

EUROPEAN INTEGRATIONIST INFLUENCES ON
MEMBER STATES' COUNTER-TERRORIST CO-
OPERATION AND CO-ORDINATION

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**European Integrationist Influences on Member States'
Counter-Terrorist Co-operation and Co-ordination.**

Submitted by

Andrew Keith Dalby

for the degree of PhD.

in International Relations, University of St Andrews,

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Abstract

Under the competences of the European Union's intergovernmentally controlled Justice and Home Affairs policy, counter-terrorist co-operation and co-ordination of efforts have progressed at a rapid pace following the 11 September attacks on the USA. Given, however, that Europe has experienced entrenched terrorist campaigns for the past three decades, one could be forgiven for questioning, in light of the unique co-operative position of Western Europe, why it has taken so long for the membership of the EU to reach a common definition of terrorism. Also why is it that even now, the EU has failed to develop a common policy against terrorism?

Political explanations are traditional responses to such questions, but there is a risk of underestimating the complexities of the European Project, and the effect which this has had on so many areas of transnational co-operation. By focusing therefore on the often-overlooked role played by European integration on counter-terrorist co-operation, in addition to empirical analysis of the efficiency of the co-operative structures, we place ourselves in a more beneficial position to understand the current situation. Intergovernmentalism, the controlling force of JHA co-operation, we find is not mutually exclusive to law-enforcement co-operation. Two theories tested for supranational influences – neo-functionalism and federalism – have also played their part, from the early 1960s onwards, in facilitating co-operation. The historical emphasis is important, because co-operation prior to the regulation of much of this area within the EU, following the Treaties of Economic Union, provides

us with ample material for analysis and greater insight into the JHA process and counter-terrorism.

Intergovernmentalism has helped push counter-terrorist co-operation along, but equally we find that it now serves as a hindrance in completing its development because of its in-built tendency to retain subsidiarity. Counter terrorist co-operation, we conclude, need not be restricted to intergovernmental control any longer.

Dedicated to the memory
of my father

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List of Abbreviations

ASU	Active Service Unit
BKA	Bundeskriminalamt
BND	Bundesnachrichtendienst
CCIC	Cross-Channel Intelligence Conference
DGSE	Direction Générale de la Sécurité Extérieure
DST	Direction de la Surveillance du territoire
ECHR	European Convention on Human Rights
ECST	European Convention on the Suppression of Terrorism
EC	European Community
EDU	Europol Drugs Unit
EEC	European Economic Community
EJN	European Judicial Network
ELO	European Liaison Officer
ETA	Basque Fatherland, Land and Liberty (Euskadi ta Askatasuna)
EU	European Union
Eurojust	European Judicial Office
Europol	European Police Office
FARC	Revolutionary Armed Forces of Columbia
FBI	Federal Bureau of Investigation
FRG	The German Federal Republic
GCHQ	Government Communications Head Quarters
IED	Improvised Explosive Device

Interpol	International Criminal Police Organisation
ILO	Interpol Liaison Officer
ISC	Intelligence and Security Committee
GAL	Anti-terrorist Liberation Group (Grupos Antiterroristas de Liberacion)
GIA	Armed Islamic Group (Group Islamique Armé)
IRA	Irish Republican Army
JHA	Justice and Home Affairs
M15	Security Service
MPSB	Metropolitan Police Special Branch
NATO	North Atlantic Treaty Organisation
NCB	National Central Bureau
NCIS	National Criminal Intelligence Service
NSIS	National Schengen Information System
PFLP	Popular Front for the Liberation of Palestine
PFLP-GC	Popular Front for the Liberation of Palestine – General Command
PIRA	Provisional Irish Republican Army
PLF	Palestine Liberation Front
PLO	Palestine Liberation Organisation
PKK	Kurdish Workers' Party (Pesh Merga)
PSNI	Police Service of Northern Ireland
PWGOT	Police Working Group on Terrorism
RAF	Red Army Faction (Röte Armee Fraktion)
BR	Red Brigades (Brigato Rosso)

RUC	Royal Ulster Constabulary
SAS	Special Air Service
SEA	Single European Act
SIRENE	Supplementary Information Request at the National Entry
SIS	Schengen Information System
SIS (MI6)	Secret Intelligence Service
SISNET	The communication infrastructure for the Schengen environment
TE Group	Interpol's Anti-Terrorist Group
TECS	Europol Computer System
TEU	Treaty of Economic Union
TREVI	Terrorism, Radicalism, Extremism, International Violence

Chapter I

Introduction

Modern terrorism has afflicted the states of Western Europe for approximately three and a half decades. In this time, Europe has witnessed the advent of international terrorists hijacking, sabotaging and bombing commercial airliners; the evolution of national separatist terrorism into a strategy of high sophistication; and the fizzling-out of left-wing extremist ideologues, whose acts of terror, although ultimately futile, shocked the political establishment. Today, the UK and Irish governments continue to hold together a shaky peace process, aimed at removing the gun from Irish politics. By comparison, the Spanish government, with the support of France, continues with an uncompromising onslaught against the Basque separatists, ETA, following the group's cynical employment of a ceasefire to rearm, breaking it in December 1999. The international terrorist threat, however, has not abated; rather it has increased, with the Palestinian question overshadowed by the issue of Islamic extremism. The spectre of al-Qaeda, and 11 September, hangs as heavily over European policy as it does over US, leading to reinvigorated co-operative measures against terrorism throughout Europe.

Academic writers have famously equated terrorism with the mythological Hydra, on the premise that for every head that you cut off, another two appear in its place. The underlying notion here is that fighting terrorism is an ongoing and ultimately never-ending battle. If we explore this myth further,

we see that the hero Hercules slew the Lernaean Hydra only with the aid of his companion, Ioloas, who cauterised each wound inflicted by Hercules with burning torches, thereby preventing the budding of new heads. The analogy now takes on a new emphasis: terrorism can be defeated by innovative co-operation. Co-operation between states is an absolute necessity to defeating terrorism, regardless of its typology. If the terrorist can be given no succour, no “haven” to plan his attacks; if justice can seek him out as readily as if he were residing in the state with which he were at “war”, then the terrorist becomes a greatly dilapidated force in attempting to force political change.

While this policy does not exactly “drain the swamp”, it certainly makes it a more hostile environment for the terrorist.¹ Geopolitically, the states of Western Europe, with their unique ongoing experiment in economic, social, financial and political union, have been in the position, beyond that of any other grouping of states, to employ such a strategy against terrorism. Only in the wake of 11 September, however, do we finally see evidence of a definite move by the EU Member States in this direction. The time scale involved in reaching the position today is truly staggering in comparison both to the menace posed by terrorism, and by the measure of other great achievements of integrative policy, such as the removal of internal border checks amongst the continental Member States, and principally, Economic and Monetary Union. Why has it taken so long for Europe’s Member States to finally begin the

¹ Donald Rumsfeld, the US Secretary of Defence, declared it necessary to “drain the swamp they live in” in the aftermath of the 11 September attacks (18 September), referring to the US’s opening moves in its “war against terrorism”. *BBC News Kabul Fall Vindicates Campaign* 13 November 2001

completion of work that was begun almost thirty years ago?² This astonishingly simple question marks the underlying focus of this research; determining an answer, however, is less straightforward. One cannot assume that the political connotations of terrorism have been singularly responsible for holding back the development of this co-operation. While this explanation holds much stock, we cannot discount other important factors, primarily the way in which those responsible for the actual execution of co-operation against terrorism – the police officers, the investigating magistrates, the judges, the counter-terrorist officers – have responded in their duties. It is this group, as much as the efforts of politicians, who are responsible for the pace and effectiveness of co-operative counter-terrorist policy. Equally, both co-operative counter-terrorist policy and the actors involved are operating in a geopolitical environment unlike that experienced by any other co-operating sovereign states, and this too is a considerable factor in understanding the development of this policy. The European Project is a socio-economic and political area that has encouraged co-operation and integration throughout Western Europe, enhancing many policies through a communitarian approach while demolishing (or at least attempting to) isolationist perspectives, and encouraging interlinkage between European society and business at all levels. The Community's role in co-operative law-enforcement development merits our attention if we are serious in our efforts to determine a comprehensive understanding of the progress made in counter-terrorist collaboration.

² The Trevi Group was the first such measure, launched in 1976.

This co-operation between the European states against terrorism can be traced back almost thirty years, enjoying an evolutionary progression throughout. Many achievements have been made; however, despite their long experience of dealing with terrorism, the European Union Member States, with all their advances in integrative union, have yet to achieve a common policy on terrorism. Falling short of this mark in tackling such a serious transnational threat has significant implications. It allows terrorists leeway to exploit differences between the judicial systems of neighbouring states, but more significantly, it compromises the ability of law-enforcement to develop a long-term co-ordinated counter-terrorist strategy. We see this illustrated in precise terms in Chapter VI's observation of the investigation into the Strasbourg plot on the eve of the 11 September attacks, where excellent initial co-operation gradually became bogged down in a re-emphasis of national priorities and lack of co-ordination.³ Is the failure of the Member States to adequately address this question, however, due to governmental intransigence or a failure in policy? In answering this question, we will reach a greater understanding of both the competency and direction of European counter-terrorist co-operation, at a time when it faces its greatest challenge.

Today, much of the co-operation on counter-terrorism within Europe occurs under the competences of the Third Pillar of the European Union, commonly known as Justice and Home Affairs issues (JHA), an area recently expanded in response to 11 September. JHA has gradually become the forum for the Member States' internal security co-operation, following its incorporation

³ See Chapter VI, pp 249 – 252 for an account of this investigation.

within the Treaty of Maastricht. Moving co-operation on law-enforcement and judicial matters into the EU system was a necessary recognition of the political, social and economic integrative developments of the new European Union. The greater openness of Europe would create new opportunities for criminal elements; consequently, internal security co-operation would have to be increased to counter this. For example, the European Drugs Unit (EDU), the forerunner to Europol (European Police Office), was established quickly in January 1994, in an attempt to make some headway against international drug trafficking. Equally, police co-operation required regulating if it were to operate with any real effect and legitimacy between the EU Member States, who, through the Treaty of Economic Union, had moved beyond the traditional concept of sovereign and independent states. Clearly, the old-style approach to police co-operation, characterised through informal forums such as the Police Working Group on Terrorism (PWGOT) and regional border agreements, was inadequate to the task ahead.

The EU approach to internal security co-operation has been driven from the outset by intergovernmentalism – the integrationist theory that allows governments to co-operate in specific fields, retaining maximum sovereignty by keeping the role of supranational institutions, such as the European Parliament and Commission, to a minimum.⁴ It achieves this by co-ordinating

⁴ It is the antithesis of supranationalism – the pooling of resources to achieve a holistic approach – and the credo of many of the EEC's founders, such as Monnet, Schuman and Spinelli. Supranationalism has done much to drive the efforts of economic and monetary integration, with the latter in especial representing the *raison d'être* of the EEC. In relation to the EU, this area of co-operation is limited to the metaphor known as the first pillar, which deals with the competences of the old EC. By contrast, the third pillar, upon which JHA policy is based, is strictly intergovernmental; as for that matter are the competences of the second pillar, which centres on the development of a Common Foreign and Security Policy (CFSP). This last pillar however has never truly been able to develop to anything near the

JHA policy through the JHA Council, a group composed of Justice and Interior Ministers and officials (previously known as the K. 4 Co-ordinating Committee) and almost entirely isolated from Europe's supranational institutions. The European Parliament, for example, is limited to receiving and debating one *annual* report from the Member State governments on their JHA activities, effectively limiting regular debate in this area.⁵ In maintaining an intergovernmental approach, however, JHA policy is isolated from the benefits of the communitarian approach, subject as it is to the need to obtain unanimous consensus while the subsequent bargaining process, which, in its desire to retain the maximum amount of sovereignty, leaves little to be pooled, reaching a policy typically derived from the "politics of lowest common denominator". From this perspective, one might question whether the incorporation of JHA policy into the EU structure was simply due to pragmatic necessity, rather than a genuine desire to utilise the competences of the Community approach to establish a communitarian attitude towards internal security. That the EU Member States have only recently reached the elusive common definition on terrorism (December 2001) speaks volumes regarding the problems faced in achieving consensus through intergovernmental co-operation, especially in the contentious area of terrorism. Does the fault therefore rest with intergovernmentalism – a policy that has played a prominent role in developing co-operative counter-terrorist

level of sophistication of the other two, due to the difficulties in attempting to achieve consensus in foreign policy decisions. This was illustrated through the divisions regarding military intervention in Kosovo in 1999, but far more significant has been the failure to reach consensus over military intervention against Iraq in 2003, and the fundamental consequences that this will have for the future of the EU. By maintaining this "pillar" construction, the EU is said to resemble the pediment of a temple, resting upon these three pillars.

⁵ Peter Chalk *The Maastricht Third Pillar* Fernando Reinares (Ed.) European Democracies Against Terrorism 2000 pp 197-8

policy? This relationship is fundamental to the aims of this thesis: to determine the validity of the intergovernmental approach in matters specific to counter-terrorism, but also in regard to general JHA co-operation.

Methodology

It has never been the purpose of this research to take a wrecking ball to the intergovernmental pillar and plant the banner of supranationalism atop its ruins; no such predetermined agenda has existed. In researching and writing about policy within the EU, which can at times excite passions, it is not unknown for an author's bias to develop into a definite slant. One need only read a few of the entries of Rodney Leach's reference work: *A Concise Encyclopaedia of the European Union*, to ascertain the author's antipathy towards supranationalism. Being able to recognise such bias in another's work is a crucial skill for any social scientist, but if we wish to be completely objective, we must also excise this trait from our own work. It is true that the intergovernmentalist approach receives a considerable degree of criticism from this research, but this stems from its position as a significant suspect in addressing the inadequacies of the state of co-operative counter-terrorist policy. It should not be forgotten, however, that there are other actors and imperatives involved in European integration. In some cases, we will find that it is not intergovernmental policy, but a supranational drive that is responsible for certain areas of co-operation, and this too will be assessed. In all cases, the author has striven to present an impartial approach, with conclusions resulting purely from the ascertained research and analysis.

To comprehend fully the competency of the co-operative counter-terrorist measures employed by the EU Member States, and their future direction, it is crucial that analysis not be restricted to the area of JHA policy. While an examination of JHA issues will ascertain the current efficacy of its counter-terrorist competencies, it is of limited use in determining where co-operation in counter-terrorism is at this particular place in time. One must also appreciate the evolution of counter-terrorism over the past three decades to obtain an understanding of the level of progression achieved. This insight is attained through an empirical analysis of all the levels of counter-terrorist co-operation and its improvement, providing us with an account of its effectiveness. Through this, the picture becomes more complete, allowing us to make the beginnings of a comparison between the old and current approach. This is still insufficient however; limiting the scope to specific co-operative counter-terrorist measures belies the reality of countering terrorism. Ahmed Ressay, an Algerian terrorist with links to al-Qaeda, failed in his attempt to bomb Los Angeles in December 1999 because he was arrested by a suspicious customs inspector when he attempted to enter the USA via a ferry from Canada. No counter-terrorist operation was required, routine police and customs work sufficed. Counter-terrorist officers will rarely be found along the border of a country unless they have advance intelligence of terrorist movement or terrorist activity is indigenous to that area. A more traditional employment of border policing, therefore, is relied upon to deter or apprehend terrorists crossing borders in pursuit of their activities. The author is sceptical of the ability of border-security, in a democracy, to provide anything more

than hindrance to the determined terrorist; nevertheless, the border remains an obstacle that transnational terrorists must cross if they are to attempt their attacks or escape justice. Therefore, an assessment of the various levels of co-operation between the border-regions of the EC/EU assists in this understanding. Equally, we could not fully appreciate terrorist extradition legislation, such as the European Convention on the Suppression of Terrorism (ECST) 1977, without an awareness of the pre-existing Council of Europe extradition legislation. Consequently, significant emphasis is placed on the empirical analysis of these areas as well.

The theoretical methodology employed by this research aims to provide a critical analysis of the current intergovernmental approach by employing traditional supranational theories conducive to understanding traditional Community competences, specifically federalism and neo-functionalism, and comparing their practical benefits in facilitating counter-terrorist co-operation against those offered by intergovernmental policy. It is a comparatively simple approach, but its success lies in the recognition of the fact that counter-terrorist co-operation, under the gamut of JHA policy, is now associated with the European Project and all the integrationist trappings that accompany it, regardless of the intergovernmental cocoon in which the Member State governments have attempted to place it. In the European political, social and economic environment, it is naïve to assume that intergovernmentalism is both the correct and only choice for managing internal security co-operation. It is for this reason that the thesis traces this co-operation back to its initial “fragmented” period. Understanding what drove co-operation during this

period, when European governments scarcely involved themselves in co-operative border agreements, let alone the actual mechanics of co-operation, provides us with considerable insight into the type of co-operation that has been brought into the intergovernmental JHA fold. A significant amount of these co-operative border-security agreements have been initiated and maintained through the work of regional police chiefs, such as the Cross Channel Intelligence Conference (CCIC), established in 1968; often, government plays a passive role, as has been the case with many of the advanced co-operative agreements along the German and Benelux borders. Even in matters of counter-terrorism, government may keep its distance; the PWGOT, established in 1979, is entirely police officer-orientated, focusing on the practical needs of co-operation. If, therefore, there are other underlying currents responsible for driving areas of counter-terrorist co-operation, how sound is the wisdom of continuing to maintain them under an intergovernmental approach? The question continually asked in this research is whether intergovernmental policy encourages or limits the parameters of counter-terrorist co-operation.

The integrationist theories

The three different theories used to test the methodology of the thesis are intergovernmentalism, serving primarily as the control, with neo-functionalism and federalism acting as contending alternatives. Neo-functionalism was chosen as a foil to intergovernmentalism because it is a theory that has a great deal of sympathy with the concept that co-operation can

be driven by the actors at the “coalface”, rather than traditional government policy, moving gradually, but continually forwards. In examining the early forms of internal security co-operation, we see a great deal of neo-functionalism dominating the forward drive. Moreover, neo-functionalism is also enjoying a renaissance in this regard because one of its main fault lines – that European integration was limited solely to economic affairs or “low politics” – has now been disproved, with the metamorphosis of the EC into the EU, begun at Maastricht. Prior to the Single European Act 1986, proponents of neo-functionalism were in quiet retreat, unable to explain the period of integrative economic stagnation from the late 1960s onwards that slowed Europe down.⁶ Few people were paying much attention to the motivation behind police co-operation at this time, however. This renewed interest in neo-functionalism and European police co-operation, in light of the integrationist developments sparked throughout Europe after Maastricht, is also due to it bearing resemblance to the neo-functionalist notion of “spillover”. This latter concept has been much refined from Haas’s original definition, by neo-functionalists such as Lindberg and Scheingold, but the premise still holds – that co-operative or integrative growth in one area, once it reaches a certain point, must inevitably have integrative consequences in another, through a knock-on effect, otherwise known as “spillover”.⁷ In this particular case, the interest stems from the events established through the Treaty of Maastricht; for example, Maastricht’s realisation of the “four freedoms” announced in the Single European Act focuses specifically on creating genuine and absolute freedom to engage in movement of persons, goods, services and capital

⁶ Anderson et al *Policing the European Union* 1995 p 94

⁷ Charles Pentland *International Theory and European Integration* 1973 pp 118-22

throughout Europe. Establishing this, however, has had the repercussion of forcing improvements in policing co-operation to cope with the increased ease of movement and removal of border controls – hence the creation of Europol and the Schengen Implementing Convention.

Neo-functionalism also offers us the practical concept of *engrenage*, which argues that the costs of opting out of joint policies are higher than continued involvement. It connotes the enmeshment of member units and the “locking in” of whatever integrative steps are achieved.⁸ We see the reality of this in the UK’s entrance into certain aspects of the Schengen acquis in 2000, acknowledging, amongst other things, that the established cross-channel police co-operation would be compromised if the UK held back (Chapter III).

By comparison, in choosing federalism, we are bringing into play one of the mighty beasts of supranationalism to contend with the intergovernmentalist policy. We do not live in a federal Europe, nor is there much likelihood that the EU will develop into a fully federalised structure in anything other than the very long term. From the outset, let us excise the analogy of “super state” in relation to European federalism. This Caliban – perceived by the more voracious Eurosceptics as the EU’s end goal, captained by the Commission – is both crude and misleading. Federalism, rather, is a broad church, containing many variants. This thesis has chosen to employ a model from the classical interpretation of the theme of the formal division of powers between levels of government, illustrated through the existing archetype of the United States of

⁸ R. J. Harrison Europe in Question 1975 pp 244-255

America. The American system was the initial template for the EEC's founding fathers such as Spinelli and Brugmans, and as such, it represents a legitimate comparable model. We must also acknowledge, however, that Europe's experiment with supranationalism was quickly realised to be *sui generis*; consequently, we are not making a direct comparison with the American model, but rather focusing on close relative interpretative themes within it, and how these could apply to the European situation.

