the bench of Antwerp. Since 1986 he is a Member of Parliament, where he is now the president of the Flemish Liberal and Democrats fraction in the House of Representatives. For four years he has been a Senator and President of the Flemish Liberal and Democrats fraction in the Senate. He has been a member of the Parliamentary commission on justice and of the commission of the Flemish Parliament on media. He has also been secretary of the special inquiry commission concerning the way mayor crime and terrorism is combated in Belgium and he was been an international observer for the elections in Namibia in 1989. He has also worked as the reporter of the inquiry commission for organised crime. Dr. Coveliers is the author of a couple of books on Belgium security and the Bende commission.

Cesira d'Aniello holds a degree in Political Science and International Relations from the University of Rome and an MA in International Relations and Economics from the John Hopkins University School of Advanced International Studies in Washington, DC. From 1983 to 1991, Ms d'Aniello worked for the European Commission delegation in Washington, DC, taking responsibility for issues relating to the fields of information and communication. Between 1991 and 1994 Ms d'Aniello worked as a press officer for the General Secretariat of the Council of the European Union, and in June 1994 moved to Common Foreign and Security Policy (CFSP) section of the General Secretariat's Directorate-General for External Relations where she specialised in the institutional, legal and financial aspects of CFSP decision-making. Since 1999, Ms d'Aniello has been a member of the Council's Policy Planning and Early Warning Unit (PPEWU) where she works on the development of the Joint Civilian-Military EU Situation Centre / Crisis Cell.

Dr. Monica G. W. den Boer, PhD in Law (European University Institute, Italy). She has been researcher (Project "A System of European Police Cooperation after 1992") at the University of Edinburgh (Scotland) and has done research secondment to Parliamentary Inquiry Committee Police Investigation Methods. In addition, she has been "Post Doc" researcher at the Netherlands Institute for the Study of Crime and Law Enforcement (NISCALE) in Leiden (Netherlands) and has been senior lecturer in Justice and Home Affairs at the European Institute of Public Administration (EIPA) in Maastricht (Netherlands). She is presently associate professor of Public Administration at the Centre for Law, Public Administration and Informatisation at the University of Tilburg in the Netherlands. She has published articles, chapters and working documents in the fields of Justice and Home Affairs, Co-operation in the European Union, cross-border policing and organised crime, the Schengen Agreements, legal semiotics, governance, accountability and information and communication technology.

Prof. Dr. Brice De Ruyver, Lic.Iur., Lic. Crim., Ph.D. Crim., is the current president of the Department of Criminal Law and Criminology of the Universiteit Gent, and director of the Research Group Drug Policy, Criminal Policy and International Crime. He has been an expert to several Belgian parliamentary inquiry committees (human trafficking, drug policy and the Dutroux case) and has conducted numerous research projects, inter alia for the European Commission and several Belgian Ministries (Justice, Home Affairs, Scientific Affairs, Foreign Affairs, Development Co-operation,…). He is currently an expert of the Prime Minister. He participates in several international networks and has published widely in the areas covered by his Research Group.

Prof. Dr. Bart De Schutter, Masters of Laws (LL.M.) (Harvard, USA), Lic. En Sc. Pol. & Diplom. (MA in Pol. & Diplom. Sc.) (Université Libre de Bruxelles, Belgium), PhD in Law (Vrije Universiteit Brussel, Belgium). He has been former Dean of the Faculty of Law of the Vrije Universiteit Brussel (1974-1978) and former Rector of the same university (1978-1982). He is now full professor at the Faculty of Law of the Vrije Universiteit Brussel, Director of the Centre for the Interaction of Law and Technology and Director of the Programme on International Legal Cooperation (PILC). He is also visiting professor in Canada, the United States, etc. He is the Chairman of the Schengen Common Control Authority, a Member of Europol Common Control Authority as well as a Member of the Belgian Data Protection Board. He has published extensively in international law, international criminal law, humanitarian law and computer law and information security.

Dr. Christoph Ehrentraut, MPA, studied in Germany where he took his First State Examination in Law at the University of Bonn and worked as a Teaching and Research Assistant at the Institute for Criminal Law and Criminal Procedure. He pursued his studies as visiting Scholar at the University of California, Berkeley. He was awarded PhD in Law from the University of Bonn. After having worked as Associate lawyer at the Chamber Court in Berlin, he joined the Federal Ministry of the Interior, Bonn where he has worked in the Unit for Constitutional Law as well as for the Coordination of the EU Presidency and at the Permanent Representation at the EU, Brussels. For three years he also joined the European Commission (Unit for Police Cooperation and Fight against organised Crime). He has pursued further studies and obtained a Master of

Public Administration from the Kennedy School of Government, Harvard University (Mid Career Program). He is currently Regierungsdirektor, at the Federal Ministry of the Interior, Berlin (Unit for European Harmonization, European and International Asylum Law).