While almost all the EU Member States are opposed to creating a European federal state, preferring instead to concentrate on a union of sovereign independent states, utilising the concept of subsidiarity as a means of checking "interference" from Brussels.⁹ Nevertheless, in fielding the federalist position we are able to identify a number of weaknesses within the intergovernmentalist approach, which have already been resolved within the federal solution, particularly in the area of improving democratic accountability.

The federalist approach also draws strong connotations with some particular developments within the area of JHA policy. Europol, the centrepiece of police and counter-terrorist co-operation, has from its very inception been

⁹Subsidiarity has long been held to be a guiding principle of federalism, under the premise that decisions should be taken at the lowest level consistent with effective action within a political system; effectively curtailing the notion of "big government". Ironically, it has been invoked in recent years as a means of limiting the EU's competence. The Treaty of Maastricht introduced a subsidiarity clause into the Treaty of Rome:

"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently be achieved by the Member States and can therefore, by reason of the scale of efforts of the proposed action, be better achieved by the Community" (Article 3b EEC).

dogged by the label of being a provisional European FBI, and it has been impossible to scotch rumour that it will one day receive full executive powers to operate as a European Police force rather than the support structure or office which it currently is. Furthermore, the removal of Europe's internal border checks draws parallels with the "openness" within a federal system. It should be remembered that Schengen was modelled in part on the confederal Customs Union between the Benelux Countries. This does not imply that Schengen is a federalist framework, but its principles, if not its practice, are much closer to this supranational influence than any other type. Finally, the federalist model provides us with the opportunity to test the development and implementation of set piece structures such as the hypothetical establishment of a common judicial policy against terrorism against that of an intergovernmental equivalent, allowing us to determine which of the two approaches offers the best solution to the possible development of such a policy (Chapter IX). This latter point is particularly important, as a common judicial policy against terrorism paves the way for significant improvement in counter-terrorism policy throughout. Furthermore, could a federal approach be sustained and limited to this particular area, establishing a Community approach to counter-terrorism, without fear of "contaminating" other areas of co-operation, which would otherwise be deeply unpopular throughout much of the EU?

Modus Operandi

To achieve these goals, the thesis focuses on three cardinal areas of co-operation relevant to counter-terrorism, namely: border security, law-enforcement investigation and judicial policy and legislation.¹⁰ The significance of these focus points lies in their counter-terrorist implications and their conduciveness to co-operation. Co-operative border-security is characterised by a preventative outlook, providing a passive or sentinel approach towards counter-terrorism. Nevertheless, it is centrally important to this study, because of the significant transnational/international aspects of terrorism. Investigative co-operation, by contrast, is much more proactive, forming the backbone of European counter-terrorist co-operation, symbolised through the organisations of Trevi, the PWGOT, Interpol and Europol. Judicial co-operation meanwhile provides the backdrop to understanding counter-terrorist co-operation as a whole. Its early efforts at proscribing terrorist offences through extradition legislation such as the ECST give us some insight into the failure of the EU in developing a true common policy against terrorism; a point further emphasised, perhaps, by the reliance on extradition as the principal tool against fugitive terrorists, categorising it as a reactive, rather than proactive instrument.

Chapter II, therefore, takes up an empirical analysis of the measures outside the Schengen acquis taken to facilitate co-operative border security. Many of

¹⁰ These three areas of counter-terrorism are by no means exclusive. European co-operation against the financing of terrorism is a particular important component of a successful counter-terrorist strategy. Time and space excluded the inclusion of this subject matter, but more importantly, the author felt that it did not fit well with the law-enforcement theme of this thesis, and consequently its inclusion could not be justified.

these agreements remain in effect, as in certain cases these bilateral agreements are more advanced than Schengen. Particular attention is also given to the level of co-operation along the Anglo-Irish and Basque Spanish-Franco borders, two areas in Europe where terrorism is prevalent, and the border itself is strategically employed by these terrorist groups. Chapter III continues with this theme in its study of the Schengen Implementing Convention, examining the effect the Implementing Convention would have had on Anglo-Irish border co-operation, had both countries signed up to it. By contrast, both Spain and France are signatories to the Convention, and the difference between counter-terrorist co-operation there is marked, but to what extent is this connected with their Schengen membership? The analysis also relates the provisions of Schengen for counter-terrorism – an area that it has not been designed to tackle – and ascertains the utility of the Schengen Information System, the mainstay of the Schengen “flanking provisions” in this matter. Now familiar with the effectiveness of the relevant provisions, we can proceed to pass them through the analysis of the integrative models with Chapter IV. Here the various co-operative conventions and agreements are categorised according to their proximity to intergovernmentalism, neo-functionalism or federalism. The resulting conclusions indicate that Schengen literally is a co-operative framework, and certainly nothing more substantial than that.

In the second section of the thesis, we turn our attention to the area of investigative co-operation. Chapter V begins with an historical and contemporary empirical examination of those areas of co-operative

investigation outside the JHA spectrum. The co-operative counter-terrorist forums Trevi and the Police Working Group are important areas of study here, and their role in the police investigation following the bombing of Pan Am 103 over Lockerbie in 1988 is particularly scrutinised. The roles played by Interpol and the security services against terrorism are also examined. In the latter case, the end of the Cold War has meant for many of these agencies an increased mandate against terrorism and organised crime, but their clandestine outlook puts them at odds with the relative openness of police co-operation, even within the gamut of JHA. The analysis here becomes all the more relevant in the wake of the opening moves to involve them in JHA co-operation following 11 September. Interpol, although an international body, has its role to play in counter-terrorist co-operation, and it remains the only vehicle available for police co-operation outside the EU. Furthermore, its international capacity places it in a significant position in the fight against international terrorism; an issue the significance of which al-Qaeda has so recently reminded us. Chapter VI turns, logically, to those areas of investigative co-operation inside the EU, principally Europol. Here we analyse the efficiency of the EU's flagship for police co-operation against terrorism, as well as outlining the threat posed to the EU by transnational Islamic extremism, through the case study of the Strasbourg plot and subsequent investigation. It is questioned why Europol was not utilised during this investigation, asking whether it could have contributed positively here. Once again, the integrative models are run through these co-operative structures in Chapter VII. Significant emphasis is placed on the position of Europol because of the ongoing debate over whether it will receive an

executive mandate, effectively transforming into a European FBI. The federal connotations associated by some with Europol are therefore particularly important, as we question whether Europol has the capacity to operate with an executive mandate under current European conditions, or if a federal Europe is required. Would Europol, for that matter, function more effectively under supranational control?

The final section of the thesis relates to judicial co-operation. Only two chapters make up this section, rather than the troika required for the other two, for the simple reason that there is less to discuss because judicial co-operation in Europe has been less active than police co-operation. Chapter VIII focuses therefore on both the Council of Europe and EC/EU efforts at judicial co-operation. For the most part this revolves around extradition agreements, and it is only in the late 1990s that we see an effort to move beyond this with the establishment of the European Judicial Network (EJN) and Eurojust, introducing a true co-operative structure, similar to police co-operation. Significant attention is given to the process of extradition against terrorists, because in a system of sovereign states, this remains the principal co-operative judicial tool against them. We also look at why co-operation in this area has been largely extradition-based, and examine some of the failed efforts to change this. Even the incoming European Arrest Warrant is still based on the concept of extradition, if not the traditional practice. An analysis of this warrant illustrates its potential to introduce a new element of proactivity into counter-terrorist policy, but its large mandate of offences is highly controversial in a Europe that lacks substantive judicial redress at the

transnational/community level. Chapter IX provides the integrative model analysis; however, because judicial co-operation is entirely intergovernmentally policy-orientated in origin, this chapter instead runs the hypothesis of the development of a supranational unified criminal policy on terrorism against that of an intergovernmental one. The threat now posed by terrorism requires that effort be made by the Member State governments in this direction; despite the large number of arrests made since 11 September 2001, there has been much less progress on actual criminal trials. Both models make use of the current structures in existence, with the intergovernmental model arguing for a framework to be established between the Member States, with derogation clauses where necessary. By contrast, the supranational model places greater emphasis on establishing a central authority to oversee the enforcement and interpretation of the common policy. Beyond this we also ask what potential there is for supranationalism to establish itself within judicial co-operation, making comparisons to the neo-functionalism exhibited in certain areas of police co-operation, due in part to the interpersonal relationships that develop between individuals. Perhaps there is also a potential for the isolation of the judicial co-operation behind official diplomatic *commission rogatoires* to be lifted via the creation of the EJM and Eurojust.

In the concluding Chapter X, we bring together all the conclusions from these chapters, to establish the state of counter-terrorist co-operation within the European Union. Knowing the propensity of co-operation to be more favourable to supranational influence, we can determine if the case is strong

enough on this point to argue for a communitarian approach to counter-terrorism in Europe, and the factors responsible for the slow development of counter-terrorist policy as a whole. Moreover, in addressing the democratic accountability deficit discussed throughout the thesis, we are able to determine the instability that this would cause to the intergovernmental approach and the subsequent consequences for this policy area.

The Literature

Insofar as the actual research material required to conduct this analysis is concerned, there is a significant dearth in the literature available. The focus instead concentrates on national counter-terrorist efforts, which, for the English-speaking reader, are heavily orientated towards the IRA and Northern Ireland. The threat posed by ETA, covered by Robert Clark and Fernando Reinares, is the next most closely examined area. Outside this scope, however, most of the literature on national terrorist campaigns has been dwindling since the groups themselves have disappeared. Very little has been written on the subject of counter-terrorist co-operation in Europe, and where this does appear, it does so specifically under the heading of EEC or EU efforts. This area itself is sparse; Lodge, together with Freestone, outlines in detail the work of the EEC, in particular the European Parliament, and its efforts to promote further developments; but this work is severely dated, serving chiefly now as historical interest.¹¹ Even Antonio Vercher's account

¹¹ Juliet Lodge with David Freestone "The European Community and Terrorism: Political and Legal Aspects", in Yonah Alexander and Kenneth Myers (eds). Terrorism in Europe 1984; Juliet Lodge. "The European Community and Terrorism: Establishing the Principle of *Extradite or Try*", in Juliet Lodge (ed). Terrorism: A Challenge to the State 1981.

of European co-operative judicial measures against terrorism quickly became dated, after moves were made in the mid-1990s by the EU Member States to create a simplified extradition process.¹² Simply put, there is little contemporary – or even historical – material on counter-terrorist co-operation in Europe. The exceptions to this are two recent publications (Peter Chalk and Reinares), which focus in part on the theme of counter-terrorism within JHA policy.¹³ Both these accounts are critical of the democratic deficit inherent within JHA policy and the negative effect that this implies for EU co-operative counter-terrorist policy in terms of civil liberties. This thesis supports these arguments, but moves beyond them, addressing the consequences for intergovernmental policy if these accountability concerns were rectified – an issue insufficiently addressed in this literature.

If the literature on counter-terrorist co-operation is sparse, there is by contrast a wealth of material on the generalised subject of European police and judicial co-operation, particularly with regard to JHA matters, but also on earlier efforts in the decades before 1992. The *European Journal of Crime, Criminal Law and Criminal Justice* provides an array of such articles. There is much incisive work in this area from Monica den Boer and Cyrille Fijnaut, both pioneers in the area of JHA co-operation with a particular interest in the Schengen acquis. Although Schengen has had a great deal written about it, there is comparatively less on the more recent Europol; meanwhile, literature on Eurojust (European Judicial Office) is virtually non-existent. In these cases there has been a special need to rely not just on articles, but also on the official

¹² Antonio Vercher. *Terrorism in Europe* 1992

¹³ Peter Chalk. *West European Terrorism and Counter-Terrorism: The Evolving Dynamic* 1996; Reinares, Op. Cit.

texts provided by the EU, particularly the Council, and the analysis of these documents by the non-profit making NGO Statewatch. Statewatch produces a bimonthly bulletin, and maintains a regularly updated website, allowing one to keep abreast of developments, especially the rapid expansion within JHA following 11 September.¹⁴

This general material, although strong on analysis, has a tendency to avoid placing law-enforcement co-operation in any category outside that of intergovernmental policy and the JHA process.¹⁵ This is unfortunate as it forgoes an opportunity to attempt to connect police co-operation to the phenomenon of European integration.¹⁶ We are well aware, through Lodge for example, that the European Parliament was very interested in judicial and law-enforcement co-operation during the mid-1970s.¹⁷ If, however, there has scarcely been any analysis outside the intergovernmental approach in terms of the EU and police co-operation, how secure can we be in the knowledge that intergovernmentalism is the vessel most suitable for facilitating this co-operation?¹⁸ Consequently we need to be able to place co-operation pre-

¹⁴ Although Steve Peer's EU Justice and Home Affairs Law 2000, does provide useful contemporary account of JHA policy, including the ramifications of the Amsterdam Treaty upon it.

¹⁵ Although police co-operation had been occurring well before 1992 in Europe, it had been a relatively quiet affair. The Treaty of Maastricht placed police co-operation squarely on the map, but because the TEU is so heavily associated with intergovernmentalism, consequently so is police co-operation. This is unfortunate, because much of the historical context of the roots of co-operation in this area has been neglected in writings relating to the current police co-operation.

¹⁶ M. Burgess makes the argument that this "understandable if undue obsession" with government actions both "obscures and devalues an important rival conception of Europe" M. Burgess *Federalism and the European Union* 1988 cited in Michael O'Neill The Politics of European Integration: A Reader 1996 p 277

¹⁷ Lodge, Op. Cit., 1981.

¹⁸ A couple of interesting articles that do push the boundaries beyond intergovernmentalism are F. Verbruggen's. "Eurocops? Just say Maybe: European Lessons from the 1993 Reshuffle of US Drug Enforcement", in European Journal of Crime Criminal Law and Criminal Justice,

existing JHA within an integrationist framework if we are to efficiently analyse the JHA process and counter-terrorism position within it. Unfortunately, the literature is too heavily fixated upon policing in the JHA context.¹⁹ Hebenton and Thomas, in an otherwise excellent contemporary analysis of police co-operation within the EU, go so far as to dismiss any analysis of the co-operation occurring during the 1970s and early 1980s as superfluous, because of its “fragmented history”; their argument is that it would be “resistant to analysis even if attempted”.²⁰ They do however concede that a number of “definite themes would emerge” upon analysis. Such “themes” are insufficient to fully comprehend the Schengen acquis, for example: one of the lynchpins securing the open borders policy of the continental EU. Schengen’s framework can be directly attributed to the co-operative regional border agreements built and expanded upon, throughout the 1960s, 1970s and 1980s. By understanding how these co-operative agreements have developed, we are in a much stronger position to ascertain how European border-security will develop in the future.

Vol. 3 No. 2, 1995 pp 150 –201 and A. Cadoppi. “Towards a European Criminal Code?”, European Journal of Crime, Criminal Law and Criminal Justice Vol. 4, Issue 1, 1996, pp 2 – 17. Verbruggen presents a noteworthy American perspective on the emerging Europol and the concept of a federalised investigative agency. Cadoppi, meanwhile, offers an interesting account, as a jurist, of the concept of adopting a Model Penal Code, arguing that such a code could be established, whilst still maintaining coexistence between the two different legal traditions in Europe.

¹⁹ An exception to this rule is contained within the *Political Theory of European Police Co-operation* chapter in Malcolm Anderson et al, Op. Cit. This work acknowledges the neo-functional argument in facilitating European police co-operation, as well as investigating the broader role-played by European integration in this capacity. Without doubt, this is an essential piece of literature for providing some understanding of the developments underway in European police co-operation. The conclusions, however, are open-ended; nevertheless, it does acknowledge that supranational developments in Europe have played a role, loosening the relationship between policing and national polity.

²⁰ Bill Hebenton and Terry Thomas Policing Europe: Co-operation, Conflict and Control 1995 pp38-39

In term of the events of 11 September, little has yet to emerge beyond some general works on al-Qaeda; however Jane Corbin's *The Base* does provide a useful chapter on related extremist activity in Europe, and the measures taken against it; equally of use is the work of Rohan Gunaratna.²¹ For the most part, however, media sources have been the most valuable in identifying the threat posed by Islamic extremists. The research on the Strasbourg plot in chapter VI, for example, was entirely media based.

In seeking to comprehend these developments, we also need to augment our understanding of intergovernmentalism and the supranational themes of neo-functionalism and federalism. Aside from the general literature and textbooks in this field, the author has found it surprisingly beneficial to focus on the earlier texts relating to neo-functionalism and federalism, in addition to some of the more contemporary work. The decline of interest in neo-functionalism, for example, following the period of integrationist stagnation within the EC, between the early-1970s to mid-1980s, with its account of steady and continued integration discredited by this soporific period has been rehabilitated to an extent, as the pillars of the EU have finally incorporated areas of "high politics" within the scope of EU co-operation. Analysis of this integration from early work (such as that of Pentland, Harrison, Groom and Taylor) is therefore just as pertinent as it was almost thirty years ago.²² No work in the integrationist theory field, however, as yet provides for a comprehensive account of JHA policy.

²¹ Jane Corbin *The Base* 2002; Rohan Gunaratna *Inside al-Qaeda* 2002.

²² Pentland, *Op. Cit.*; Harrison, *Op. Cit.*; A. J. R. Groom & Paul Taylor. *Functionalism: Theory and Practice in International Relations* 1975.

There is, therefore, a substantial gap in the literature relating not only to the empirical aspect of European counter-terrorist co-operation, but also to its standing within the development of the European Project. Similar could be said of our understanding of JHA co-operation in general. This research has identified this lacuna in our knowledge and has attempted to rectify it.

Addressing this problem provides us with not only a more accurate picture of JHA policy, but in light of the renaissance in counter-terrorist co-operation sparked by the 11 September attacks, we are also able to assess the merits of its placement under intergovernmental control. If intergovernmentalism is an inhibitory factor on this area of co-operation, might a greater emphasis on Community activity provide greater and more democratic impetus?

Observations about 11 September 2001

When research into this thesis began, there had been no Tampere Summit; no Eurojust; Europol had yet to officially receive its counter-terrorist mandate; ETA had just announced a ceasefire they were to break a year later; November 17 remained at large, maintaining their record of never having a single member of their group arrested. Most importantly of all, the world had yet to arrive at the date of 11 September 2001. The consequences of this attack transformed the way Europe looked at counter-terrorist co-operation.

Terrorism dominated the field of law-enforcement co-operation in Western Europe in the 1970s, but by the conclusion of the Cold War, it had dropped its ranking in the threat priority table, to be replaced by drugs, organised crime and illegal immigration. Only after 11 September did the issue of terrorism

again become a matter of urgent priority for Europe and governments throughout the world.

The author chose terrorism as a subject to test competency of the intergovernmental approach to co-operation, represented through JHA policy. It could equally have been any other area; co-operation against organised crime would have presented a similar test case, and represented a more contemporary threat. Terrorism was, however, chosen because of the author's personal interest in the subject, and it was felt that it would offer an interesting opportunity to study the various integrationist influences through the initial counter-terrorist structure that were formed in the 1970s, together with a marked reluctance by some Member States to actually place terrorism under the remit of JHA policy.

Osama bin Laden and his terror group, al-Qaeda, through their attacks on Washington and New York, have transformed the nature of counter-terrorism. American policy has shifted to the use of pre-emptive strike to prevent possible terrorist attacks from occurring in the future. Only history will tell if the Bush administration has been justified in its policy. From a European perspective, however, JHA policy retains its traditional emphasis on counter-terrorism, the only significant difference being the priority now associated with it. With such a serious threat looming over Europe and the world, the conclusions of this thesis on the judgement of intergovernmental policy have taken on a weight that the author never expected when he began this research.

Chapter II

The Role of Border Security against Terrorism

Part 1: bilateral co-operation

Modern terrorism within Europe has been highly transnational in character; Palestinian terrorists have long used Western Europe as a battleground against Israeli and American interests, while the Algerian GIA has operated in France in an attempt to force the former colonial power to withdraw its support from Algeria's secular government. Even those terror groups indigenous to a particular European state have not confined themselves to operating exclusively in the domestic arena: the Provisional IRA engaged in a campaign against British military targets on the European mainland in the 1980s, as well as crossing back and forth between the Irish Republic and the North. Similarly, the Basque group ETA has frequently initiated attacks against Spain from across the Franco-Spanish border.