Prof. Dr. Erik Jurgens holds a degree in public law from the University of Amsterdam. He is currently President of the National Organisation of Institutions for Mental Health, Member and Vice-President of the Upper House of the States-General (Parliament), Member of the Netherlands delegation to the Parliamentary Assembly of the Council of Europe and of the Western European Union. At present, he is Vice-President of that Assembly. Past positions have included Chairman of the Board of the Netherlands Broadcasting Corporation, a Professor of Constitutional Law and Media Law at Maastricht and Amsterdam and Member of the Lower House of the States-General (Parliament). In addition, Erik Jurgens is President of the society for media and- and communication law and Chairman of Press Now, an organisation that seeks to help independent media in former Yugoslavia.

Roland Klages holds a degree in law from the University of Heidelberg and a Master in Advanced European Legal Studies from the College of Europe, Bruges. He has studied law at the Universities of Heidelberg and Geneva and at the College of Europe. At present, he is working as a teaching assistant in the Department of Legal Studies of the College of Europe. His areas of main interest include the EC Internal Market, Judicial Remedies and the Area of Freedom, Security and Justice. He has published in the field of EC law and is currently working on a PhD thesis on the role of the European Court of Justice in the Area of Freedom, Security and Justice.

Professor Dr. Dieter Mahncke grew up in Africa where he studied History and Economic and Political Sciences at the University of Cape Town and at the University of North Carolina. He pursued his studies in International Relations, International Economics and International Law at the John Hopkins University in Washington D.C. and at the School of Advanced International Studies in Bologna, where he obtained his Master of Arts. He became a Fellow at the University of Washington and continued studying at Bonn University, where he was awarded Ph.D. in Political Science from the School of Advanced International Studies. After having worked as a Research Assistant, he became Professor at the University of Munich and at the University of Hamburg. He has been a Special Advisor to the Federal President in Bonn and to the Under-Secretary of Defence, as well as Deputy Director of Policy and Planning to the Ministry of Defence. He has extensive academic experience at the Universities of Washington D.C., Mainz, Bonn, Munich, Hamburg, Dresden, and the College of Europe (Bruges). He has been Visiting Professor in several other places. He is currently Director of the Department of Political and Administrative Studies, at the College of Europe.

Prof. Dr. Jörg Monar studied at the University of Münster, Institut d'Études Politiques de Paris and the University of Munich where he was awarded Dr. phil. He pursued his studies at the European University Institute (Florence) where he obtained his Dr. rer. pol. He became Research Associate, then Research Fellow at the European University Institute (Florence). After having worked as an Assistant Professor he became Associate Professor at the College of Europe (Bruges). He has been Director of the Institut für Europäische Politik (Bonn). From 1995 to 2001 he was Professor of Politics and Director of the Centre for European Politics and Institutions at Leicester University. He is currently Professor of Contemporary Studies and Co-Director of the Sussex European Institute, University of Sussex as well as Professor at the College of Europe (Bruges and Natolin). Other professional activities include Member of the Scientific Board of the Institut für Europäische Politik (Bonn), Member of the Council of the Federal Trust for Education and Research, Member of the Academic Council of the College of Europe (Bruges), Chairman of the European Association of Researchers in Federalism (Tübingen), Specialist Advisor to the House of Lords and Co-editor of the "European Foreign Affairs Review".

Dott. Letizia Paoli, Ph.D. studied Political Science at the University of Florence and at Georgetown University, Washington, DC. She was awarded a Ph.D. in Social and Political Sciences from the European University Institute, Florence. Her dissertation on the Italian mafia was published in 2000 in Italian by Il Mulino and will be published in 2002 by Oxford University Press. Dr. Paoli served for three years as a consultant of the Italian Ministry of the Interior (being in charge of the report on the organised crime phenomenon; which is presented yearly by the Minister to the Parliament), was adviser to the Italian Minister of Justice (forfeiture legislation) and consultant to the Executive Director at the UN Office for Drug Control and Crime Prevention (Vienna) and at the UN Interregional Crime and Justice Research Institute (Rome-Turin). She is currently Senior Research Fellow at the Department of Criminology of the Max Planck Institute for Foreign and International Criminal Law in Freiburg. She has academic experience at the Universities of Florence, Konstanz, Tuebingen, Gießen, Lleida and Paris 1. Other professional activities include the completion of a study on illegal drug trade in Russia on behalf of the UN Office for Drug Control and Crime Prevention (Illegal Drug Trade in Russia, Freiburg, "edition iuscrim", 2001) and the co-ordination of a study on illegal drug markets in Frankfurt and Milan for the European Monitoring Centre on Drugs and Drug Addiction in Lisbon.

Dr. Steve Peers, a Reader in Law at the University of Essex in the United Kingdom, has lectured and written extensively on EU law, in particular EU immigration, asylum, policing and criminal law. His publications include a book, 'EU Justice and Home Affairs Law' (Longman/Pearson, 2000), and he is also the co-author of a report for the European Parliament on 'The Impact of the Amsterdam Treaty on Justice and Home Affairs Issues' (2000).

Christopher Reynolds holds a BA (Hons) in Politics and French from the University of Wales, Cardiff, and pursued Erasmus studies at the *Institut d'Etudes Politiques* in Lyon, France. He holds a Masters degree in Advanced European Studies from the College of Europe, Bruges, his thesis examining the European Security and Defence Policy and its implications for transatlantic relations. He is currently working as a teaching assistant in the European Political and Administrative Studies department in the College of Europe, and is also co-editor of the College's academic journal, Collegium.

Jacek Saryusz-Wolski was born in Łódz, Poland in 1948. He holds an MA in economics from the University of Łódz, and pursued post-graduate studies at the Centre Européen Universitaire, at the University of Nancy, France. He obtained his PhD from the University of Lódz (1980) where he also worked as associate professor in the Institute of Economics. His other academic experience includes working as a researcher at the Universities of Lyon, Paris, Grenoble, Oxford and at the IEP, Paris, as well as being a Jean Monnet Fellow at the European University Institute, Florence (1989-90) and the Director of the Centre for European Studies at the University of Łódz (1988-91). Between 1991 and 1996, Mr. Saryusz-Wolski was the Polish government's Plenipotentiary for European Integration and Foreign Assistance and Chief Negotiator for the country's Association Agreement with the EU, as well as Chairman of the "Poland-EU Association Committee". From 1997-1999 Mr Saryusz-Wolski was the Vice-Rector of the College of Europe, in Natolin, Poland, and since 1999 has been chief advisor to the Polish Prime Minister on European Integration and since 2000, Secretary of the Committee for European Integration, Secretary of State.

Christine Stockhammer holds an MA in Politics from the University of Vienna and pursued Erasmus studies at the University of Leiden, The Netherlands. She holds a Masters degree in Advanced European Studies from the College of Europe, Bruges, her thesis examining the access to documents legislation. She worked for the European Parliament and for a Public Affairs Consultancy. She is currently working as a teaching assistant in the European Political and Administrative Studies department at the College of Europe, Bruges.

As a Canadian citizen, **Nadine Thwaites** studied Civil Law and Common Law at the Faculty of Law of McGill University, where she worked for the *McGill Law Journal* and was a member of the Faculty team for the Charles Rousseau Moot Competition (Public International Law). She then studied European Law at the

College of Europe, where she wrote her thesis on judicial co-operation. She also studied Public International Law at the Université Libre de Bruxelles and was a member of the Facutly team for Jean Pictet Moot Competition (Humanitarian Law). She has worked for one year at the Legal Division of the International Committee for the Red Cross in Geneva. She is presently teaching assistant at the Department of European Legal Studies of the College of Europe.

Professor Dr. iur. Stephan Trechsel, University of Berne, is currently a fully tenured professor for criminal law and procedure at the University of Zurich. After having pursued his studies in law at the University of Berne, he qualified for the bar in 1963. He obtained at PhD (Dr. iur.) in 1966 and became Privatdozent in 1974. He has been working as a public prosecutor and a professor of criminal law and procedure at the Universities of St.-Gallen and Zurich. In addition to that, Professor Trechsel has been the Swiss member of the European Commission of Human Rights, where he has inter alia held the position of the president. Furthermore he is a member of the Conseil de direction of the International Association of Penal law, of the International Advisory Council of the Netherlands and Austrian Institutes of Human Rights and was a member of the Fachbeirat and Kuratorium of the Max-Planck-Institute for foreign and international penal law in Freiburg, Germany. He has been a guest lecturer at UCLA and St. Louis University and holds an honary degree from New York Law School.