Such examples illustrate the terrorist's willingness to "run the gauntlet" of crossing a state's frontier, where checkpoints are at their tightest, in furtherance of their cause, whether it is to execute an attack, plan reconnaissance or transport arms. What this chapter seeks to analyse is the effectiveness of border security vis-à-vis terrorism in both actual and prophylactic terms. Practical border security co-operation amongst EU Member States has advanced considerably since the advent of the Schengen Implementing Convention (1991), to the extent that some enthusiasts of the

European Project such as Germany have put forward a proposal for the establishment of a European Border Guard.¹ This latest proposal comes after the shockwaves of 11 September, and is focused as much against terrorism as on guarding the EU's eastern marches against illegal immigration and organised crime. Such co-operation has focused specifically on the regulation of police co-operation on the Member States' marches in an effort to "soften" the limitations that the sovereignty of national borders imparts upon law-enforcement. Certainly, we can be in no doubt that terrorists are willing to cross these borders; indeed the execution of an attack on a target in another country only enhances the "propaganda by the deed". Provisional IRA attacks in Northern Ireland before the onset of the Peace Process, which began in 1993, would attract little media coverage in Britain unless they were "spectaculars". Even a small bomb on the British mainland, however, generates great media interest. The same could be said for the European mainland campaign. The Palestinian struggle was catapulted onto the international stage with Black September's attack in Munich in 1972, and subsequent Islamic/Palestinian attacks since. Such strategies echo the words of one Latin American terrorist leader: "If we put even a small bomb in a house in town, we can be certain of making the headlines in the press. But the rural guerilleros liquidated thirty soldiers in some village, there was just a small news item on the last page".² In doing so the terrorists are seeking to reach a wider audience than they would otherwise have done within their own theatre of combat, in an effort to maximise the potential leverage needed to effect political change. Brian Jenkins describes terrorism as "theatre" in his

¹ Sunday Times News section, *Al-Qaeda infiltrates Channel refugee centre*, 2 December 2001, p 2

² Walter Laqueur The New Terrorism, 1999, p44

influential 1974 paper, explaining how “terrorist attacks are often carefully choreographed to attract the attention of the electronic media and international press”.³ With transnational attacks therefore being important to the strategy of many terrorist groups, the issue of border security becomes all the more apparent as a means of deterring, if not thwarting such attacks.

From the outset, this chapter argues that border security insofar as terrorism is concerned is limited in its effectiveness. Individuals and small groups can always slip through undetected. Nevertheless the border still remains another obstacle for the terrorist to overcome, often through the use of forged documentation and passports: one more opportunity to slip up and risk apprehension. This challenge has been put into a radical new context since the removal of the majority of the EU Member States’ internal borders with the implementation of the Schengen Area in 1995.⁴ Also of significance is the concern that terrorists are able to enter the EU under the guise of “legitimate” asylum seekers. From their initial entry into Schengen Area, they are then free to travel within this Area without the need for additional visas. A matter of equal concern is the influx of asylum seekers entering the EU, forming displaced communities that could provide “water” for the terrorist “fish” to hide in, and/or receive support. Such communities can also provide terrorists with the opportunity to recruit new members, typically through influencing young members of the community who have become disaffected or developed extreme hostile views of the host society or, indeed, of the ex-homeland. The

³ Brian Jenkins, *International Terrorism: A New Mode of Conflict* in David Carlton and Carlo Schaerf (eds.) *International Terrorism and World Security* (London: Croom Helm, 1975) p 16, cited in Bruce Hoffman, *Inside Terrorism*, 1998, p132

⁴ The Irish Republic and the UK are not part of the Schengen area.

young Muslims involved in hijacking the planes used in the 11 September attacks represent just such a case.⁵ Conrad employs this phenomenon in “The Secret Agent”, centring around a group of crackpot anarchists and terrorists in London, who whilst not given a particular nationality, are assumed to be either Russian or Central European exiles. Historical examples include the Molly Maguires in eastern Pennsylvania in the 1860s and 1870s, made up from Irish Catholic immigrant minors, who opposed the conditions and labour practices in the Protestant-owned coalfields.⁶ Meanwhile the Fenians, a group of Irish Catholic immigrants in New York who supported Irish independence, made raids into the British territory of Canada in the mid-nineteenth century, before extending their agitation into Ireland and England. A more contemporary account is the number of first and second-generation Muslim immigrants who were found to be members of the Taliban or al-Qaeda in the aftermath of the Taliban regime’s collapse in Afghanistan in December 2001. In these cases, many relatives were shocked to hear this news because their sons or brothers had given them no indication of their extreme beliefs and intentions. Is the Schengen acquis capable of keeping track of the movement of non-EU citizens within its borders? Such issues form the mainstay of an analysis into the areas that relate to counter-terrorism policy and its concern with border security.

In providing an effective analysis of border security within the EU the following areas need to be addressed. In the first instance, an assessment of the actual effectiveness of the security provided to the democratic state by the

⁵ Jane Corbin’s *The Base: In Search of Al-Qaeda – the Terror Network that Shook the World* 2002, provides a good account of the background of these young “westernised” Muslims, and how they changed into fanatical extremists.

⁶ Allison J. Gough *The Molly Maguires’ Terrorist Campaign* in *International Encyclopaedia of Terrorism* (ed.) John Pilmott 1997 pp 546-7

border against terrorists will be made. Having arrived at the necessary conclusions, one can then move on to discuss the following co-operation types that occur within Europe: informal bi-lateral relationships and permanent multi-lateral structures. The former includes the Cross-Channel Intelligence Conference (CCIC) (1968) and the Nebedeag-Pol Agreement (1969), which are essentially regionally orientated (the latter of which is covered by the generic Schengen acquis). By focusing on each area and correlating the analysis in relation to counter-terrorism and how these areas interlink, we are able to present an objective overview and evaluation from the perspective of counter-terrorist mechanisms that exist throughout Europe to enforce border security and co-operation.

Terrorism and the Effectiveness of Border Controls

Terrorists have long exploited the existence of borders between states, utilising them to escape justice or as a staging post for launching attacks. Such borders are usually crossed illicitly, either by a clandestine circumvention of border patrols or posts, or through the "front door", using forged or illegally obtained documents. The likelihood of a terrorist being apprehended while crossing a border between democracies is minimal. Normally success relies on the quality of the forged documents that the terrorists are using. The Greek authorities arrested and put on trial a suspected terrorist, Avraam Lesperoglou, an alleged member of Anti-State Struggle, who entered Athens Airport on an Air France Flight from Amsterdam in December 1999. He had been on the run since 1982 and was wanted for six cases of

murder, and was finally arrested because he was caught travelling on a forged passport.⁷ Terrorists usually have a sophisticated support structure behind them, and reliance on poor quality forgeries is usually rare. The terrorist Ahmed Ressam, who was arrested by a suspicious customs inspector while attempting to enter the US from Canada on a ferry in December 1999 with bomb making equipment, was found to be in the possession of a legitimate Canadian passport, obtained by using a false name. Suspicion was only aroused through the manner in which he answered questions, and not because of the quality of the actual passport itself. It is also suspected that Ressam was connected to the Algerian GIA, and possibly obtained this passport with the help of Karim Said Atmani, a reputed GIA document forger, with whom he shared an apartment in Montreal. This case also demonstrates an increasingly popular strategy among terrorists of entering the target country through a friendly neighbour, (in this case, Canada) thereby diminishing suspicion as opposed to entering the country on a flight from the Middle East. By contrast, border controls are stricter along the US/Mexico border, due to the constant stream of illegal immigrants.⁸ Consequently, measures must now be taken to improve co-operation along what are perceived as "soft" borders. Such co-operation is best manifested not through additional and costly security measures, but through increased intelligence co-operation, to pre-empt and intercept such terrorists. The Schengen Information System, as discussed in

⁷ *Athens News Agency: Daily News Bulletin in English Suspected terrorist arrested, jailed for forgery 27/12/99.* Lesperoglou was imprisoned for 3 and a-half years on forgery charges, as it could not be proven that he was a terrorist.

⁸ As an interesting aside, on one occasion where the IRA were attempting to obtain advanced radio-controlled detonators from the USA in the early 1980s, their supplier considered passing the equipment to the IRA via a courier in a Mexican border town, but decided against it due to the fact that the area was "under watch for drug activities". (Toby Harnden, *Bandit Country*, 1999, pp 364-365)

the next chapter, could serve as a useful example of how to improve intelligence at the border for countries such as the USA and Canada who do not want to impose measures that would curtail trade and travel between their countries.

Passing through “unguarded” backdoors is an option for terrorists, especially if they have weaponry or ordnance to smuggle in, or believe that they are on a “watch list”. It is obviously much harder to police such incursions without significant expenditure, diverting resources from other law-enforcement programmes, (not to mention the economic impact) and so deterrence must be heavily relied upon here. The border between the Irish Republic and the North is frequently a crossing point for Republican terrorists. South Armagh, nicknamed “Bandit Country”, has been a dangerous place for the security forces’ patrols. The Spanish Basque/French border sees ETA members moving secretively back and forth through the hidden mountain passes of the Pyrenees. Interestingly enough, despite the removal of border controls throughout most of Continental Europe, ETA members continue to traverse the border through long mountain hikes. In this case such a mentality is probably derived from the continuing desire to install a quasi-military outlook on ETA’s membership, thereby retaining the perception of their being a guerrilla force rather than terrorists.⁹

Alex Schmid comments that “(p)rofessional European terrorists...are not impeded by present borders. They have crossed borders in Europe for a long

⁹ Organised Crime and Terrorism Conference, University of St Andrews, June 2001

time and for them the changes introduced at the end of 1992 will not make much difference.”¹⁰ The examples of incursions above are merely an illustration of many such transgressions. Border controls did not stop PIRA Active Service Units (ASUs) targeting British Army personnel in Continental Europe during the 1980s, nor did they stop GAL Death Squads entering France from Spain to eliminate suspected ETA members.¹¹ Indeed some terrorist groups have gone beyond using the border simply as a means of escaping justice. The IRA have employed the border as part of their operational strategy in South Armagh to ensure that their ASUs stand a better chance of evading confrontation with the security forces. On numerous occasions they have chosen targets close to the border, allowing the opportunity to flee back across afterwards. An early example of this is the ambush of two RUC officers outside Crossmaglen in September 1972 when their car detonated a mine and then came under Armalite fire.¹² Such attacks revert back to the formation of the Free State 1922, when Frank Aiken, who opposed the Treaty and went on to become the IRA’s Chief of Staff the following year, led an attack across the newly drawn border, thereby exploiting the difficulties for the Northern Ireland and Free State authorities of mounting a response in two jurisdictions.¹³

More egregiously, the IRA has initiated attacks whilst remaining firmly on Irish soil. A number of cross-border gun battles have occurred. In December

¹⁰ Alex P. Schmid, *Terrorism and Democracy in Western Responses to Terrorism* Alex P. Schmid and Ronald D. Crelinsten, (eds) 1993, p18

¹¹ It is believed that GAL is responsible for 29 deaths in France. *Euskal Herria Journal* 4 April 2001, “France Sets up Anti-ETA Brigade”

¹² Toby Harnden, *Bandit Country*, 1999, pp 58-62

¹³ *Ibid.*, pp 133-134

1972, three IRA terrorists were arrested by gardaí in a field at Courtbane after engaging in a cross-border gun battle with the British Army.¹⁴ The danger of snipers has also posed a very real threat to the security forces. The IRA has managed to obtain a very small number of .50 calibre sniper rifles, capable of accuracy at over a mile, and able to penetrate vehicle and body armour with ease.¹⁵ Such weapons can easily be fired from the Republic into targets on the other side of the border, allowing the IRA a psychological weapon as well as one capable of making easy kills. As a psychological weapon, the sniper installs not only an element of fear in security force patrols, but also serves as a propaganda tool through the use of signs put up by the IRA in South Armagh, which parody road signs but warn of “Sniper at Work”. Only by adopting counter-sniper tactics provided by the ceasefire have the security forces been able to move the sniper attacks away from open patrols to more risky “static” attacks closer to a base.¹⁶

By the same token, bomb attacks can also make use of this strategy. It is strongly suspected, for example, that the two IRA terrorists who detonated the Warrenpoint bombs on 27 August 1979, killing 18 British soldiers and leading to the most devastating attack on the security forces in the history of “the troubles”, did so from the safety and vantage point of the Republic Irish side of the border.¹⁷

¹⁴ Ibid., p 63

¹⁵ Ibid., p 377

¹⁶ Ibid., p 416

¹⁷ Ibid., p 198-216

While there is sufficient evidence demonstrating the case against the effectiveness of border controls against terrorists, those who do support them point to the fact that many arrests occur at the border. The reality, though, is that border checks are a convenient location to make an arrest, which occur usually as a result of advance warning or surveillance. The UK, for example, makes half of its seizures of drugs entering the country at its ports of entry; the majority of the larger seizures are the result of prior intelligence.¹⁸ One advantage is that if the intelligence regarding the terrorist comes from an informer, a seemingly “random” check at the border may mask this breach in the terror organisation’s security. A significant case in point of border controls working effectively against terrorism is the confrontation of an IRA ASU by SAS troopers in Gibraltar, in March 1988. Spanish immigration officials pass on all details of Irish passports to Madrid’s *Servicios de Información*’s Euro-terrorism office. They in turn check the details with MI5 in London (prior to October 1992 the police Special Branch dealt with Republican terrorist intelligence). Such checks enabled the British security forces to detect the arrival of the ASU in Gibraltar and activate counter-measures against it.¹⁹ However, this particular incident was detected largely because Gibraltar is so small. The ASU would have had to come across through conventional channels, as any other way would most likely draw unwanted suspicion e.g. bribing a fishing boat to drop them on the coastline.

¹⁸ House of Lords European Communities-Seventh Report, Session 1998-99, Schengen and the United Kingdom’s Border Controls, paragraphs 16-17

¹⁹ James Adams, Robin Morgan and Anthony Bambridge, Ambush: the War Between the SAS and the IRA, (Pan Books: London, 1988) p145

In dealing with Irish terrorism the view of British police officers has always followed the line that:

...it would be totally irresponsible for the British authorities and the Irish...to abandon checkpoints, road blocks and other devices for assisting security against terrorism...Open borders are simply not a sensible option for either the British or Irish Governments.²⁰

The security measures of the Irish borders can perhaps be seen as an exceptional case to the argument that border controls do not stop terrorists. Of course, terrorists cross the border between the Republic and the North, but the border has been an open one due to a Common Travel Area agreement between the UK and the Republic well before their entry into the EEC in 1973. The security measures and structures that exist here are ones whose sole purpose has been to counter terrorism. Take away the threat and the guard towers and checkpoints are no longer required. The dismantling of some of this security apparatus as the peace process continues provides confirmation of this. Further to this is the fact that this border is a specific traffic corridor for a large number of terrorists and geo-politically epitomises "the troubles". It is policed because of this. In the case of ETA, France and Spain re-established surveillance along their common border in the Basque region in August 2000, after renewed ETA violence. Additionally, these two authorities have established a number of joint police stations along the border after an agreement in June 1996. The following year, plans were announced for more

²⁰ The views of the Scottish Police Federation in The House of Commons Home Affairs Select Committee on Practical Police Co-operation in the EC (1989-90) 363-I, (HCHASCR) (Stationary Office) p55

such stations.²¹ These stations are designed to improve co-operation on the ground as well as augmenting the security along the border, by attempting to police the routes in and out of the Spanish Basque region.²² Only the frontiers of regions where terrorism is endemic are worth the effort and expenditure of enforcing security apparatus along them. However, even in these cases, crossing the border for the terrorist is a relatively simple matter; indeed it has been incorporated into their strategies and tactics. Increasingly, the measures

²¹ Current information available puts the number of stations at a total of seven.

²² Along the Irish border in South Armagh, the checkpoints and watchtowers established by the security services, in an effort to try to curtail PIRA activity, have actually served as a focus of attack for the terrorists. The Drummuckavall watchtower, for example, was attacked in October 1986 with seven Mark 6 mortar bombs, and again the next month with another nine; demonstrating the terrorists' determination to destroy these structures (Harnden, p256). While May 1992, saw a 2,200 lb bomb in a van with converted wheels, so that it could travel along the railway line next to the Cloghogue checkpoint tower, obliterated the checkpoint, killing one soldier (Harnden, pp 262-264). As a target they represent significant propaganda purposes if destroyed, as well as a strategic "military" victory. Being static structures they are obvious targets for the terrorists and consequently they are "hardened" to protect them and those inside.

By building joint police stations on the Basque border, a message is being sent in tangible terms that France is co-operating in earnest with its Spanish neighbour in counter-terrorist matters, and that these police stations serve one purpose only: to defeat ETA, and as such these buildings also lend themselves to the possibility of attack. ETA has engaged in three gun battles with French police between November and December 2001, in each case after being forced to stop at a border check. The ETA leadership has tried to play down these events, describing them as "chance skirmishes", despite the fact that two officers were seriously wounded. Such incidents have been branded as ETA opening a new front in France by Spanish officials; certainly, given the improved co-operation in recent years resulting in a crackdown on ETA, such attacks could be seen as a sign of desperation in on the part of the terrorists. Attacks on French police forces were an effort to deter this improved co-operation without actually officially declaring hostilities on the French authorities. Indeed an unsigned communiqué to the French media declared that these attacks were in response to the crackdown. This does tally when one considers that ETA are well versed in passing through the border undetected, and would not chance a checkpoint when there are so many other ways through. Prior to this, the only time a French policeman has been wounded by ETA was in a shoot-out in 1988. In furtherance of this argument is the fact there have been eight firebomb attacks on the houses of police officers in the French Basque Country in 2001, which strongly suggests that ETA has in fact attempted to warn the French off. (The Guardian, 19 November 2001, "ETA extend armed struggle into France"; 14 December 2001, "ETA denies shooting French policeman amounts to a new front")

Again, the fact that such attacks happen at the border represents the attractiveness of the ability to flee across to the other side afterwards, escaping any pursuing authorities. It also demonstrates that future attacks will be aimed at the vulnerable border region, and only an official declaration against France would result in a bomb attack in Paris. Therefore the current border campaign undergone by ETA is in itself a strategy, and if necessary more targets can be found along it.

put in place by the security forces to police these areas become prime targets in their own right.²³

Bilateral Border Co-operation and Security

The above demonstrates that border controls are a precarious defence against terrorism. Why should this be the case? Many of the contributing factors have already been mentioned; but the primary factor is that it is difficult to detect or prevent the terrorist entering a country without very good intelligence. No democracy can realistically strengthen their borders without encountering serious fiscal, economic and geographic difficulties. The alternative option is to maintain good relations with neighbouring states not only at governmental level, but also at the law-enforcement level. Where issues of border security are concerned, such co-operation can take the form of bilateral agreements tailored to particular areas and geopolitical conditions. The CCIC, for example, covers the area of Rotterdam through to Flanders through to Northern France, and Suffolk, Essex, Kent, Sussex and Hampshire on the UK side. Police forces in Devon, Cornwall and Dorset, on the other hand, maintain separate links with their respective counterparts in Normandy.²⁴ Where these agreements work well, terrorists and other criminals will find it harder to abuse the border *but only in the sense of utilising the border as part of their strategic policy* as ETA and the IRA do, as opposed to simply crossing it to reach a destination.

²³ It should be noted that this is only in reference to separatist terrorism. Elements of the Red Brigades and the Red Army Faction fled to France when on the run from the authorities, but they did not include border attacks as a strategy.

²⁴ House of Lords European Communities-Seventh Report, Session 1998-99, Schengen and the United Kingdom's Border Controls, paragraph 59

The IRA in South Armagh have been able to utilise the border in such an extreme manner precisely because the co-operation between the Security Forces in the North and the Republic's Garda Síochána has not always been the most effective. The Irish Army, for instance, does not augment the Gardaí presence in the same way as the British Army does for the RUC/PSNI; they support Garda officers at checkpoints near the border areas, but not in any patrol capacity, thereby stretching their resources in policing their side of the border.²⁵ Disputes have arisen over incidents; Warrenpoint, for example, created a rift between the two police forces as the RUC perceived there to be a "degree of reticence in co-operating with us" at the official level, largely because the Irish government did not wish to acknowledge the embarrassing fact that the initial bomb was triggered from the Irish side of the border.²⁶ Such co-operative travails are discussed in more detail below.²⁷ Conversely, a discussion of the fact that improved co-operation along the Basque border has actually led to ETA attacking it is also merited.

It should be stressed that most of the bilateral agreements on border security that have been established over the years are geared towards conventional crime rather than terrorism, focusing on facilitating general police co-

²⁵ Statewatching the new Europe: a handbook on the European state Tony Bunyan (Ed.) 1993 p 51

²⁶ Detective Inspector Anderson, who led the Warrenpoint investigation. Toby Harnden, Bandit Country, 1999, p 213

²⁷ The IRA's success in South Armagh also stems from the fact that the overwhelming population of the province is Catholic, coupled with the fact that historically South Armagh has always been a geographic demarcation point in the Irish Isles, due to the Mountain ranges straddling its south-eastern border, in particular the Gap of the North between Black Mountain and Feede Mountain, through which the main road to Dublin passes. This area has been rife with banditry, cattle raiders and Celtic and Irish heroes holding back invaders. Consequently South Armagh is the perfect water for the terrorist fish: a Catholic province which has always regarded itself as a periphery, never caring for involvement of the centre's authority in their affairs.

operation. Indeed, some of these agreements were initiated before terrorism appeared on the European stage. The purpose of their study is to help provide an analysis of the evolution of police co-operation in this area throughout Europe. The CCIC, the Benelux Treaty, the Nebedeag-Pol and the Convention of Paris 1977 are examples of earlier bilateral agreements pre-1972, and represent a useful time frame from which to begin the examination.

Border Co-operation Agreements pre-1972: The CCIC, the Benelux Treaty and the Nebedeag-Pol

The purpose of the CCIC, established in 1968, has been to foster regional cross-border policing between the key areas in England, France, Belgium and the Netherlands, and is concerned primarily with smuggling, vehicle crime, drug trafficking and illegal immigration. The then Chief Constable of Kent, Sir Dawney Lemon, a leading figure in the CCIC at its birth, stated that by “encourag[ing] closer personal relationships” a greater understanding of each other’s laws and procedures would develop, which in turn could lead to “closer co-operation”.²⁸ The Chiefs of the services (principally police and customs) of the regions involved meet on an annual (occasionally biannual) basis to discuss policy, while at the “coalface” officers are able to work with their counterparts to arrange assistance in interviewing witnesses and gathering evidence. Such co-operation is further facilitated by the presence of liaison officers seconded to one another’s respective divisions. The value of

²⁸ James W.E. Sheptycki *Police Co-operation in the English Channel Region 1968-1996* in the European Journal of Crime, Criminal Law and Criminal Justice Vol. 6/3 1998, p 218. From the minutes of the CCIC’s first meeting at Police Headquarters, Maidstone, 15 May 1968.

liaison officers cannot be overemphasised. Regular exchange of officers provides a greater understanding of another state's policing and judicial systems, and thereby a sound appreciation of the conditions under which they operate, especially with regard to dealing with terrorism. This reflects the fact that police forces, like many other institutions, have a tendency to perceive situations solely from their own perspective rather than from that of any other party. Couple this with the natural belief that *their force is the best*, and one has a recipe that does little to facilitate police co-operation on a transnational basis, especially under the trying conditions of a terrorist investigation. The investigation into the Lockerbie bombing, discussed in detail in Chapter V, is a classic case of the friction that can develop between two police forces who are unable to understand the means and procedures by which the other works. Additionally, liaison officers provide an opportunity to develop a learning curve of new skills and experiences, along with valuable contacts, which are consequently transferred to the home unit at the end of the secondment to the benefit of all.

The establishment of a European Liaison Unit (ELU) in 1991, based at Folkestone and formed as part of a review of necessary measures required upon the completion of the Channel Tunnel, has further enhanced this co-operation. Communication between the Kent police and their French colleagues has been greatly improved through the ELU with the development of the LinguaNet system, capable of email and translation in real time²⁹ (diagrams I and II – appendix – illustrates how this network is placed and

²⁹ House of Lords, *op. cit.*, paragraph 59

developed throughout the region). It is worth giving some specific attention at this point to the extent of police co-operation involved within the Channel Tunnel. The Tunnel is unique in that it has provided the UK with a terrestrial border with continental Europe; being a tunnel, it simply cannot be policed at either end of it in the manner of a normal border. The Tunnel can also be regarded as a potential terrorist target; since its conception, a feared terrorist attack under the English Channel has always been a legitimate concern, and has even resulted in a number of novels having just such an attack as their basis.

Since the Anglo-French border is in the middle of the English Channel, a juxtaposed position has been taken with regard to policing controls, having been agreed in a Protocol between the two countries at the end of 1991.³⁰ The co-operation is designed with speed and efficiency in mind, acknowledging the Treaty of Canterbury 1986, which requires that “the frontier controls shall be organised in a way which will reconcile, as far as possible, *the rapid flow of traffic* with the efficiency of the controls” (author’s emphasis).³¹ The Tunnel is after all a commercial venture and major artery; thus exit and entry checks are only carried out at the terminal of the country of departure. The Protocol allows officers policing the tunnel extraterritoriality powers, permitting officers and Customs officials to operate at both Folkestone and Frethun with authorisation to exercise their national powers of arrest, search and detention within the control zone. Equally, “breaches of laws and the regulations

³⁰ *A Protocol between Great Britain and France Concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link* 1991

³¹ Roy D. Ingleton *Mission Incomprehensible*, 1994, p 70

relating to the frontier State which are detected in the control zone located in the host state shall be subject to the laws and regulations of the adjoining State, as if the breaches had occurred in the latter's own territory" (Article 5, Protocol). This means that an individual passing through the control point in France in possession of a forged passport may be dealt with as if he were in England and even returned to the latter to face judicial proceedings.³²

However, when an offence not connected with frontier control regulations is contravened, the State that has jurisdiction will be the one in whose territory the offence occurred, including that part lying within the Tunnel.³³

At both ends of the Tunnel, a Major Incident Co-ordination Centre (MICC) has been set up for use by the emergency services in the event of a major incident in the Tunnel. This can handle the cross-language communication, along with a Bi-National Emergency Plan (BINEP), which is capable of establishing a required plan with a "lead" and "support" nation, according to the circumstances, through consultation between the *Préfet* for the Pas de Calais *département* and the Chief Constable of Kent. This system of co-operation for policing the Tunnel is designed to remove the confusion and ambiguity of jurisdictional matters in everyday policing affairs as well as in the event of a major incident, rather than simply augmenting security in itself. By ensuring the smooth running of co-operation, the Tunnel hinders attempts at individuals or terrorists expecting to take advantage of an uncoordinated response.

³² Extradition is not required because of the special classification of this territory.

³³ *Ibid.*, Chpt. 4

Nevertheless, security flaws in the “Chunnel” have been publicly demonstrated on a number of occasions. Specifically, these have been revealed not by determined or fanatical terrorists, but by desperate, ill-equipped asylum seekers. The weakness lies in the system of freight transport. Asylum seekers have been able to penetrate the freight depot at Calais, and stowaway aboard the freight containers after breaking into them. In May 2002, for example, 45 illegal immigrants were arrested at the Freight Depot in Kent, but many others like them are not caught. The following June, police apprehended fourteen from a group containing around thirty stowaways. It is quite conceivable that a terrorist could masquerade as an asylum seeker in this way. Pressure from Britain has forced France to improve security at Calais, with the French rail company, SNCF, announcing an injection of €7.3 million (£5 million) on security measures to prevent illegal immigration.³⁴ In this regard, the additional closure of the Sangatte refugee camp in Calais will remove a concentration of would-be stowaways; however, the fact remains that the Chunnel has been and can be penetrated. How far the new security measures will deter a determined terrorist remains to be seen.

The CCIC enjoys a high level of co-operation – one beyond that seen, for example, along the Irish border.³⁵ However, it is one that has been eclipsed with the advent of the Schengen acquis. Border co-operation now operates through formal channels throughout “Schengenland”, while the CCIC continues to operate on a less formal basis than Schengen. Because the UK has not been party to the full acquis, some problems have arisen particularly

³⁴ BBC News *Hunt continues for Chunnel stowaways* 10 June 2002

³⁵ Independent Commission on Policing for Northern Ireland, Report, Chapter 18

with regard to new initiatives relating to cross-border co-operation on the Schengen Convention. Belgian colleagues actually informed Kent Police, unofficially, that they could only foresee future co-operation with Kent if it was based on a stronger legal basis, either through an intergovernmental agreement, Schengen or Interpol.³⁶ The UK's partial joining of the Schengen acquis by signing up to elements of the Schengen Information System in March 1998 (joined May 2000) met these Belgian concerns. Consequently, the CCIC gained access to this pooled information – information that was previously unavailable without undergoing a convoluted process of bilateral enquiry for data of a comparable nature, as opposed to the CCIC members on the continent who can use a “one-stop shop” approach.³⁷

The Benelux Treaty 1962 includes the level of police and customs co-operation necessary for the facilitation of the Benelux Economic Union of 1960. The dissolution of the three countries' internal borders, creating a common trade area, consequently provides a more sophisticated example of police co-operation at this level in Europe than has been seen until the advent of the Schengen Implementing Convention. It serves as a useful illustration of the potential for co-operation when borders have been dissolved between states which do not face the problems generated by serious transnational criminal activities such as an ongoing terrorist campaign and thus do not have their border security bolstered by pressure. Amongst the usual measures of border co-operation, two in particular stand out as unusually progressive. Under Article 26, Paragraph 1, officers may be deputised, allowing them to

³⁶ House of Lords, *op. cit.*, paragraph 62

³⁷ *Ibid.*, paragraph 64

operate on another state's territory with the permission of that party's prosecution service. Article 27, Paragraph 1, meanwhile deals with the issues of "hot pursuit", i.e. the pursuit of a suspect across a state border to prevent him/her from escaping. Under the Article's conditions, the pursuant officers *must inform immediately* the competent authorities of the transgressed territory of the situation. The relevant authorities may then attempt to stop the suspect in order to establish identity and if necessary arrest him/her. The limitations to this are given in Paragraph 2, which states that if the pursuit is uninterrupted and the need for urgency prevents the ability to contact the local authorities, then the pursuant officers may, provided they are within ten kilometres³⁸ of the border, attempt to apprehend the suspect and bring him before the local authorities. However, the use of force is not permitted save in the direst of circumstances, and only then within the conditions as permitted to the officers of the party on whose territory the action is occurring. Under no circumstances may the pursuant officers attempt to arrest and return the suspect to their own jurisdictional territory. If the suspect is arrested, then extradition procedures must begin.

Under the remit of these two articles, cross-border observation is permitted; however, the actual relevant articles are "rather mysterious on this point"³⁹. Fijnaut concludes that while the text is ambiguous, Art.26's provision allows the officers of another party to assist in the detection of an offence. Fijnaut is more concerned with how freely such action should be taken. Consider

³⁸ This ten-kilometre limitation applies only to municipal police, and not with respect to the judicial or state police.

³⁹ Cyrille Fijnaut *Police Co-operation Along the Belgian-Dutch Border* in Cyrille Fijnaut The Internationalisation of Police Co-operation in Western Europe, 1993 p 119

observation actions that are not designed to track criminals or help in the detection of offences, but rather to effect strategic observation, pure and simple. In such a case Article 26's conditions are not fully satisfied.

In terms of dealing with terrorists, these conditions offer considerable benefits to the law-enforcement authorities. Crucially, they remove the vulnerability that the border casts on the security forces who guard it; certainly it can still remain a target in its own right, but the responses available to its defenders are markedly increased. Such provisions work at their best with the active co-operation of the neighbouring partner-states; it is their decision as to whether or not an arrested suspect's case is suitable for extradition. It is at this point that the terrorist invariably attempts to play the political card or even intimidate the state detaining him/her with terrorist repercussions if they proceed with extradition. The Benelux countries have been plagued with some serious terrorist campaigns such as that of the South Moluccans in the Netherlands during the 1970s and the seizure of the French Embassy in The Hague on 13 September 1974 by the Japanese Red Army, but never by a group that exploited the sovereignty of borders. When discussing the co-operation between the RUC and the Garda Síochána below, however, referring back to the provisions of this Treaty brings to light some interesting comparisons.

Rather than move now to study an example of border co-operation that goes beyond that of the Benelux countries, a move sideways instead will give an illustration of co-operation between the established Benelux union and a third

party: the FRG. The *Arbeitsgemeinschaft der Leiter der Polizeidienststellen im Belgisch-Niederländisch-Deutschen Grenzgebiet*, otherwise known as the Nebadeag-Pol Agreement 1969, focused on police co-operation centred between the areas around the Rhine and the Meuse, where Belgium, the Netherlands and Germany meet.

The Nebadeag-Pol increased co-operation in the usual manner, through investments in communications such as the direct telex link connection between Maastricht, Eupen, Verviers and Aachen and a permanent radio connection between a number of police headquarters.⁴⁰ Likewise, liaison officers were appointed and language courses made available for them. The co-operation extends even further beyond this to allow liaison in the actual fieldwork of crime detection due to the attachment of the German-Dutch Agreement of 3 June 1960, which permitted the involvement of officers to assist in the investigation of serious crimes perpetrated on foreign soil, especially drug trafficking, in what became known as "duty tours".⁴¹

One border agreement that originated directly from terrorist events is the Convention of Paris between Germany and France in 1977. The Convention was the result of negotiations initiated by the FRG government at the beginning of the 1970s in response to growing concern about the activities of the Baader-Meinhof gang.⁴² Essentially the Convention concentrates on provisions that encourage and oblige police officers in the common border

⁴⁰ Lode de Witte *The Belgian Perspective on the Internationalisation of Police Co-operation* in Fijnaut Op. Cit., p 91

⁴¹ Fijnaut, Op. Cit., p 125

⁴² P. Cullen and W. Gilmore (eds.) *Crime Sans frontières* 1998, p 40

area to co-operate. Article 7, for example, states that the senior officers of the *Landespolizei*, *police nationale* and *gendarmérie nationale* should meet regularly and discuss common police measures if the circumstances so require. In practical policing terms, the Convention aims at developing organisational, tactical and technical conditions that will facilitate co-operation against trans-frontier crime rather than attempting to regulate cross-border police co-operation between France and Germany per se. Principally this is developed through the direct exchange of information concerning (potential) criminal offences and their perpetrators, the development of uniform investigative methods and procedures, the framing of plans for emergency cases and the deployment of common communication lines.⁴³

In practical terms, although it has its origin in a terrorist situation, the Convention itself is limited in what it can achieve against terrorism. While it improves police co-operation, nothing really stands out in relation to counter-terrorism. Cross-border pursuit and observation are not provided for, thereby denying a useful tool against those terrorists who utilise the border for strategic or tactical purposes. As has already been mentioned, Europe's "Red Terrorists" never focused on the weakness of borders, and judging by the fact that a number of RAF terrorists sought refuge in France, these provisions were of little use. The crime would have to be recognised as non-political to permit police intervention, and as Chapter VIII emphasises, the removal of the non-political definition for terrorist crimes has been problematic throughout the

⁴³ Ibid., p 50

history of European counter-terrorist co-operation. The “get out clause” of Article 4 permits either party, should it be:

of the opinion that the support that should be given, might jeopardise the sovereignty, the safety, the public order or the essential interests of its country, it is empowered to withhold that support, partially or completely, or to make its provision dependent upon certain conditions.

The existence of such clauses, as will be discussed in later chapters, provides an Achilles Heel against their *raison d'être*. Events concerning terrorism can have a tendency to test a government's will, and by evoking such a clause political expediency takes precedence over jurisprudence.

Although now outdated by the Schengen acquis, a study of these latter three examples is merited not merely as an example of police co-operation, but to illustrate that the co-operation witnessed here can rightly be seen as a template for the police co-operation measures implemented by the Schengen Convention. Before closing this chapter to discuss Schengen, a final study is required of examples of bilateral cross-border collaboration that relate specifically to terrorism. Interestingly, neither bears much resemblance to Schengen.

Police Co-operation along the Anglo-Irish Border

Having given due attention to the IRA's strategic use of the Anglo-Irish border it is now necessary to explore exactly why they have been able to exploit this so successfully. The level of co-operation between the Garda Síochána and the RUC is one of the keys to understanding this. Observing the incidents that have occurred along the Anglo-Irish border involving the IRA, one may find it difficult to appreciate the fact that the Garda-RUC relationship enjoys a high degree of co-operation, galvanised against a common enemy: the IRA.

the present relationship between the Garda and the RUC is, as both services described it to us, a good one. There are frequent meetings, both regular and ad hoc, at various levels, from the operational level to the top ranks. There has long been a good exchange of information and good operational co-operation, especially against terrorism.⁴⁴

Co-operation as a whole is good, but border police co-operation lacks written protocols covering this. Consequently the co-operation that does exist is very much at the ad hoc and personal level. Such an approach has its merits, returning to the earlier example of the political fallout after the Warrenpoint bombings, whilst the co-operation between the Garda in Dublin and Newry's RUC was stretched "at local level with established contacts in Newry RUC station there appeared to be a more congenial relationship and at least a little

⁴⁴ Independent Commission on Policing for Northern Ireland, Report, September 1999, Chpt. 18 Para. 18.5

more assistance was forthcoming".⁴⁵ Additionally, the period between the declaration of the Republic in 1948, which exacerbated the North's suspicions, and 1968 has been one characterised as drift and neglect with regard to the official channels of co-operation (save the period of co-operation over internment during the 1950s IRA border campaign). With their common enemy neutralised, the need for greater collaboration fell by the wayside, allowing the latent feelings of hostility within the organisational structure to resurface.⁴⁶ Those officers operating along the periphery were in a sense inoculated against this suspicion, and were able to continue to foster a co-operative culture within certain parameters. With the return of the IRA, co-operation between the Centres was once again united against a common enemy. However, without sufficient protocols border co-operation can never really be truly effective against terrorism. The degree of co-operation required for the unique circumstances of the border equals that of generalised co-operation. The particular nuances developed between localised co-operation, effective against the IRA thirty – even twenty – years ago, quickly become obsolete in an age of greater governmental and media scrutiny. Ruralised policing, necessary when communications were primitive and communities lacked a decent infrastructure, has disappeared. Incidents where one side's officers once strayed onto the other, either deliberately or not, can no longer be so easily dismissed by averted eyes. Centralisation does not permit such infringements of sovereignty; consequently security force personnel caught by the Garda on their side of the border would be detained or

⁴⁵ Harnden, *op. cit.*, p 213 (DI Anderson's words)

⁴⁶ Innovation: The European Journal of Social Sciences Sept 1998, Vol. 11 No. 3, pp267-277, Jason Lane, "Police Co-operation and Internal Conflict Resolution Strategies: The Case of Ireland"

arrested. One famous incident involved the arrest of eight SAS troopers by the local Garda at Cornamucklagh on the night of 5 May 1976. Freed on bail, they were tried the next year in Dublin on charges of possessing arms with the intent to endanger life. They were acquitted, because the prosecution could not prove that the soldiers had crossed the border intentionally.⁴⁷ Another occasion in November 1986 involved the arrest by the Garda, for possession of an illegal firearm, of a soldier who, due to the particular circumstances of the situation, had pursued the ASU involved in attacking the Glasdrumman watchtower only a few metres over the border.⁴⁸

Some of these incidents are innocent, but the Security Forces, the British Army particularly, are not unknown to have blithely ignored the Anglo-Irish border, and deployed SAS snatch squads across the border to apprehend wanted terrorists and deposit them on the Northern side where RUC officers are waiting to arrest them. Harnden, for example, mentions that both former and serving SAS men informed him that deliberate incursions occurred throughout the 1970s and 1980s. One of the first occasions was in March 1976 when Sean McKenna was taken from his bed in Edentubber in the early hours and transported to Killeen to be arrested.⁴⁹ The incident at Cornamucklagh in 1976 would also seem to have resulted from such a mission.

The alternative to these obviously ineffective informal arrangements is to put in place a formal bilateral agreement or protocol. This is one of the

⁴⁷ Mark Urban *Big Boys' Rules: The Secret Struggle against the IRA*, 1992, pp 9-10

⁴⁸ Harnden, *Op. Cit.*, pp 256-7

⁴⁹ *Ibid.*, pp 163-5

conclusions of the Independent Commission on Policing for Northern Ireland (Chapter 18 paragraph 7), which recommends something akin to that of the CCIC, due to the fact that the “scale of cross-border criminal activity is at least as significant as that between Kent and France or Belgium and probably larger”.⁵⁰ Such protocols could contain articles relevant to “hot pursuit”, which at the moment is currently limited only to helicopters (probably because it is difficult for the pilot to judge exactly when or where they have crossed the border).⁵¹ Provisions could also be made for officers carrying arms across the border, which presently is illegal and the security forces of the North are treated as individuals carrying illegal weapons (the common travel area means that they are free to cross as private citizens). This is not to suggest that these firearms would be employed in the same way as they are in the North; no border co-operative treaty in Europe permits firearms to be discharged except in self-defence. Additionally the Report notes that no liaison exchanges occur between the two police forces (18.9) despite earlier decisions made at the intergovernmental Anglo-Irish Agreement 1985 (Article 9) for such arrangements, and points out the lost opportunities for enhancing co-operation because of it.