Luc Vandamme is currently Head of Division of the "SIS" in Directorate-General H (Justice and Home Affairs) of the General Secretariat of the Council of the European Union. Mr Vandamme was born in Mechelen, Belgium in 1956 and holds a Masters degree in Economics from the University of Brussels (VUB/ ULB). Mr Vandamme has been a member of the Belgian Planning Office since 1981, and a lecturer at both the University of Brussels (VUB / ULB) and the Brussels Institute of Management. Mr Vandamme worked as the Director of the cabinet of the Belgian Secretary of State for Cooperation and Development and as the Deputy Director of the Cabinet of the Minister of Foreign Affairs before being appointed in 1997 as the Deputy General Secretary of the Benelux Economic Union, taking responsibility for Schengen affairs. He has also held positions with the OECD, the Belgian Senate and the Council of the Brussels Region.

André Vandoren holds a degree in law from the University of Leuven (K.U.L.) and a Master's degree in disaster medicine and disaster management. He is also a member of the Brussels bar. His past positions have included that of senior deputy public prosecutor in Brussels and that of leader of the special team for suppressing serious crime and terrorism. He has been appointed national magistrate in 1997 and Chairman of the Standing Police Monitoring Committee, decided by vote in Parliament in 1999. André Vandoren has widespread professional experience in the international field; it includes a number of stays in prosecutor's offices, academic institutions and the police forces in a vast range of countries in Europe, Asia and North America. He is a member of the national service and chairman of the Belgian Red Cross, dept. Halle.

Prof. Dr. John A.E. Vervaele (1956) was honoured Master of Laws (J.D./LL.M)and Master in Criminology (MA) at the University of Gent (Belgium). Between 1980 and 1985 he was assistant researcher in criminal law and criminal procedural law at the University of Antwerp (Belgium), where he defended also his PhD. From 1985 till 1987 he was senior researcher at the Belgian Ministry of Justice. In 1987 he left for the University of Utrecht in the Netherlands. There he secured the prestigious PIONIER subsidy of the Dutch Council for Scientific Research for the 'Enforcement of European Law' project (1991-1997). He established in 1991 the Centre for Enforcement of European Law at the University of Utrecht and was subsequently appointed Professor/Director in Law Enforcement and European Integration in 1992. Since 1996 he is also Professor in Economic and Financial Criminal Law at the University of Utrecht. At the Law Faculty of Utrecht he is actually teaching economic & environmental criminal law and procedure, tax criminal law and procedure, European criminal law and procedure. The main topics in his research field are: enforcement of Union law; procedural safeguards and human rights; criminal law and procedure an regional integration; comparative economic and financial criminal law. He has realized a lot of research in these areas, both for Dutch Departments and European Institutions and worked as well as a consultant for them. He is regular-

ly teaching as visiting professor in foreign universities, in Europe and in the Americas, including Columbia Law School in New York. For several years he is teaching also 'enforcement of community law' at the College of Europe in Bruges.

Dr. Marc M.R. Vuijlsteke is presently *Director General* at the College of Europe (Bruges, Belgium) where he has worked since 1982, after an academic career at the University of Ghent (B) where he was conferred his *Doctorat ès Lettres*. At the College of Europe he heads the *Directorate-General of Development* that is in charge of all external and contractual activities of the College. As such he co-ordinates, next to the service and research contracts of the College, numerous PHARE, TACIS or TEMPUS Programmes in Central and Eastern Europe and in the NIS, as well as MED-CAMPUS Projects in Israel and in Turkey. He is also currently initiating actions of the College of Europe in Latin America,in Laos and in Japan. Dr. Vuijlsteke is also, since March 2000, Doctor *honoris causa* (in International Relations) of the State University of Saint-Petersburg (Russia).