Harnden is critical of the co-operation that exists between the Garda and RUC, but his book’s focus is on South Armagh and the cross-border incidents

⁵⁰ Smuggling is part of a way of life in border regions, and is not perceived to be a significant crime by many of those who live in these periphery regions. Smuggling has a much more serious dimension in Northern Ireland as the significant brunt of it is carried out by the IRA as another source of filling their war coffers. Police on both sides of the border estimate that the Real IRA has earned more than £40 million since 1999, from smuggling tobacco and diesel, as well as from donations. One smuggling operation in the North of England netted the dissidents £7 million alone. (*Observer* *Real IRA makes millions from smuggling deals* 6 February 2002, p 5

⁵¹ Harnden, *Op. Cit.*, p215

involving the IRA that occurred there. Such border co-operation will remain problematic until a more structured approach is taken to the policing of the Anglo-Irish border. The necessary changes are now beginning. The British and Irish governments, after the recommendations of the Independent Commission on Policing for Northern Ireland's Report, drew up a document to be implemented in January 2002, along with Protocols between the Garda Síochána and the Police Service of Northern Ireland (formerly the RUC), which were agreed upon from February 2002 onwards. These protocols were supported by a British/Irish intergovernmental agreement in April 2002, which immediately came into effect, demonstrating the importance which both governments placed upon these co-operative enhancements.⁵² The protocols introduce a structured approach to co-operation between the two forces, including the recommendation of long-term secondment of officers with full policing powers (Recommendation 159); the pooling of investigative teams after major incidents with a cross-border dimension (163); liaison officers at both central headquarters and/or border headquarters (160); and the improvement of radio links and establishment of compatible IT systems (164).⁵³

Such an increase in co-operation will greatly enhance relations between the two forces, resulting in a greater compatibility between the two, but whether or not it will include the widening of "hot pursuit" remains to be seen –

⁵² *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, April 2002*, Northern Ireland Office Online: Key Issues, Policing

⁵³ *The Implementation of Recommendations Concerning North/South Co-operation on Policing Matters, Lateral Entry and Secondments – A Joint Timetable by the British and Irish Governments*

although judging from the recommendation for secondments with full police powers, one suspects that in due course it will.⁵⁴ This will put in place a more proactive policing stance, which will improve the measures against the IRA splinter groups, where a large majority of the ASUs live, in South Armagh and across the border. This co-operation is important in countering the cross-border activities of the organised crime elements of the paramilitaries. It is equally important that both governments give support to their police forces, the Irish in particular, because even with the best will in the world, the Garda units policing the border cannot cover it as effectively as the Security Forces in the North can, who have army support. This is precisely why co-operation is essential to make up the shortfall.⁵⁵ The Garda have protested in the past that the RUC “were asking too much of them on the border, yet when the BSE crisis came there were suddenly vehicle checkpoints every night of the week and more security than ever before”. This was the view of an RUC Special Branch Officer.⁵⁶ Resources for such extensive policing can only be authorised from the centre. This security would be expensive for Dublin and one could not expect to maintain it in the long term; in reality, a serious blow to the Republic’s cattle farming would damage its economy far more than the ongoing IRA campaign has.

⁵⁴ See Chapter III for fuller discussion of “hot pursuit” in this case.

⁵⁵ With eventual peace in the province however, the British Army’s presence will no longer be required, and law and order will again be upheld solely through a police presence.

⁵⁶ Harnden, *Op. Cit.*, p216

Police Co-operation along the Franco-Spanish Basque Border

The current wave of co-operation against terrorism along the Franco-Spanish Basque border is extremely good. Increased surveillance, joint police stations, and an aggressive stance towards ETA by the French authorities has led to a series of arrests since the end of the ETA ceasefire in December 1999. The US State Department's "Patterns of Global Terrorism 2001" congratulates the authorities on "dismantling a dozen important terrorist cells".⁵⁷ Overall, since the collapse of ETA's ceasefire, 158 arrests have been made against ETA and its support network in France and Spain, including a number of its leadership (see table II for a breakdown of these figures.) As has already been shown, the level of co-operation has caused ETA consternation enough to react against it. Co-operation however has not always been this fruitful. Co-operation with the French authorities was dogged with disappointment until 1986 when Jacques Chirac brought a conservative administration into Paris. Chirac reversed the previous policy of simply expelling wanted ETA members to third countries such as Algeria, Gabon and the Cape Verde Islands who would endorse their behaviour, favouring instead the immediate expulsion of all those who crossed the border back to Spain itself. Over the period between July 1986 – May 1988, around 200 Basques were handed over to Spanish police,⁵⁸ with October 1987 witnessing the largest ever police action against ETA in France with over 120 homes raided in the French Basque area and eighty-three arrested out of a list of ninety-two ETA suspects wanted by Paris

⁵⁷ US State Department *Patterns of Global Terrorism: 2001 Europe: Spain*

⁵⁸ *Euskal Herria Journal Extradition, Deportation, and Expulsion*, p 1 (<http://osis.ucsd.edu/~ehj/html/extrad.html>)

and Madrid.⁵⁹ Such a policy was partially due to intimidation from the GAL Death Squads and their incursions across the border, and partially because of the Interior Minister, Charles Pasqua's hard-line policy to "terrorise the terrorists". However, this process was itself stopped when a French socialist government retook office in 1988, although some ETA members were still expelled under the "reconduction to the border" law. Nevertheless, this was still an improvement on the levels of co-operation pre-Chirac and Pasqua.

France's reticence in improving co-operation with Spain on this matter has been tied very closely with the Spanish record on torture. Torture of ETA members did occur during the Franco regime, and even in its immediate aftermath. The Council of Europe sponsored international conference on terrorism in 1980 concluded that suspects should not be extradited to countries that practiced torture, and cited Turkey and Spain as examples.⁶⁰

Investigations by Amnesty International, however, into claims of torture and mistreatment have sadly corroborated that such practices have in fact continued into the present day.⁶¹ The Spanish government itself has not denied the existence of torture, which has been frequently corroborated by prison doctors. The government has undeniably prosecuted and convicted officers and sentenced them, but the sentences are typically short, usually only

⁵⁹ Euskal Herria Journal, (date and issue unknown) *France's Campaign against the Basque Resistance*

⁶⁰ Mark Kurlansky *The Basque History of the World*, 1999, pp 285-6

⁶¹ See for example Amnesty International, Spain: A briefing for the United Nations Committee Against Torture October 2002 AI Index: EUR 41/12/2002

two or three months long, or they were pardoned, released early or in some cases, did not even serve the sentence.⁶²

Be that as it may, co-operation began to improve into the 1990s with the return of a Gaullist administration in 1992, although much of this co-operation has been based on reciprocity. Pasqua and the Spanish Minister of Justice and the Interior, Juan Alberto Belloch, agreed at a meeting in Madrid in late 1994 on a package under which Spain would control and place under surveillance Islamic fundamentalists in return for French collaboration against ETA. France was concerned that members of the Algerian Islamic Salvation Front who had been expelled from France were entering Spain illegally. The Spanish authorities responded by increasing the border controls and strictly applying the provisions of the Law on Aliens.⁶³ Co-operation has become much more active in the past few years, with reciprocity less of an issue due to the growing anathema of the Spanish public to ETA, sparked into mass demonstrations after the kidnap and murder of Miguel Angel Blanco, a young local councillor in the Basque country in July 1997. After such displays even the return of a Socialist government under Lionel Jospin in 1997 (a cohabitation government as Chirac was still President) was in no position to return to its softer style policy regarding ETA. This co-operation, however, was strained recently, when France perceived Spain to be easing the pressure on Islamic extremists in the months preceding 11 September 2001.⁶⁴

⁶² The conclusions of a 1997 UN Human Rights Committee report; Mark Kurlansky The Basque History of the World, 1999, pp 295-6

⁶³ Statewatch Spain: Police Co-operation Vol. 4 No. 6, November-December 1994 p 3

⁶⁴ See chapter VI and details of the Strasbourg plots.

The actual policing of the Franco-Spanish Basque border on the Spanish side is carried out by the *Guardia Civil* and the Basque Autonomous Police Force, the *Ertzantza* (although the latter is more orientated towards the urban communities). Both forces have counter-terrorist units attached to them: the UEI (*Unidad Especial de Intervencion*) and the GAR (*Grupos Antiterroristas Rurales* of the *Guardia Civil*); and the *Guardia Civil*, in addition to its mountain units, can be supplemented by a helicopter unit. The Basque region itself is heavily policed with approximately 15,000 uniformed police officers to the 2.1 million inhabitants of the Spanish Basque region – more than seven police officers per 1,000 citizens, making this the most policed population in Western Europe.⁶⁵ As has already been emphasised however the Pyrenees make the Basque border one of the most difficult to patrol, thereby negating the effectiveness of the increased number of units who operate along the border. Two *Guardia Civil* officers, for example, were killed by a bomb near the Pyrenees border area in August 2000.⁶⁶

ETA has made the police its primary target, demonstrating its contempt for Madrid's authority (the *Guardia Civil* are seen as a foreign occupation force by Basque nationalists, whether they are conservatives, leftists, or moderates)⁶⁷(See table I below). The rural areas of the Basque Country can be especially dangerous for the police, on a par with South Armagh in Northern Ireland. Consequently, the *Guardia Civil* operate in armoured patrols in rural areas to lessen the chances of an ambush, although as the example above

⁶⁵ Kurlansky Op. Cit., p 292

⁶⁶ CNN.COM 8 September 2000, Spain Moves against ETA

⁶⁷ Kurlansky Op. Cit., 1999, p 301

illustrates, that, they, like their colleagues in Northern Ireland, are still susceptible to bombs and mines.

Table I Classification of Fatalities caused by ETA terrorism, 1968-1991

	PERCENT
Police	45.1
Military Officers	13.0
Citizens	34.9
ETA members	3.9
Local politicians	2.0
Industrialists	1.0
National politicians	0.1

SOURCE: Spanish Ministry of the Interior, reports on antiterrorist activities⁶⁸

The responsibility for policing the French side of the border lies primarily with the *gendarmerie nationale* who are responsible for rural policing, whilst the *police nationale* focus on urbanised areas, although the Criminal Investigative Department of the latter is responsible for the actual investigation of terrorist incidents. Like the *Guardia Civil*, the *gendarmerie* is a paramilitary police force and is equipped to deal with border duties. Additionally this has been supplemented with the newly formed *Brigade de Recherche et d'Intervention*, BRI, to deal specifically with ETA activities, but also to deal with the growing confrontations between French Basque youths that have become an increasing concern as resentment grows in the French Basque region over the growing

⁶⁸ Martha Crenshaw (ed.), *Terrorism in Context*, 1995, p 441

number of ETA activists arrested by the French. The BRI reports to the Judicial Police of Bordeaux, and is comprised of three operating groups, of around twenty members each, whose tasks include surveillance, arrest and prosecution.⁶⁹

Most of the actual co-operative examples between these two police forces over the past few years have already been mentioned, but what has yet to be discussed is how the actual cross-border co-operation itself works.

Collaboration is working effectively and efforts are being made to augment the measures at the border in sympathy with the removal of internal borders. Both countries are signatories to the Schengen acquis and since March 1995, the Schengen Implementing Convention can be considered the minimum standard of co-operation in this area. However, all the cases of ETA suspects and members arrested on the French side of the border have been due either to luck – the arrests of Joaquin Etxeabeina Lagiska, one of ETA's leaders in August 1991, or those of two members arrested outside Pau (near the border) who were found in possession of arms and false documents, were in both cases as a result of routine traffic checks – or due to co-operation.⁷⁰ An example of the latter is the arrest by French officers of ETA's "maximum leader" since 1992, Ignacio Gracia Arregui, in September 2001, in collaboration with the Spanish authorities.⁷¹ No instance of any form of "hot pursuit" has been documented, demonstrating instead a co-ordinated, intelligence-orientated approach to dealing with ETA. While Schengen allows for the secondment of

⁶⁹ *Euskal Herria Journal* 4 April 2001, "France Sets up Anti-ETA Brigade"

⁷⁰ *BBC News* *ETA leader arrested in France* 2 August 1999; *BBC News* *France Arrests ETA Suspects* 25 October 1999,

⁷¹ *Voice of America* 16 September 2001

liaison officers and cross-border surveillance (see Chapter III), it is more than apparent that the Spanish and French authorities are tackling ETA through enhanced bilateral co-operation rather than relying on Schengen alone.

Nevertheless, the increased surveillance of the border in the wake of ETA's ceasefire collapse undoubtedly finds support in the Schengen provisions.⁷²

Where cross border hot pursuit would have been effective in the cases of the firefights between French police and ETA at the border in November and December 2001, the officers did not pursue, most likely because they were either wounded themselves or giving assistance to their injured colleagues instead. No arrest profile matches the conditions of a high-speed chase.

One can see a marked difference in the level of co-operation between the Anglo-Irish border and the Franco-Spanish one. Ironically, this is comparatively weak in the case of the former, where the terrorists manipulate it fully to their advantage; whereas it is the stronger in the latter, where the terrorists have only recently began to change their strategy towards it, using it more offensively rather than as a simple passage point. The following chapter examines how effective the adoption of a standard template for border co-operation fares in counter-terrorism terms.

⁷² *BBC News France and Spain Tighten Border Security* 18 August 2000

Conclusions

The borders of a democracy are a particular weakness in attempting to fight terrorism. The forces of law and order are restricted to operating on their own side of the border, and consequently terrorists and other criminals have manipulated this to the best of their abilities, not only to escape justice, but also employing it strategically as a staging post. Improving airport security and screening within the United States will have little effect on terrorists entering it from its most vulnerable point: the US/Canadian border. Equally, while the attempted attack on Strasbourg in December 2000 was chosen as a target primarily for its symbolism, its close proximity to the Franco/German border would have allowed the terrorists a greater chance of escaping justice.⁷³

Borders are notoriously difficult to police, and this is one of the reasons for most of the EU Member States implementing the Schengen acquis and removing their internal borders, shifting the emphasis of security onto greater co-operation through flanking measures and improved intelligence sharing via the Schengen Implementing System. This chapter has shown bilateral border co-operation to be for the most part ineffective against terrorists. These agreements have been designed to focus on countering other areas of criminal activity more localised to the area. Terrorists can pass through these nets without too much difficulty. Even along borders where terrorism is inherent to the local conditions, co-operation has been, for the most part, surprisingly poor. Political conditions were a major inhibitory factor to improving co-

⁷³ See chapter VI for more on this attempted attack.

operation along the Franco/Spanish-Basque and Anglo/Irish borders. Only when the political conditions improved has co-operation really been allowed to take off. Spain is reaping the rewards of collaboration with France against ETA, with enhanced border co-operation as part of the new "get tough" strategy. Again, it should be pointed out that much of this success stems from a general enhancement of collaboration against terrorism, rather than specifically focusing on improving border security. Intelligence co-operation is responsible for far more arrests and smashing of cells than the odd car-chase along the border area. Meanwhile co-operation is finally developing at a rapid pace along both sides of the Anglo-Irish border because the terrorist threat has diminished. Only in the "through the looking glass" world of Northern Irish politics could this not be construed as irony.

The post-11 September environment has illustrated that no state is safe from terrorist attack. Traditional border security has been shown to be ineffective; therefore, it is important that a new approach is pursued. The emphasis within the EU on acknowledging the limits of border security, replacing them with a universal minimum level of co-operation, for the security of all, and supported by new innovative measures as well as incorporating bilateral enhancements, is the direction in which Europe is heading. Attempting to raise the drawbridge will not work.

The EU approach is conducive, for the most part, to the inclusion of bilateral co-operation (consider the problems associated with the CCIC before the UK's partial joining of the SIS). Bilateral co-operation has not halted because of

this; rather it has continued to grow. The common border between Britain and France created by the Channel Tunnel has produced an innovative policing system allowing officers from either side to execute their duties on the other side's soil. Diagram II (appendix) illustrates the co-operation between the police forces bordering the sea areas around the English Channel not only in terms of co-operative ties, but also the installation of tangible structures for facilitating communication to support these. Police authorities are regarding sea-borders as no different from land-borders in terms of co-operation, and this may have great significance for the future stance that the UK adopts towards Schengen. For the most part, however, the EU/EC's role in bilateral co-operative border security has itself been distant. Nonetheless, it is evident that the growing ties between the European States, facilitated by membership of the Council of Europe, NATO, and the Common Market and its associated European Free Trade Association (EFTA) have helped produce co-operation where none existed before. Indirectly, therefore, and in its raw form, integrationist theory has played its part, even at the bilateral level, in enhancing co-operative border security, by bringing groups together. As we move on to examine an area of co-operation where the EU has had a more direct role, it will be interesting to observe the differences between these two areas of border security co-operation.

Law-enforcement co-operation has advanced a long way, but in terms of countering terrorism, policing the border is akin to Canute attempting to hold back the tide. The border provides a commonality that should allow a greater level of co-operation to develop than between the central authorities, but

terrorism hampers this, as both sides must wait for the sanction from the Centre before engaging in advanced co-operation. If the Centre is not prepared to support their police forces in this regard then counter-terrorism can only suffer. Northern Ireland and the Basque Region demonstrate this in both similar and later parallel ways. The question to ask is can Schengen, with its universal approach, transfer this braking power away from the centre to the periphery, and what would the consequences be for counter-terrorism?

Chapter III

The Role of Border Security against Terrorism

Part 2: multilateral co-operation – Schengen

The Single European Act 1986, so famously criticised by the *Economist* newspaper, contained within it the seed that would change the way Europe viewed its internal borders.¹ The SEA's pledge of achieving "Four Freedoms" within Europe, namely the free movement of goods and persons; freedom to provide services; and the free movement of capital, ultimately meant a new approach would be necessary towards policing these borders. The mélange of existing bilateral agreements were, however, in no position to consolidate the security repercussions of establishing a "Europe of the Citizens".² A regulated, if not quite centralised approach was therefore required to shore up this security deficit, and ensure that the new system would work.

As the *Economist* rightly put it, producing the SEA was long in labour, so much so, that some Member States despaired of the EC ever breaking out of neutral and making headway towards the realisation of the four freedoms. With the negotiations dragging, France, Germany and the Benelux countries decided to take matters into their own hands and force the pace, signing the Schengen Agreement in June 1985.

¹ The magazine argued that Europe's leaders had laboured long and hard "to produce a mouse". (7 December 1985 pp 57-8)

² Roland Genson *The Schengen Agreements – Police Cooperation and Security Aspects* in P. Cullen and W. Gilmore (Eds.) *Crime Sans Frontières*, 1998 p 133

The Agreement consisted of a number of short-term measures designed to come into force on 1 January 1986, dealing mainly with the free movement of goods and services, and laying the general foundations for an implementation agreement to make this a reality.³ The Schengen Implementing Convention, also known as Schengen II, was therefore signed in June 1990. This was concerned with long-term measures, primarily dealing with the free movement of persons and the necessary compensatory security measures.

The Schengen Five saw their Agreement as one sympathetic to the European Project and legislation, rather than an actual regional agreement, and consequently a blueprint for future European integration. Schengen was therefore open to all Member States to join, and once the entire membership had signed, Schengen would be incorporated into EU legislation.⁴

Membership gradually grew to include every Member State of the EU with the exception of the United Kingdom and Ireland.⁵ The go-ahead, however, to transfer national powers regarding immigration and asylum policy to the EU, coupled with the realisation that the UK and Ireland's non-membership was going to prove a long-term issue, made it evident that the incorporation of Schengen into EU legislation could not be postponed indefinitely.

Consequently, incorporation went ahead at the Treaty of Amsterdam (coming into effect on 1 May 1999) with the proviso of "opt-ins" for both the UK and

³ Monica den Boer Working Paper V: Schengen: Intergovernmental Scenario for European Police Co-operation 1991, p 3

⁴ *Ibid.*, p 3

⁵ Italy signed the agreement on 27 November 1990, Spain and Portugal joined on 25 June 1991, Greece followed on 6 November 1992 (although because of Greece's geography in relation to the rest of the EU, the full benefits of Schengen are not currently applicable to Greece), then Austria on 28 April 1995 and finally Denmark, Finland and Sweden joined on 19 December 1996.

Ireland i.e. the *acquis* would not apply to them until they actually signed up to the agreements.⁶ Both countries chose to enter partially into the Schengen *acquis* through membership of elements of both the Schengen Information System and Implementing Convention (the UK government applied in March 1998, joining on 29 May 2000), concerning the sharing of intelligence, due primarily to pressure from the UK's police chiefs.

Does the adoption of a communitarian approach to border security, however, improve counter-terrorist capability within the Union over that of the traditional methodology? If this can be proven, it would strengthen the case for an enhanced internal security role for the EU throughout, as well as forcing us to reconsider our attitude towards the border as a defensive wall, and the outdated drawbridge mentality which accompanies this. The recognition that international/transnational crime demands a transnational confrontation has ramifications well beyond Europe, forcing us to confront how we secure our internal security in the globalised West. The weak point in this approach, however, is that in a Union of states, internal security becomes pegged to the member whose security is weakest rather than strongest. This is contrary to the traditional style of security arrangements offered by the likes of NATO. The issue then becomes one of whether we are prepared to accept this Achilles' heel as a necessary condition, or does the traditional national approach offer greater consolidation of security?

⁶ Reticence in joining the Schengen area lies with the UK only. Ireland would be keen to join, but cannot, without annulling the Common Travel Area that exists between the two countries. Additionally the Schengen Area incorporates Iceland and Norway, who although not EU Member States, joined Schengen to safeguard the Nordic passport Union (Finland, Sweden and Denmark being EU Member States). Whilst they may attend, debate and submit proposals to such meetings, they may not vote, and must decide independently whether or not to accept later decisions and declarations made by the Committee.

It is therefore the Schengen Implementing Convention with which this chapter is concerned, in order to provide an appraisal of Schengen's effectiveness in tackling terrorism and terrorist-related issues, including arms and drugs trafficking, along with the movement of non-EU citizens within the Area. How effective is Schengen's emphasis on employing new technology, vis-à-vis computerised databases, as a flanking measure? Can it equate its original aim of tackling illegal immigration with the threat posed by terrorism, or has the current trend of associating terrorists with immigrants and asylum seekers become a validation of its *raison d'être*? Does Schengen shift more responsibility to the periphery, and how does it equate with Article K.5 of the Treaty of Amsterdam (K.2.2 of the Treaty of Maastricht), which states clearly that:

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

By adopting a model of the Schengen Implementing Convention at work in policing the Anglo-Irish border, it becomes possible to identify some of the pros and cons of such a shift towards a periphery notorious for its frequency of terrorist attacks. Does the argument of maintaining national control of its borders against terrorism therefore substantiate the UK's refusal to enter fully into Schengen, in light of both the Northern Irish model and situation, and the threat posed by Islamic extremism?

The Schengen Implementing Convention

The Schengen acquis can best be summarised as an overarching structure regulating cross-border co-operation at both the vertical and horizontal level throughout EU legislation. It ensures that the level of security lost from the removal of internal border controls is compensated through a series of “flanking” measures designed to improve cross-border law-enforcement. Interestingly, neither the term “terrorism” nor any of its derivatives are mentioned at any point within either the Schengen Agreement or the Implementing Convention. The most likely explanation of this relates to the problems associated with the political connotations of terrorism and until recently, the lack of any authoritative definition of the phenomenon (see below). Schengen however provides a workable solution simply by ignoring the concept of terrorism and concentrating instead on issues of serious crime, acts which in any event are the *sine qua non* of terrorism. Terrorism is simply “crime, is crime, is crime” to the Implementing Convention; a straightforward solution, but one that has yet to be fully tested. The “flanking” measures are contained within the 142 Articles of the Implementing Convention, of which more than eighty are devoted to police and security co-operation, categorised into four main fields:⁷

- Police co-operation designed to improve prevention and detection of criminal offences
- Extradition and mutual assistance in criminal matters

⁷ Genson, Op. Cit., p 135

- Repression of crime in the field of narcotics and drugs
- Control of purchase, and possession of, and control of transaction in, weapons and ammunition

Being areas that have been targeted for additional co-operation due to their transnational aspect, all four of these categories demonstrate a particular relevance to terrorist-related activities. This chapter focuses primarily on the direct aspects of police co-operation relevant to this field, while Chapter VIII focuses on the judicial aspects; however, because of the significance of narcotics trafficking and illegal arms to terrorists, a discussion of these also becomes viable. It is also important to consider the policy that Schengen adopts for keeping track of immigrants and other third party nationals once they have entered the Area.⁸

Title III of the Implementing Convention deals with the issue of police and security and defines the regulation of police co-operation as such:

The Contracting Parties undertake to ensure that their police authorities shall, in compliance with national legislation and within the limits of their responsibilities, assist each other for the purposes of preventing and detecting criminal offences, insofar as national law does not stipulate that the request is to be made to the legal authorities and provided the request or the implementation thereof does not involve the application of

⁸ This does not in anyway place implication of association between terrorism and immigration; rather it is a simple acknowledgement that non-indigenous terrorism has at times been initiated by individuals who have entered Europe through asylum application – the case of the 11 September attacks being a case in point.

coercive measures by the requested Contracting Party. Where the requested police authorities do not have Jurisdiction to implement a request, they shall forward it to the competent authorities.

(Title III, Article 39.1)

Articles 40 and 41 deal specifically with cross-border observation and “hot pursuit” respectively, which are particularly important in relation to countering terrorism. Provisions relating to cross border surveillance are borrowed from the Benelux Treaty, and confer on police and customs officers the right to cross a border to continue an observation begun in their own territory. Authorisation is required prior to the observation by the Contracting Party, but if urgency dictates, then it must be obtained afterwards without delay. The main criteria permitting such extraterritorial observation are: that the observation may only occur when it already forms part of a criminal investigation; that there must be reasonable suspicion of involvement in the commission of the crime; and the offence must be an extraditable one. Under these conditions, the observation may also be proactive in the sense that a crime has yet to be committed. The crimes permissible for such are: assassination; murder; rape; arson; counterfeiting; armed robbery and receipt of stolen goods; extortion; kidnapping and hostage taking; traffic in human beings; illicit traffic in narcotic drugs and psychotropic substances; breach of the laws on arms and explosives; use of explosives; and illicit carriage of toxic and dangerous waste (Article 40.7).

This focus on observation introduces a much-needed proactive element into border co-operation. This is followed up by Article 41's right of pursuit which attempts to develop some sort of commonality on the issue of "hot pursuit". Unlike the Benelux Treaty, the diversity of Schengen's membership has made it impossible to reach a common standard in this area: should, for example, a distance of ten kilometres be the limit of pursuit as in the case of the Benelux Treaty, or should a time limit apply? A ten-kilometre limit would last only a couple of minutes before pursuit would have to be abandoned. A Dutch initiative therefore left this Article open to bilateral agreement on whether or not a state's agents should have the right of pursuit, what offences justify pursuit and what time and/or distance limitations apply. Germany, for example, allowed unfettered access in terms of distance of pursuit and arrest powers (it is the only Member State to allow its Schengen neighbours' police officers the right to arrest a suspect on its soil). By contrast, Belgium and the Netherlands followed Article 27 of the Benelux Treaty (the ten-kilometre rule), while Spain and Portugal permitted a fifty kilometre or a two-hour time limit on pursuit – whichever is reached first. General conditions, though, that do apply to this Article are that the offence must be an extraditable one, subject to reciprocity and most importantly of all, the offence must have been witnessed by the pursuing officers. Within this fall the usual parameters that pursuant officers must inform the relevant authorities of the Contracting Party upon crossing the border, and are only permitted to detain the fugitive and must await arresting officers from the Contracting Party, after which extradition procedures must be enacted.

How advantageous are such provisions within the remit of counter-terrorism?

Cross-border surveillance has useful benefits, especially in permitting the proactive surveillance of suspects. The import of obtaining permission first through filing a request for mutual assistance implies that this Article is not intended simply for the purpose of undertaking observations that are threatened with abortion simply because the suspect crosses the border.

Premeditated surveillance, having been permitted, has the practical advantage of not eating into the resources of the Contracting Party's law-enforcement authorities (i.e. the host state), and one can immediately see the advantages this lends to the Anglo-Irish border, where the Garda's resources are already stretched. The end product of this surveillance (it must be executed within the laws of both parties) is also advantageous in its utilisation for judicial proceedings, as it is intelligence that has neither been obtained by nor belonged to another state party, hence circumventing judicial technicalities that would have incurred had it been obtained from such a source. Cross-border surveillance, however, is limited in its effect in a border area not associated with terrorism, as terrorists are unlikely to be in such an area for any reason other than to cross it. It is particularly significant, though, that the Irish Republic decided not to participate in Article 40 when applying for participation in the Schengen acquis, while the UK abstained from entering into the conditions of Article 41. The House of Commons European Scrutiny Select Committee deduced this to be because of the sensitivity of relations between the two countries in this area.⁹ Discussion in relation to the Anglo-Irish border is to an extent moot; this aside, Article 40 can be seen as a useful

⁹ *House of Commons European Scrutiny Select Committee 24th Report Irish Application to take part in elements of the Schengen acquis 5.1-5.8, 24 July 2000*

provision should the need arise, although it is of course governed by the willingness of the Contracting Party to grant permission on a case by case basis.

The advantages provided by hot pursuit have been discussed to some extent above. In some respects though, their application is more limited where terrorism is concerned than cross-border surveillance for the simple reason that the counter-terrorism operations rarely conclude with a hair-raising chase across a national border.¹⁰ Rather, terrorist arrests are usually the result of intelligence and surveillance, and any arrests at a border are either due to luck or for convenience only. The exception is where the terrorists employ the border strategically, as addressed in the previous chapter. This type of co-operation within Schengen's acquis is governed through bilateral agreements; however none exist in any form between Ireland and the UK, other than to allow helicopters to engage in hot-pursuit, and this (the lack of policy) is detrimental to an effective counter-terrorist policy. Were an agreement to have existed, issues that have caused friction between the Garda and the Security Forces in the past would have been diminished. Soldiers and RUC officers who "strayed" onto the Republic's side of the border were arrested on charges of carrying illegal weapons (the Common Travel Area means that they are free to cross as individuals). By contrast, Schengen permits officers to cross a national border carrying service firearms, with the proviso that they

¹⁰ Indeed, "hot pursuits" as a whole are particularly uncommon affairs. During the period between 1997-1998, there was a slight increase from 36 to 39 pursuits. Council of the European Union 1998 Annual Report on the Implementation of the Schengen Convention 10846/1/99 (LIMITE) CATS 23 ASIM 36 COMIX 223

can only be employed in self-defence (Article 41.5(e)).¹¹ Cross-border pursuit would have had the potential to seriously undermine Republican terrorist strength in South Armagh because the border could no longer be regarded as a defence for retreating terrorists. This would have caused significant upset to IRA strategy, along with making it less attractive to execute an attack from the Republic across the border. Potentially, this would have provided an opportunity to end the “no-go zone” which South Armagh had become. Certainly the local population may well have retained their antipathy towards the security forces, but the IRA would have been curtailed. Their route to a southern bolt hole would have become hazardous, and in theory, with a less dangerous border, Security Force patrols would then have been in a position to return, putting greater pressure on the South Armagh IRA.¹² Such a context rests on an unproven premise, but one can be certain that a “hot pursuit” provision would have allowed a more aggressive approach to be taken by the Security Forces. Although “hot pursuit” typically applies to car chases, a number of terrorists have been pursued by the Security Forces on foot – there is no reason why such a pursuit need be limited to a vehicle.¹³

Within the context of Northern Ireland, some problems exist with a cross-border agreement of this type, especially in relation to the position of the

¹¹ Abstention from this particular clause without abstention from the Article itself would be impossible without undermining the Article, as it would effectively deny the officers of most European states the ability to engage in pursuit across a border simply because these police forces carry weapons as standard.

¹² Whilst the past tense has been adopted for discussion of this particular area in recognition of the Peace Process and current paramilitary ceasefires, one could just as easily adopt the present tense because of the splinter groups that are not on ceasefire. Of these, a significant number of the disaffected Republicans belong to the South Armagh brigades, which have been more hostile to the Peace Process than their colleagues in Belfast or Derry.

¹³ There is nothing in the Implementing Convention’s provisions to suggest that pursuit by foot across a border is not permissible.

British Army. The Implementing Convention refers to police and customs officers, but where would the army fit in, representing as they do an important aspect of British counter-terrorist policy within Northern Ireland? Could army personnel undertake cross-border surveillance or feasibly cross the border in pursuit of a suspect; would carrying standard SA80 rifles (the standard British Army service weapon) be considered an overextension of the term "service weapon" in relation to the "less offensive" firearms carried by civil police forces?¹⁴ One would also arrive at the problem of the British Army in Northern Ireland not having the same policing powers as their RUC/PSNI colleagues. Their purpose is rather to serve in a support capacity to the police. Such an issue would obviously have to be negotiated at the bilateral level. If the issue were to prove seriously contentious, it would significantly impede the practical effectiveness of this area of co-operation. As it is, the army patrols the rural areas because of the greater danger there; the police presence has been secondary to that of the army. The second point is that pursuing officers must be in uniform, and must be able to show proof of their professional capacity, thus removing undercover units from the equation, such as elements of the SAS, unless they are capable of identifying themselves with some form of insignia such as an armband or vehicle markings.

That neither the UK nor the Irish Republic have in place provisions for "hot pursuit", either through the opportunities provided by the areas that they signed up to in Schengen or through bilateral initiatives, speaks volumes on

¹⁴ The Garda Siochana has traditionally been a largely unarmed force, but the standard weapon, when used is a .38 revolver (although they also have access to Uzi sub-machine guns). Peter Klerks *Police Forces in the EC and EFTA countries* in Tony Bunyan (ed). Statewatching the New Europe: a handbook on the European state 1993 p 50

their co-operative policy on terrorism. The explanation interpreted by the Commons' Select Committee above was that the sensitivity of the situation prevented such measures. How far is this the case? The previous chapter notes the current sanguine relationship between the two police forces as concluded by the Independent Commission on Policing for Northern Ireland's report, but the report did not cover the past relationship. The chapter also noted Harnden's criticism of the level of co-operation, but much of this is due to the lack of a structured co-operative agreement – a more detailed observation of their relationship paints a more positive picture.

The Garda and RUC have maintained cordial relations throughout their history. Even in the immediate post-1922 period with the creation of the Free State after the Anglo-Irish War, one would have expected the relationship between the newly formed Garda, comprised mainly from IRA men, and the RUC with its influx of officers from the disbanded Royal Irish Constabulary, old enemies on either side, to be hostile. This was not the case. In a particularly illuminating article, Jason Lane points to a much more amicable relationship between the two forces. Unofficial contact has been recorded from 26 September 1922, through the Vice-regal Lodge in Dublin, even before the final British evacuation on the subject of mutual assistance dealing with criminals taking refuge on either side of the border.¹⁵ This archive showed that the Free State Quartermaster for Donegal was quite willing to assist in the capture of such criminals, provided it was a reciprocal agreement. Officers in plain clothes could, by prior arrangement, cross the border to identify

¹⁵ Jason Lane, *Police Co-operation and Internal Conflict Resolution Strategies: The Case of Ireland* *Innovation: The European Journal of Social Sciences* Sept 1998, Vol. 11 No. 3, pp 267-277

criminals. Interviewing a former Garda officer, Lane asks a concluding question: "So relations would have been very friendly between the Guards and the RUC?" to which the answer was "Very friendly. Not "very" friendly, but it's as well...As far as duty was concerned they were very friendly and they were very dependent on that line".¹⁶ Lane does make clear that there have been troughs in the relationship, such as Warrenpoint and the Dowra Affair, but these are not illustrative of the relationship as a whole.

If the lack of such co-operative provisions cannot be attributed to the individual police forces, then perhaps the answer lies in the political sensitivity of the environment. The Anglo-Irish Agreement 1985 (which included co-operative police measures) proved unpopular among the majority of the Unionist population of the North who saw the Agreement as the beginning of the end of Unionism, and felt that the British government had sold them out. The Unionist MPs of all parties renounced their seats in the Commons and a civil disobedience campaign, although ultimately futile, was initiated to attempt to sabotage the Agreement. Both governments might have feared that the Unionists would have viewed a reciprocal Agreement allowing Gardaí to cross the border in pursuit of suspects or establish surveillance operations as a further encroachment of Dublin into the North. Continuing this rationale explains why co-operation has not developed to the same extent as it has between other Member States' police forces within the wider EU framework: the peace process and David Trimble's standing as leader of the Ulster Union Party, which are interlinked, have been in a precarious position for a number

¹⁶ Ibid., p 270

of years now. To increase co-operation in such a direct way may have been thought to risk the undesirable effect of bolstering the opposition to Trimble's leadership. Opinions on this matter, however, would seem to be changing. The Patten Report 2001, in its review of the restructuring of the RUC, recommended the introduction of liaison officers and fixed-term secondments between the two forces.¹⁷ The secondments would be in specialist fields where most needed, in areas such as drugs and training. Both governments have been exploring the possibility of expanding the potential here and have introduced legislation (summer 2002) that will provide these seconded officers with full police powers.¹⁸ Such a move, concluded a recent Commons' Select Committee, is a significant policy shift from the previous cautious approach taken by both governments.¹⁹ The obvious conclusion to this is that both governments believe that the situation now permits progress to be made on police co-operation. No timetable, however, has yet been produced by either government that makes provision for cross-border observation or "hot pursuit". The assumption would be that such measures will soon be proposed, but it is curious that measures allowing secondments with police powers, an advanced form of co-operation rarely seen on Continental Europe, would be introduced before basic measures such as "hot pursuit". It may well be that a Garda patrol car chasing a suspect into the North is, in qualitative terms, more likely to inflame opinion than a Garda officer accompanied by Northern Irish police on a drugs raid.

¹⁷ The Patten Report Updated Implementation Plan August 2001 Recommendations 157, 158, 160, 162, 163 and 165. The liaison officer implementation is also covered by Article 47 of the Schengen Implementation Convention, to which both are party.

¹⁸ The Implementation of Recommendations Concerning North/South Co-operation on Policing Matters, Lateral entry and Secondments – A Joint Timetable by the British and Irish Governments Northern Ireland Office, (publication date unknown)

¹⁹ House of Commons Op. Cit., 5.1-5.8, 24 July 2000

The less obtrusive aspects of the Implementing Convention, however, do remain open to both police forces. Article 46, for example, is highly significant in that it allows for the exchange of information “without being asked” to prevent “future crime and offences against or threats to public policy and security”. This goes beyond the traditional “reactive” style of co-operation covered by Article 39, which manages the exchange of information between police authorities on a requested basis. Article 46 actually introduces an approach conducive to co-operation.

The sectarian divide within Northern Ireland has been responsible, as the Commons Select Commission concludes, for holding back greater police co-operation. Whether this is still the case is debatable. What can be concluded, though, is that if the police are unable to work to the best of their ability against the terrorists who exacerbate these rifts, a vicious circle is inevitable.

Dealing with terrorist support networks?

An area covered by the Implementing Convention worth noting is the section containing provisions dealing with drug trafficking (Chapter 6). The relevance to terrorism here is that increasingly terrorist group funding is derived in part from the sale of narcotics. The terrorist groups in Northern Ireland, for example, have retained significant control of this highly profitable market whilst maintaining the dubious façade of the traditional socio-political values of their “struggle”.²⁰ Extortion, loan sharking and fraud, especially in

²⁰ See chapter IV.

the construction trade, are other typical methods of racketeering employed by the terror groups (although none are as lucrative as narcotics). It is with good reason that the British government has referred to these groups in the past as “gangsters” and “godfathers”. Alison Jamieson also points to a clear link between drug trafficking and the financing of Islamic terrorism, citing the example of a major drugs and terrorist operation dismantled in Milan in 1998.²¹ The Basque terror group ETA receives its funding not only through the traditional method of extortion or “revolutionary taxes” and bank robberies, but also through narcotics. Much of the explanation behind this trend rests with the end of the Cold War, and that rapprochement with traditional Middle-Eastern proponents of state-sponsored terrorism, typically Iran, Libya and Syria towards the West, left some terrorist groups orphaned. Faced with the harsh realities of the Market Economy these terrorist groups were left with the choice of going to the wall or embracing the opportunity of the free market and the lure of the high mark-up associated with trading in proscribed goods.