LIST OF SPEAKERS
CHAIRPERSONS AND RAPPORTEURS

(in order of appearance)

H.E. Minister Antoine DUQUESNE
Ministry of the Interior
Rue Royale, 60 – 62
B – 1000 BRUSSELS
Tel.: +32-(0)2-504.85.11
Fax: +32-(0)2-504.85.00

Mr Patrick ZANDERS
Diplomatic Advisor to the Minister of the Interior
Ministry of the Interior
Rue Royale, 60 – 62
B – 1000 BRUSSELS
Tel.: +32(0)2-504.85.11
Fax: +32(0)2-504.85.00

Chairman of the Scientific Committee of the Conference

Mr Paul BREYNE
Governor of the Province of West Flanders
Provinciaal Goevernement
Burg 3
B – 8000 BRUGES
Tel.: +32-(0)50-40.58.11
Fax: +32-0)50-40.58.00

Mr Charles ELSEN
Director General, General Secretariat of the Council of the EU
Rue de la Loi 175
B – 1048 BRUSSELS
Tel : + 32-(0)2-285 82 53
Fax : + 32-(0)2-285 58 53

Dr. Otto VON DER GABLENTZ
President, The European Institute for Law-Enforcement Co-operation (EULEC)
P.O. Box 12
B – 1050 BRUSSELS
Tel.: +32 (0)2-643.10.72
Fax: +32 (0)2-644.64.11

Former Rector of the College of Europe, Bruges

Dr. Marc VUIJLSTEKE
Director General Development
College of Europe
Dijver 11
B – 8000 BRUGES
Tel.: +32-(0)50-44.98.12
Fax: +32-(0)50-44.98.10
e-mail: mvuijlsteke@coleurop.be

Prof. Dr. Jörg MONAR
Co-Director
Contemporary European Studies
Sussex European Institute
Arts Building
University of Sussex
GB – FALMER, BRIGHTON BN1 9QN
Tel.: +44-(0)1273-606.755
Fax: +44-(0)1273-678.571
e-mail: j.monar@sussex.ac.uk

Dr. Christoph EHRENTRAUT
Regierungsdirektor
Unit for European Harmonization
Ministry of the Interior
Department A
Alt Moabit 101 D
D - 10559 BERLIN
Tel.:+49-30.3981.21.76
Fax:+49-30.3981.22.33
e-mail: Christoph.Ehrentraut@bmi.bund.de

Dr. Monica DEN BOER
Associate Professor
Public Administration and Informatisation
Tilburg University
Warandelaan 2
Postbus 90153
NL - TILBURG
Tel.: +31-(0)466.24.13
Fax: +31-(0)13466.81.49
e-mail: m.g.w.denboer@kub.nl

Policy Director, EULEC
P.O. Box 12
B – 1050 BRUSSELS
Tel.: +32-(0)2-643.10.72
Fax: +32-(0)2-644.64.11

Prof. Dr. John A.E. VERVAELE
G.J. Wiarda Instituut
Utrechts Instituut voor Rechtswetenschappelijk Onderzoek
Universiteit Utrecht
Boothstraat 6
NL - 3512 BW UTRECHT
Tel : +31-30 253 80 30
Fax: +31-30 253 72 42
e-mail: j.vervaele@law.uu.nl

Prof. Dr. Bart DE SCHUTTER
Law Faculty
Vrije Universiteit Brussel (VUB)
Pleinlaan 2
B – 1050 BRUSSELS
Tel.: +32 (0)2-629.26.32
Fax: +32 (0)2-629.26.62
e-mail: Bart.De.Schutter@vub.ac.be

Chairman of BDS (Schengen Common Control Authority)

Mrs Michèle CONINSX
President
PRO EUROJUST
Rue des Quatre Bras 13
B - 1000 BRUSSELS
Tel: +32-(0)2 508.61.40
Fax: +32-(0)2 511.22.74
e-mail: nat.mag.nat@skynet.be

Dr. Willy BRUGGEMAN
Senior Deputy Director
EUROPOL
Postbus 90850
NL-2509 LW DEN HAAG
Tel: +31-(0)70.302 52 01
fax: +31-(0)70.302 54 75
e-mail: secr: DeJongA@europol.eu.int
e-mail: BruggemanW@europol.eu.int

Mr Hugo COVELIERS
Chamber of Representatives of Belgium
Huis der Parlementsleden
B - 1008 BRUSSELS
Tel. +32-(0)3.226.36.70
Fax: +32-(0)3.226.66.14
e-mail: hugo@coveliers.be

Dr. Steve PEERS
Human Rights Centre
University of Essex
Wivenhoe Park
GB – Colchester, ESSEX CO4 3FQ
Tel: +44-1206-87.33.33
Fax: +44-1206-87.35.98
e-mail: speers@essex.ac.uk

Prof. Dr. Erik C.M. JURGENS
Member of the Parliament
Binnenhof 22
Postbus 20017
NL – 2500 EA DEN HAAG
Tel.: +31-(0)70-31 29 200
Fax: +31-(0)70-36 53 868
e-mail: ejurgens@xs4all.nl