The relationship between terrorism and organised crime has continued to grow with the expansion of globalisation. Some black marketeers have found a novel way of increasing their profit by selling the arms required by terror groups along with a package of drugs. The two are part and parcel of the deal and non-negotiable. If the terrorists accept the deal, they have to sell the drugs to recoup their losses. A vicious circle is entered into: the arms dealer has off-loaded a sizeable quantity of drugs to a customer that has the means to sell

²¹ *ibid.*

them, and is often able to ensure that it has no rival competitors in its market area. Alex Schmid cites the example of ETA having to accept such a package in the past. The group then started to kill drug dealers to give the impression that its credo was anti-drugs, whilst at the same time ensuring a secure market for its product.²² It is no coincidence that today many arms dealers are also involved in drug trafficking. Denied the support from state-sponsors, these illicit groups have no option but to accept such terms if they wish to continue to exist. One of the IRA's main arms suppliers, General Ivan Andabak of the Croatian Defence Council was tried in Zagreb on drug running charges.²³ Andabak was responsible for supplying what was believed to be the Real IRA's biggest gunrunning operation, which was seized in Split, Croatia, in July 2000. The weapons seized were ex-Yugoslav, Russian and Chinese arms, including rocket launchers, automatic rifles, and detonators, more than 4,000 rounds of ammunition, grenades and about 40 kilograms of commercial explosive.²⁴

The Schengen Implementing Convention does contain provisions for dealing with firearms and ammunition (Chapter 7), but for the most part it focuses on regulating national laws on registration and licensing, listing those firearms which require authorisation and the permanent marking of serial numbers rather than actively engaging in tackling smuggling of such ordnance. Chapter

²² Alex Schmid, *The Link between Transnational Organised Crime and Terrorist Crimes in Transnational Organised Crime*, Vol. 2, No. 4 1996, p 70

²³ Ostensibly, Andabak was charged on these crimes. He does have connections with European terrorist groups dating back to the 1970s via the "black underground" – a network through which these groups exchanged weapons, ideas and support. Andabak's fall from grace lies with the fact that he fell foul of the post-Tudjman regime in Croatia that was increasingly sidelining the hardliners. (*Sunday Herald*, 17/9/00, *Croatian war criminal led Real IRA gun-running* p 10)

²⁴ *Ibid.*

6, however, is more aggressive in its attitude towards drug smuggling, and has been termed by den Boer as a "joint war against drugs".²⁵ Aside from making a concerted effort to prevent and punish illegal trafficking, Article 70 provides specifically for the establishment of a permanent working party to draw up proposals for the improvement of the practical and technical aspects of co-operation. In relation to border security, Article 73 is particularly interesting, because it allows "controlled delivery" (delivery under surveillance) of narcotics, as long as it is in line with the national legal system. Prior authorisation of each Contracting Party is required to initiate Article 73, although "each Contracting Party shall retain the direction and supervision of the operation in its territory and shall have the right to intervene". At this point a little should be said about the concept of "controlled delivery". Its purpose allows law-enforcement agencies the ability to collect information about a particular criminal group through long-term surveillance, rather than arresting individuals immediately, and even allowing some to complete their activity if it means garnering important information on a larger group. Police authorities have long since recognised that simply arresting couriers or "mules" is not conducive to preventing the trade of illegal narcotics; those at the top need to be arrested in order to have any real effect, or at the very least the guts of the organisation torn out. Article 73 illustrates recognition by the Schengen members of the necessity of this strategy, by actually providing for it in international legislation. This is a particularly significant development in the world of international co-operation against drug trafficking, as previously "controlled delivery" has usually not been legally prescribed, relying on

²⁵ den Boer, *Op. Cit.*, p 18

individual sanctioning by prosecutors and members of the judiciary.²⁶ The Implementing Convention now provides legal prescript throughout the Area. One should be a little wary, however, of the phenomenon of “forum shopping”, where, through the exchange of information, drugs officers intervene in a drugs transport when the trafficker passes through the country with the severest penalties.²⁷ This potentially risks the success of an operation if it is continued beyond necessary in order to allow the trafficker to continue onto a “high penalty” country, equally an operation may be terminated unnecessarily early for similar reasons.

Controlled delivery also has its part to play against terrorism: arrest a suspect too early and it may be that there is not enough evidence for a conviction, or even worse the group goes to ground, setting back the investigation. Indeed the investigators may never even find out exactly what the group’s plans were. Two months prior to the bombing of Pan Am 103 in December 1988, the German BKA arrested a Popular Front for the Liberation of Palestine – General Command cell (PFLP-GC) believing that they were planning to bomb an airline, but despite the strong suspicions, all the suspects were released because of lack of secure evidence. The suspects then promptly disappeared, “going to ground”.²⁸ The alternative view is the one put forward by Dostoevsky’s investigating magistrate, Porphyrius Petrovitch:

²⁶ Les Johnston *Transnational Private Policing: The impact of global commercial security* in James W. E. Sheptycki (ed.) *Issues in Transnational Policing* 2000 pp21-2

²⁷ den Boer, *Op. Cit.*, p 19

²⁸ Chapter V provides a fuller account of Operation “Autumn Leaves”.

supposing I have this gentleman arrested prematurely, although I am positively that he is *the man*, yet I deprive myself of all future means of proving his guilt” but “if I do not have him arrested, if I in no way set him on his guard” and “that I do not lose sight of him either by night or by day...he will provide me with ample evidence against himself.”²⁹

The concern with taking this approach to terrorism is that it is open to the possibility of backfiring. The decision by the French authorities to place under surveillance the close associates of Djamal Beghal, a French-Algerian businessman suspected of being Al Qaeda’s senior recruiting officer in Europe, following his arrest in Dubai for passport irregularities six weeks before 11 September, rather than detaining them, is now viewed by analysts as a grave error. It was later discovered that these suspects included a number of high profile figures within Islamic extremism, and that Beghal was in fact returning to Europe with the final orders for initiating a substantial terror campaign against US targets. In this particular case, acting “aggressively” *may* have provided warning of the 11 September attacks. Terrorism is a much more volatile issue to risk controlled delivery than is the case with drug trafficking. Ultimately a call of judgement is required for deciding when to make the arrest, but if it is not made at the right moment then lives hang in the balance in a more immediate manner that differs from those lives threatened by the more insidious nature of the illegal drugs trade. It is a dangerous balancing act.

²⁹ Fedor Dostoevsky Crime and Punishment Chapter 5, 1951

The Schengen Information System

One of the most innovative features of the Implementing Convention is undoubtedly the Schengen Information System (SIS) – a vast computer database capable of holding information on up to eight million people and seven million objects on its initial set-up.³⁰ The SIS is a major “flanking” measure, shifting the emphasis away from the concept of internal borders to that of a heavily sentinel orientated one. All Schengen members’ border checkpoints are linked to their National SIS database (NSIS), which is capable of rapidly communicating information requested by officers at these checkpoints, as well as those responsible for police and customs checks carried out *within* the country, and the co-ordination of such checks.³¹ The system is designed to allow these officers to check individuals entering or leaving the Schengen area, running their name through the system to ascertain whether or not there is any alert tagged to that individual. The types of individuals who are subject to SIS reports are:

- persons to be arrested for extradition purposes, on the basis of an arrest warrant or a sentence
- aliens who are reported for the purpose of being refused entry on the basis of a national decision
- persons having disappeared or persons who, in the interest of their own security, need to be placed in a secure location

³⁰ Benyon et al Police Co-operation in Europe: An Investigation, 1993, p 237

As noted this was the SIS’s initial capacity, based on the original membership of five.

³¹ Article 101(1). This refers to the mobile units permitted to operate in the border area. See below for a discussion on this.

- persons required to be located for the purpose of judicial proceedings, because, for example, they are witnesses who have to appear before a judicial authority
 - persons required to be subject to discreet surveillance or specific checks for crime prevention purposes
- (Articles 93-101)

Article 99(2) is interesting in this regard, as it permits the addition to the list of individuals who pose a “threat(s) to public safety”. In effect, this permits data to be included on those whom the authorities believe *may* pose a risk at some possible future date. Whilst a useful clause, especially in relation to terrorist suspects, it does appear to run contrary to the spirit of a person being innocent until proven guilty, and has ramifications for the enforcement of data protection legislation. . The conditions for this are:

- a) where there are real indications to suggest that the person intends to commit or is committing numerous and extremely serious offences, or
- b) where an overall evaluation of the person concerned, in particular on the basis of offences committed hitherto, gives reason to suppose that he will commit extremely serious offences in future

Information holding parameters

The information that may be held regarding such individuals above is not related to criminal intelligence due to the fact that the SIS works by means of

a common pool to which all the Schengen members contribute; consequently information related to criminal activities would be incompatible with the divergent data protection laws of the individual members. As such the data is limited to defined categories: real and assumed names; physical distinguishing marks; initial letter of second forename; date and place of birth; sex; nationality; indication that the person is armed or violent; reason for report and action to be taken (Article 94.3). Article 99(3) however permits the state security authorities to request that a report, beyond that permitted for SIS information on individuals, should be included if the said individual represents a "serious threat to internal and external security". This is subject to the authorities' possession of "concrete evidence" and the proviso that all other Contracting Parties are contacted beforehand. It is clear that such a provision is aimed directly at terrorist suspects, but equally one can include drug barons and organised crime bosses, who are always careful to ensure that they cannot be directly linked with their criminal activities. It is in the interest of all states to be aware of their less salubrious visitors and for what purposes they are visiting. The obvious fault with this system is that one must have a suspect in the first place to put on a watch list; many terrorist groups employ "unknowns" to circumvent a state's security network. The IRA have demonstrated this with their ASUs on the British mainland employing "lily whites"; more recently the terrorists involved in the 11 September hijacks were all "clean skins" as far as the US authorities were concerned.

The information accessible through the SIS is succinct, briskly addressing an enquiry within five minutes; however sometimes more detailed information is

required. This requirement was initially addressed by the Supplementary Information Request at the National Entry (SIRENE), a system incorporated within the SIS to deal with such enquiries as quickly as possible. There is an emphasis on speed because the requester may often be working under time restrictions – information may be needed for an arrest warrant, for example. Equally a magistrate may need additional information to extend an extradition detention, as a person can normally only be detained for 24-48 hours (although terrorist suspects can usually be held beyond this depending on the anti-terrorist legislation of the individual Schengen member), requiring the description of the criminal offence and the maximum possible prison sentence.³² SIRENE was staffed not only by representatives of the national police authorities, but also customs officials – and crucially, legal experts. The latter's purpose is not only to answer enquiries regarding the judicial system, but also to act as a safeguard against SIRENE replying to a request that would be technically illegal in the requesting country. This SIRENE procedure therefore aims at preventing a prosecution case or extradition hearing being thrown out or falling apart simply because procedures were followed incorrectly.³³ One particularly infamous example of such an occurrence is Belgium's refusal in 1988 to extradite IRA suspect Patrick Ryan because of an incorrect drafting of the initial extradition request from the UK.³⁴

SIRENE was replaced in August 2001 with the more advanced SISNET as part of the overhaul necessitated by both technical advances and the

³² Benyon, *Op. Cit.*, p 230

³³ For statistics on SIRENE "hits" see tables iv and v

³⁴ See chapter VIII for more details and similar examples.

recognition that the SIS was never designed to handle the capacity required by so many states after the Nice accession. The new system required not only efficiency but also flexibility in adapting to new technological advancements and new applicants, in addition to being legally applicable in all Member States. The new system maintains all the functions of the old one, but also serves as a single input and output data exchange network, resulting in more efficient service provided by a “one-stop shop”. Rapid electronic transmission of photos, fingerprints, ballistic images, identikit profiles, DNA profiles (the EU plans to create an international DNA database) and direct links with diplomatic missions outside the EU allowing the “exchange of data on the issuing of visas” are all functions available through the SIRene Picture Transfer (SIRPIT).³⁵ Additionally, real-time video images and sound are also transferable, and this can prove especially useful in the context of Articles 40, 41 and 99 (surveillance of suspect vehicles) although the entire system will not be fully operational until 2006.³⁶ A DNA database would offer some assistance in tackling the present problem faced by European law-enforcement agencies in identifying the numerous Islamic extremists originating from North Africa. Many of those arrested have possessed as many as forty forged identity documents, making it impossible to correctly identify them.³⁷ If they cannot be identified, it makes it much more difficult to arrest accomplices. The problem, however, is that it would require the incorporation of DNA

³⁵ The transfer of fingerprints and photographs by fax for speed, followed by the later sending of the original copy for accuracy often results in too poor quality to permit automated comparison, while the latter regularly leads to delays which may result in the release of a suspect. (*European Report*, 25 March 2000)

³⁶ *European Report EU: Schengen Convention – New technical and institutional developments in the offing* cited in University of Exeter website: www.ex.ac.uk/politics/pol-data/undergrad/paterson/sis/html

³⁷ See chapter VI for more on this threat.

samples from Third Party governments, which stirs up a cauldron of legal issues. Moreover, the majority of these suspects come from poor countries where DNA profiling simply does not exist.

Europe's law-enforcement authorities have enthusiastically welcomed the SIS, registering an increase of recorded "hits" from 5.9 million at the end of 1997 to 8.7 million at the end of 1998, and regarding it as a crucial flanking measure.³⁸ Michel Pinault, a Préfet on the K4 Committee took the view that the SIS "has been extremely useful" and "is proving its use more and more day by day".³⁹ A senior UK official meanwhile believed, in preparing the British entry into parts of the Implementing Convention, that "it will considerably expand the UK's ability to tackle crimes".⁴⁰

The SIS plays an important part in policing the external border of the Schengen Area, serving as one of the main flanking measures required for augmenting its peripheral security. By maintaining a quantitative database, all those entering the Schengen Area will be checked and their details run through to determine whether they are an undesirable or wanted by a Schengen member. So runs the theory. Examining how the external border is policed determines the security of Schengen as a whole.

³⁸ Council of the European Union 1998 Annual Report on the Implementation of the Schengen Convention 10846/1/99 (LIMITE) CATS 23 ASIM 36 COMIX 223

³⁹ House of Lords European Communities – Seventh Report Session 1998-99, The Schengen System and UK Policy on Frontier Controls, paragraph 53

⁴⁰ The Herald 29/5/00, p 6

Policing Schengen's External Border

Schengen operates on the concept of collective trust. Each member must feel secure regarding the competence of its neighbour's internal security policy before they will remove their internal border controls. The UK's subdued confidence regarding the competence of its fellow EU Member States in this matter provides one explanation for its reticence to fully enter into the Schengen Area⁴¹. Fundamentally, though, this trust can only be achieved through the augmentation of Schengen's external border. The mainstay of this rests with the SIS, although it is interesting to note that the Schengen States view this system as one orientated towards the control of immigration than towards that of crime, the latter being the primary reason as to why British police chiefs pushed for the UK's association with the SIS. The security of the external border is also supported by the transfer of additional units from the internal to the external, with the addition of mobile units to exercise surveillance on external borders between crossing points, and on border crossing points outside normal opening hours (Article 3). However the Convention stresses that this type of "surveillance shall be carried out in such a way as not to encourage people to circumvent the checks at crossing points". In other words, it is a warning not to employ heavy-handed or blatantly overt tactics that would push this policy in the direction of "Fortress Europe" – a terminology with "iron curtain" connotations, which the architects of Schengen and its members have been at pains to avoid. Whilst the maintenance of the integrity of the external border is left to the responsibility

⁴¹ House of Lords, Op. Cit., paragraph 11

of the individual state, the Schengen Common Border manual provides stipulations as to how this shall be practised, effectively establishing a communitarian approach.⁴²

Does the UK's reluctance to be part of this communitarian approach imply a lack of confidence on the part of British authorities towards Schengen? The UK's argument against Schengen rests on the premise that its sea borders provide a natural and far more effective protection than a land border, and thus while it is sensible for Continental Europe to restructure its border security, it makes less sense for the UK to do so. Therefore, the UK's position rests on what it sees as practical points – to join Schengen entirely would be to dilute its security. The UK has cited terrorism as one of its main reasons for this policy. Its security forces were concerned that “the elimination of internal border checks in the rest of Europe would also greatly assist the IRA, making it easier for IRA terrorist cells to carry out attacks against British targets on the Continent and to find safe haven in neighbouring European States.”⁴³ The Irish government, however, no friend of the IRA, has made it clear that its opt-out from full participation on Schengen is due only to its commitment to maintaining the Common Travel Area with the UK.⁴⁴

Equally, with the commitment to the peace process, the IRA argument for determining policy is now redundant. To use al-Qaeda as an excuse would be

⁴² This manual has remained classified, unavailable even to legislative committees such as the House of Lords Select Committee on European Communities Seventh Report, but a non-classified version of it has recently been made public in October 2001, following an application under the rules on access to documents, the Council has released the English text in an on-line format. (Common Manual Council of the European Union Brussels 22 June 2001 (23.08) OR (Fr) 8248/01 LIMITE FRONT 32 COMIX 309)

⁴³ House of Commons Home Affairs Select Committee 7th Report, Practical Police Co-operation in the European Community Session 1989-90, 363-I, p 55

⁴⁴ House of Lords, Op. Cit., paragraph 10 (Introduction)

contemptible when Britain's European partners have long regarded it as a haven for Islamic extremists.⁴⁵ On these grounds, one must question the validity of such an argument, accepting the premise that border security measures have little effect in preventing terrorism.

Sustaining this argument are developments occurring in the traditional methods of policing entry into the UK. This is conducted through the "funnel points" of airports and ports (plus the Channel Tunnel), which provide a managed approach to observing, if not actually checking, every entrant into the UK if so required.⁴⁶ The UK security forces therefore favour the retention of these controls over Schengen, even if they allow only a slim chance of detecting a terrorist. However, with the ever increasing volume of traffic into the UK, currently approximately 100 million per annum – 90 million of whom arrive from within the Schengen Area – growing at a compound eight per cent each year, one might view such a policy as wishful thinking.⁴⁷ Indeed when one takes into account the fact that whilst the number of passengers arriving in British ports has risen by fifty per cent, staffing levels rose by only ten per cent over the past five years,⁴⁸ leading to the July 1998 White Paper *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* warning that:

without modernisation and greater flexibility, so that resources are targeted more effectively on tackling abuse and clandestine

⁴⁵ Jane Corbin *The Base* 2002 Chapter 16

⁴⁶ *House of Lords*, Op. Cit., paragraph 20 (Introduction)

⁴⁷ *Ibid.*, paragraph 16 (Introduction)

⁴⁸ *White Paper Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* July 1998 paragraph 6.2

entry rather than routine work, it will become increasingly difficult to maintain effective frontier controls, cope with passenger growth, deliver the kind of service standards that facilitate trade, tourism and education, and maintain the United Kingdom's position as an international hub.

(Paragraph 6.5)

Such concerns, taken in conjunction with the fact that, as far as drugs are concerned "the majority of the seizures are as a result of prior intelligence", question the validity of maintaining the current system.⁴⁹ Changes are required, but should the UK adopt Schengen as its solution?

Most of the Schengen members maintain an identity card system, which serves as a definite supplement to the "flanking measures". Whilst the Implementing Convention does not require such a system, it would be regarded as a strong fallback position by the UK if it did choose to enter fully into Schengen. Yet the controversial nature of identity cards, sceptically viewed by the British public, make such a decision doubtful, even in the post-11 September environment. Opposing this argument is the fact that although eleven EU Member States maintain identity cards, three of the Schengen members, France, Italy and Portugal, operate it as a voluntary system, which almost everyone carries. While the majority – Belgium, Germany, Spain and Greece – maintain a compulsory card,⁵⁰ the fact that two Schengen Members, Sweden and Denmark,

⁴⁹ John Abbot, Director-General of the National Criminal Intelligence System; House of Lords, Op. Cit., paragraph 17 (Examination of Witnesses, Questions 1-19)

⁵⁰ Bill Heberton and Terry Thomas Policing Europe: Co-operation, Conflict and Control 1995 p 108; Migration News Vol. 8 No. 11 November 2001 "EU: Terrorism, Harmonisation".

do not operate such a system, whilst another three do not operate compulsory cards, does question the validity of an identity card system representing a natural fallback position for the UK government in the event of Schengen entry. The UK's partial acceptance of Schengen was driven by its police chiefs and policing needs, and not political expedients. In this light British policy is therefore determined by practicalities rather than politics.

The British decision of opposing full membership places the issue of terrorism squarely with that of Schengen, unlike its fellow Member States who associate Schengen primarily with immigration issues. Spain, the other EU state to have suffered a sustained terrorist campaign, sees Europol as the favoured tool for fighting terrorism at a European level. Such a difference of viewpoint, while serving as yet another example of Britain being out of kilter with the rest of her EU partners, demonstrates a doubt about Schengen that is not acknowledged by the rest. The Spanish recognise that Schengen was not designed to tackle terrorism, and excluding France's initial raising of the drawbridge in response to the Islamic fundamentalism in 1993 and a GIA campaign in 1995, have not initiated Article 2.2 on terrorist matters. The open border between Spain and France has not been sealed because of the threat posed by ETA; rather, renewed co-operation between the two states against ETA has proven far greater in worth. Nevertheless, the UK is in the unhappy position that were it to open its internal borders, it would not have the same availability of flanking measures open to the other Schengen members. Because entry to Britain is through the "funnel points" of ports and airports, border security has never been required outside these points; indeed the point

to make is that security has been contained *within* these areas. Schengen provides for mobile patrols in compensation, but because the UK has no border areas, it has no tradition of policing such areas, unlike Germany for example, which maintains the *Bundesgrenzschutz* (BGS), a federal border police numbering 30,300 in 1991⁵¹. Moreover, Germany maintains a “security zone” extending thirty kilometres into Germany along its eastern border where the BGS and customs officers have the same powers as the state police.⁵² Would mobile patrols operate within a twenty-kilometre diameter of each British port and airport, and how does one equate this to the UK’s lack of border policing tradition (the obvious exception being Northern Ireland)? Exacerbating these concerns is the fact that “stop and search” remains a controversial issue in a society that does not employ identity cards.⁵³ Such problematic circumstances indicate that Schengen does have difficulty accommodating the EU island Member State’s security considerations with those of the initial continental core members, but they fall short of causing what could be described as a security deficit for the UK. What would be more problematic for the UK is the introduction of a system of mobile patrols focused around the points of entry into the country, moving Britain away from its traditional decentralised policing system and bringing it closer towards an operational national policing methodology, and all the structural changes that this would induce.