Prof. Dr. Stefan TRECHSEL
Lehrstuhl für Strafrecht, Strafprozessrecht und strafrechtliche Hilfswissenschaften
University of Zurich
Wilfriedstrasse 6
CH – 8032 ZÜRICH
Tel.: +41-1 634 30 52
Fax: +41-1 634 43 93
e-mail: lst.trechsel@rwi.unizh.ch

Mrs Cesira D'ANIELLO
EU Situation Centre/Crisis Cell – Policy Planning
and Early Warning Unit
Secretariat General of the Council of the EU
Rue de la Loi 175
B – 1048 BRUSSELS
Tel : +32-(0)2 285 82 53
Fax :+ 32-(0)2 285 58 53
e-mail: Cesira.D'Aniello@consilium.eu.int

Mr Luc VANDAMME
Head of Division Section IV – SIS
Directorate II
Justice and Home Affairs DG H
Council of the EU
Rue de la Loi 175
B - 1048 BRUSSELS
Tel: +32-(0)2-285 53 99
Fax: +32-(0)2-285.54.47
e-mail: luc.vandamme@consilium.eu.int

Mr Jacek SARYUSZ-WOLSKI
Chairman
College of Europe, Natolin
Ujazdowskie 9
PL - 00-918 WARSAW
Tel: +48-22 54.59.405
Fax: +48-22 64.91.352
e-mail: jsaryusz-wolski@natolin.edu.pl

CHAIRPERSONS AND RAPPORTEURS

Dr. Piet AKKERMANS
Rector
College of Europe
Dijver 11
B – 8000 BRUGES
Tel.: +32-(0)50-44.99.03
Fax: +32-(0)50-44.99.00

Session 1:
Policy making in the Area of Freedom, Security & Justice
Chairwoman: **Dr. Letizia PAOLI**
Department of Criminology
Max Planck Institute for Foreign and International Criminal Law
Günterstalstrasse 73
D – 79100 FREIBURG
Tel: +49-(0)761 7081 311
Fax: +49-(0)761 7081 294
e-mail: L.Paoli@iuscrim.mpg.de

Rapporteur: **Ms Christine STOCKHAMMER,**
Teaching Assistant, College of Europe
e-mail: cstockhammer@coleurop.be

Session 2:
Police and Judicial Co-operation in the European Union
Chairman: **Dr. Otto VON DER GABLENTZ**
President, The European Institute for Law-Enforcement Co-operation (EULEC)
P.O. Box 12
B – 1040 BRUSSELS
Tel. +32-(0)2-643.10.72
Fax: +32-(0)2-644.64.11

Former Rector of the College of Europe, Bruges

Rapporteur: **Ms Nadine THWAITES,**
Teaching Assistant, College of Europe
e-mail: nthwaites@coleurop.be

Session 3:
Constitutional and ethical principles of democratic control on national and European Institutions
Chairman: **Mr André VANDOREN**
President, Committee Parliamentarian Control on Police
Wetstraat 52
B – 1040 BRUSSELS
Tel.: +32-(0)2-286.28.11
Fax: +32-(0)2-286.28.99
e-mail: andre.vandoren@mine.be

Rapporteur: **Mr Roland KLAGES,**
Teaching Assistant, College of Europe
e-mail: rklages@coleurop.be

Session 4:
Cross – Pillar Approach and Enlargement
Chairman: **Prof. Dr. Dieter MAHNCKE**
Alfred Krupp von Bohlen und Halbach Chair
for European Foreign Policy and Security Studies

Director of European Political and Administrative Studies
College of Europe
Dijver 11
B - 8000 BRUGES
Tel.:+32-(0)50-44.99.30
Fax: +32-(0)50-44.99.74
e-mail: dmahncke@coleurop.be

Rapporteur: **Mr Christopher REYNOLDS,**
Teaching Assistant, College of Europe
e-mail: creynolds@coleurop.be

EULEC

A CONTRIBUTION TO
FREEDOM, SECURITY AND JUSTICE

The European Institute for Law-Enforcement Co-operation
P.O. Box 12, B – 1050 Brussels
Tel. 02-643 10 72 – Fax 02-644 64 11
www.eulec.org
E-mail: info@eulec.org

College of Europe
Collège d'Europe

College of Europe - Dijver 9-11 - 8000 Brugge
Tel. 050 44 99 11 - Fax 050 44 98 10
www.coleurop.be
E-mail: collegium@coleurop.be