⁵¹ Klerks, *Op. Cit.*, p 48

⁵² [FFM Bordereconomies](http://www.moneyations.ch/topics/border/titelbord.htm) “Living Near the Border”
(www.moneyations.ch/topics/border/titelbord.htm)

⁵³ A point that relates to the UK government’s decision to retain border controls because they “match both the geography and traditions of the country and have ensured a high degree of personal freedom within the UK”. [House of Lords](#), *Op. Cit.*, paragraph 13 (Introduction)

The previous chapter makes clear the limited extent to which border security can be effective against terrorists. It is equally important, however, to discuss the ramifications linked to the free movement of individuals within the Schengen Area for counter-terrorism, especially in relation to the fact that this permits asylum seekers and refugees belonging to third party states the same freedom of movement, once inside the Area. The European states have been victim to numerous terrorist attacks perpetrated by non-indigenous groups, and it is worth remembering that it was such a group who entered the USA on tourist visas to carry out the 11 September attacks. How effective is Schengen in separating the “goats from the sheep”, and is it in a position to keep track on all who pass its external border?

The Implementing Convention makes the important distinction between EU Member States who are outside the Area as “Third Parties” and non-EU Members as “Aliens”, a significant differentiation in how each party is treated upon entry into the Area.⁵⁴ It is mandatory, for instance, for each entrant to be subject to at least one check, making it possible to establish their identities based on their presentation of travel documents (Article 6(b)). Aliens, however, in addition to providing documentation demonstrating their ability to support themselves during their stay and return trip, as well as their reasons for staying, are also subject to exit checks “in the interest of all Contracting Parties under the law on aliens. This is done in order to detect and prevent threats to the national security and public policy of the Contracting Parties” (Article 6(c)), ensuring that any such malefactor may be apprehended before

⁵⁴ For the purpose of continuity the Schengen terminology shall be adopted here, but the term “Alien” shall be considered interchangeable with the term “non-EU national”.

leaving the Area. Again, this relies on the assumption that a terrorist would enter through a legal conduit, travelling under false identification which is either known to the authorities or detectable as a forgery.

The employment of mobile patrols and surveillance aims to protect the non-authorised crossing points along the border. Such patrols have been found to be extremely useful by the Schengen members – internally, as well as along the external border. Michel Barnier, the French European Affairs Minister, stated that these “could be more effective than fixed controls”.⁵⁵ They were introduced internally at a meeting of the Schengen Executive Committee in October 1995 after a proposal by Germany to recognise their creation under bilateral agreements between Schengen members, leading to a network of agreements throughout the Union. Their purpose lay in raising the threshold required by a Schengen member before it would initiate the Implementing Convention’s derogation clause. Article 2(2) permits border controls to be reinstated at any time if “public policy or national security so require” for a “limited period”, as derogation clauses inhibit the spirit of a treaty. France, for example, was the first to make use of this in April 1993 to prevent “illegal immigration and the spread of Islamic fundamentalism”⁵⁶ and again following a series of Armed Islamic Group (GIA) bombings in Paris after the summer of 1995. The efficacy of merely reverting to traditional controls against the GIA is questionable considering the general porosity of borders. In a similar vein, French hostility to the liberal drugs laws of the Netherlands has caused it to maintain border controls along its Belgian and Luxembourg borders, arguing

⁵⁵ *Statewatch*, *Schengen: “Mobile frontiers” introduced* Vol. 5, No. 6, 1995, pp 5-6

⁵⁶ *Statewatch*, *France: new immigration laws* Vol. 3, No. 3, 1993, p 1

that these are transit countries for drugs leaving the Netherlands. France did however lift its border controls with Germany following an announcement on 18 April 1996, after reaching an agreement to maintain “mobile border controls” instead. The Belgian Interior Minister, Johan Vande Lanotte, agreed that “mobile” or “surprise” checks were much more effective than fixed points, although France has yet to revise her policy regarding this border.⁵⁷ Because these mobile checks are exactly that, and not fixed, they do not contravene the Implementing Convention, and typically may be employed within twenty kilometres of the border, although not actually on it.⁵⁸ Their effectiveness lies in much the same respect as that of police patrols in urban areas. Again, good luck plays an important part in apprehending a terrorist in such a catchment area. To what extent, for example, were ETA’s confrontations with French checkpoints in November and December 2001 due to the terrorist’s bad luck or intent? The primary importance of mobile units where counter terrorism is concerned is that they can act as “chance” encounters to mask the role played by an informant in the same manner used at conventional frontier checks. The importance of this cannot be overstated. Only by protecting informants through such means can law-enforcement agencies reduce the possibility of a “mole” or “tout” hunt within the group following an arrest.⁵⁹ It is also important to note that mobile units provide the state with the additional means to provide an element of individual responsibility over and above that of the collective response devised by the Implementing Convention. This last point is particularly significant because it

⁵⁷ Statewatch, *SCHENGEN: “teething” problems, expansion and first annual report* Vol. 6, No. 3, 1996, p 19

⁵⁸ House of Lords, *Op. Cit.*, paragraph 11

⁵⁹ See chapter V for a greater discussion on the use of informers.

does provide the state with the opportunity to augment its security at an individual level, thereby partially alleviating concerns regarding the competence of other Member States' internal security policy. Mobile units provide a means of ensuring a necessary degree of flexibility within the Implementing Convention in terms of security, which is perhaps essential in reducing the employment of the derogation clause.

The effectiveness of these "flanking measures" is important because once inside the Schengen Area, Third Party nationals and aliens enjoy free movement with no further need for a visa (non-EU nationals or aliens are limited in their movement through a three-month visa), with their substantive rights in such matters as movement and residence being governed by Community law, to which the Implementing Convention is subservient. Within this context, a Schengen state is obliged to refuse an individual entry if he or she does not fulfil the minimum requirements for entry. Therefore, decisions made at the national level take effect throughout the Area. The exception is that a Schengen State may admit, *onto its own territory only*, any alien who has failed to satisfy entry conditions, on national interest or humanitarian grounds, or because of international obligations (Article 5(2)).

This area of the Implementing Convention was put to the test during a trying three months that began in November 1998 when the Kurdish PKK leader, Abdullah Ocalan arrived in Rome on 12 November as an international *persona non grata*, wanted only by Turkey, who had filed for his extradition. Italy's courts turned down the extradition request, but hoped that Ocalan would leave

of his own accord. Ocalan's strategy, however, was diametrically opposite to the EU Member States; he refused to leave Italy unless it was for a country not too far from Western Europe with good security and a sizeable Kurdish community.⁶⁰ No EU state wanted Ocalan, even Germany, which had initiated an extradition warrant for him after his arrest by the Italian authorities but had then declined to act on it for fear of provoking trouble between the Turkish and Kurdish communities within Germany. Despite being regarded as a terrorist by most Western governments, Ocalan's detention by the Italians was lifted following Germany's decision not to pursue its international arrest warrant for him. Technically a free man and within the Schengen Area, Ocalan could, in theory, have moved within the Area were it not for the fact that he was regarded by those states as a "threat to public policy, national security or the international relations of any of the Contracting Parties" (Article 5(e)). Consequently, he could not travel across these internal borders.⁶¹

The Implementing Convention is equally concerned with matters pertaining to asylum (Chapter 7) – once an applicant has been granted the right of asylum, he or she is free to move within the Area. Contracting Parties need only share information on such individuals if it is necessary to establish which state is responsible for processing the application. In both cases such exchange occurs

⁶⁰ *The Observer Can't stay, won't go: Italy's difficult guest* 3/1/99 p 17

⁶¹ In addition to concerns regarding the Kurdish and Turkish communities within their borders, Ocalan's presence in Italy soured relations with Turkey. Mesut Yilmaz, the Turkish Prime Minister, criticised Germany for backing away from legal action against Ocalan, and Turkey criticised Italy over letting him go, resulting in a boycott of Italian goods. The relationship between Turkey and Greece (Ocalan found sanctuary in the Greek Embassy in Nairobi) was also put under intense strain because of this issue, leading not only to the resignation of the Greek Foreign Minister, Theodoros Pangalos, but also criticism from some of Greece's allies. (*BBC News Ocalan fallout hits Greece* 18 February 1999)

prior to granting asylum status. Decisions made at a European Council meeting in December 1998 stressed the need for “an overall migration strategy” to be “established in which a system of European solidarity should figure prominently”.⁶² Such a system would require a greater exchange of information and statistics on asylum and immigration policy as well as the status of aliens, possibly lending itself to SISNET’s expansion plans on immigration data. A move has also been made to limit the “secondary movements” by asylum seekers between Member States (Article 36 b (iv)). As it presently stands though, asylum seekers are free to move within the Schengen Area provided that the application process has begun, unless prohibited by specific national legislation (Implementing Convention, Articles 33(1) and 34(1)).

The events of 11 September have placed new emphasis on the issue of asylum, since many of those involved had been granted visas or asylum to stay in Europe, allowing them to plan and train for the attacks. Ramzi Yousef, who was responsible for the first terrorist attack on the Twin Towers in February 1993 had entered the USA in 1992, claiming political asylum upon arrival. The controversial Egyptian born cleric, Sheik Abu Hamza, who preached at Finsbury Park Mosque in London (which has also been associated with alleged meetings of al-Qaeda supporters) and who was questioned by Scotland Yard in 1999 on suspicion of terrorist offences, remains a source of contention. It has been alleged that he may have played an indirect role in connection with al-Qaeda. These concerns pressed the EU Member States to

⁶² Action Plan of the Council and Commission on how best to implement the provisions of the Amsterdam Treaty establishing an area of freedom, security and justice European Council 4 December 1998, Articles 32-38

make changes to the current procedures. On 27 December 2001 the Council of the EU adopted four acts by written procedure,⁶³ one of which (Council Common Position on combating terrorism, Article 16 (of 11-17)) takes the position that:

Appropriate measures shall be taken in accordance with the relevant provisions of national and international standards on human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts.⁶⁴

Such measures are essentially pragmatic, although how far they will actually be able to determine a terrorist suspect's past is questionable. All asylum-seekers and refugees will become subject to vetting by the police and security services before their status can be granted. Article 4 of the EU Common Position covers "any form of support, active or passive" for terrorist activities, which while perhaps useful against terrorist support networks, is also capable of being detrimental to someone who does not consciously assist those involved with terrorism. This is because the common position no longer differentiates between these two groups, and neither for that matter between a terrorist and a liberation group: a person, for example, who had helped raise

⁶³ Number 2 is concerned with the application of specific measures to combat terrorism; Number 3 is concerned with the freezing of funds and resources to terrorist groups; and Number 4 lists the persons, groups or entities covered by the freezing of funds and the ban on the supply of resources.

⁶⁴ *Statewatch analysis no 8 New EU measures on terrorism criminalises all refugees and asylum-seekers* Online edition www.statewatch.org

funds to support the humanitarian needs of PKK prisoners in Turkish gaols, could therefore be refused refugee or asylum status.⁶⁵

These measures are useful in prohibiting the entry of individuals who have been clearly associated with terrorist activities outside the EU Member States. However, it is the final arrival at a common definition by the JHA Council, in December 2001, of “terrorism” and “terrorist acts”, as well as a list of proscribed groups and individuals, which marks a significant development. The EU definition follows the principle of subsidiarity, accepting the primacy of national terrorist legislation, thus allowing the Schengen area to operate as smoothly as possible by introducing a number of agreed upon offences which can be regarded as non-political. Utilising Article 99/3, these lists could be entered into the SIS database as individuals and groups who threaten the public safety.⁶⁶ Such an enhancement would improve the counter-terrorist potential of Schengen. However the fact remains that such measures can only be effective when that particular information is known about the individual in question; equally, the authorities must be capable of apprehending or detaining the said individual. Again, the SIS is only as useful as the intelligence it receives.

⁶⁵ Statewatch Observatory In Defence of Freedom and Democracy, Reports on analysis no 8, *New EU measures on terrorism criminalises all refugees and asylum-seekers* January 2002

⁶⁶ As the history of European co-operation in counter-terrorism demonstrates, arriving at a common definition has been no easy matter; what is a political offence and what is not. Witness the problems associated with the Council of Europe’s Convention on the Suppression of Terrorism 1977, discussed at length in Chapter VIII. The matter of recognising terrorism as a criminal offence in national legislation was finally resolved by the establishment of a common definition on terrorism throughout the EU, at the 6 December 2001 Council meeting. The definition covers terrorist offences, as well as those linked to them, including incitement and abetting (Articles 1, 2 and 3). Prior to this definition only Germany, Italy, the UK, Spain and Portugal incorporated any such definition into their national legislation. The EU began work on this issue in 2000, but the al-Qaeda attacks in September 2001 accelerated the process.

(Council of the European Union, Outcome of Proceedings; 7 December 2001, Proposal for a Council Framework Decision on combating terrorism. 14845/1/01 Rev 1 Limite).

Conclusions

From a practical perspective, Schengen's provisions for protecting its external border inspire little confidence in the protection of the Area against terrorism; but then that has neither been a primary nor realistic goal for the Implementing Convention. No type of border control is much of a guarantee here. Rather Schengen's concern has been to prevent both an influx of immigrants across its Eastern and Mediterranean borders, and the smuggling associated with organised crime across these borders, hence the intention to expand SISNET into immigration data. From the mid-1980s up until the 11 September attacks, these two concerns have been regarded by the EU Member States as the principal internal security threat. However, with the emerging threat of Islamic extremism, concerns over immigration have taken a new direction, with the possibility of terrorists hidden amongst the thousands of legitimate asylum seekers and illegal immigrants. The Schengen machinery is in a position to provide some relief to this problem by policing entry into the EU, effectively establishing a "Domesday Book" or database of every non-EU national within the Union. Unfortunately, the resourceful and determined terrorist should be able to circumvent this with relative ease. This problem could be partially addressed by the introduction of an EU-wide "smart" identity card. All but two Schengen states operate some form of identity card system, and Sweden is now considering implementing such a system. If all Schengen or EU citizens were issued with such an "un-forgeable" card, along with every legal entrant into the Schengen Area, the policing of illegal immigrants and terrorists who crossed the border illicitly would be made

easier, to an extent. Of course there are flaws: besides the obvious one of a “clean skin” being granted a card, a typical cursory inspection of identity could be thwarted by a terrorist employing a legitimate card belonging to, or stolen from, someone else. It would not be difficult for a terrorist support network to obtain a legitimate card from a sympathiser or through blackmail or bribery. If the terrorist then altered his/her appearance to look similar to the original owner, and bearing in mind traditional racial stereotypes, the terrorist could pass with this identity unless subjected to a more detailed inspection. Such identity cards might therefore introduce a dangerous element of false security, unless sophisticated technology incorporating biometric data, e.g. a thumbprint, was employed.

The Implementing Convention is much more effective, however, in serving to remove some of the obstacles towards practical police co-operation along border regions, while also encouraging the passing of intelligence on a proactive basis. This can have a useful effect in policing, as the acquisition of seemingly unconnected or random intelligence may be a missing piece of the jigsaw in someone else’s investigation. It should also be noted that Europol provides a more effective service in these terms, especially with regard to serious crime investigations such as terrorism (see Chapter VI). The Implementing Convention does allow for much greater scope in terms of co-operation, permitting bilateral agreements that enhance this. This is less a feature associated with the policing of the external border, as Schengen’s provisions are much more rigid here due to the uniform approach required. Annex 3 of the Common Manual on External Borders provides only for

bilateral agreements on local border traffic. Bilateral agreements concerning the external border are therefore ones between a Schengen signatory and a non-EU member. Co-operation in this sphere is a necessity in preparing the accession candidates for membership, but because Schengen does not regulate this, the Schengen minimum requirements are not mandatory.⁶⁷ Indeed, in this respect Schengen's requirements for policing the external border are not remarkably different from the philosophy of policing national borders; there is nothing dynamically new here, simply provisions for augmenting this area of security. Thus the regulations managing the internal borders are the more original and innovative of the two, for the reason that policing the open internal borders provides much scope for co-operation. However, a major criticism of this approach is that those countries with external borders are expected to foot the bill for securing the standards required by the External Borders Manual, with no recompense for this increased outlay of funds. Establishing a central pool of funds available for Schengen to compensate these states would not only be fair, but would also help ensure the required level of security – something which would benefit all Schengen members.

Crucially, Schengen's achievements in dealing with terrorism lie in the practical measures it can provide against terrorists engaged in a border campaign. Much of this so far remains a theoretical approach, as it cannot be accurately demonstrated how far the general open borders policy has contributed towards the recent flourish of co-operation between the Spanish

⁶⁷ There is much to be said, however, for introducing the Schengen system to the candidate members prior to actual accession. Although these countries will not actually be able to remove their external borders until their security arrangements match the requirements of the JHA Council, a regulatory approach would benefit security arrangements, especially between candidate members.

and French authorities against ETA. Confidence in the level of co-operation however has been such that there has been no invoking of Article 2.2; even when ETA activity reached an initial height in the summer of 2000, the authorities introduced only increased surveillance and checkpoints along the Basque border. From a holistic perspective, recognition of the existence of the Third Pillar and the EU involvement in this area are also deemed to be contributing factors to the improved co-operation in this area.⁶⁸

Despite the weaknesses inherent to Schengen in terms of policing against terrorism, it does give an indication of confidence in the flanking measures that no Member State attempted to reinstate border controls after the 11 September attacks. The realisation that co-operation with neighbours is a more effective defence against terrorism appears to be sinking in. It is evident, though, that Schengen has significant potential against some particular terrorist campaigns, but this has remained largely untapped. Schengen's universal regulatory scope would certainly have helped in countering terrorism along the Anglo-Irish border, in the absence of a bilateral agreement, but its enforcement, unless carefully maintained and monitored, could have exacerbated the situation. Although how far the "Europeanness" of the legislation would have facilitated de-escalation because the Unionists could not legitimately claim it to be an Anglo-Irish deal is another matter.

⁶⁸ Lane, *Op. Cit.*,
Whilst Lane's article refers to law-enforcement co-operation between the North and South, the premise holds true for co-operation in general throughout this area in Europe as this thesis hopes to make clear.

Can we see Schengen as a legitimate security continuum, or is it merely another forum for police co-operation? Schengen goes well beyond a simple forum. It is a framework of the minimum co-operation required by the Member States to ensure that they can maintain a "borderless" Europe. The framework contains a sophisticated computerised database, and looks set to make inroads into immigration control. Beyond this, the framework encourages further bilateral co-operation, and one can expect Schengen to raise its co-operative minimum when the bilateral level is profuse throughout the framework. This almost symbiotic relationship has important ramifications on how we have traditionally viewed co-operation within the JHA sphere. Without the initial bilateral border co-operation in Europe, Schengen and the Implementing Convention would have had great trouble in getting off the ground. However, Schengen's origins lie with "The Six", many of which had enjoyed advanced security co-operation along their borders for some time, particularly along the Franco-German and Benelux borders. This pre-existing co-operation, together with the integrationist drive associated with the original six Member States, who were able to manifest their enthusiasm for deeper integration through the construction of the Schengen Area, directly shaped the form and standards by which cross border security co-operation would operate. Schengen was designed as a European template, not a regional one; as such, neo-functionalism has had little effect on it. Rather it has been the intergovernmental construction of Member States, establishing it initially outside the parameters of the EC, and it is this integrationist drive which has developed this particular framework. The regulatory order required for such a large encompassing framework implies

that neo-functionalist co-operation can have little place in its construction, although as we shall see, this need not necessarily be reflected in its actual functioning. Schengen currently dominates European border security co-operation, but in encouraging further bilateral co-operation, it will eventually become eclipsed unless it is updated to reflect the new developments.

We now need to address where border security co-operation is taking the European Project; after all, if this supposition is correct, then there must be a point at which enhanced co-operative border security reaches saturation point in a borderless Europe Union.

Chapter IV

The Position of Border Security within the European Integration Process

Of the many debates and discussions regarding the JHA gamut initiated after the 11 September attacks, one of particular interest where border security is concerned is that of establishing a common European Border Guard. This policy, already under discussion before 11 September, centres on bolstering the border security of the accession states along the EU's eastern border. It does so in preparation both for the entry of these candidate countries and to alleviate the financial burden imposed by the need for heightened security at the external border on those countries that have such exterior borders.¹

Discussion has ranged from the placement of individual officers from differing Member States to a fully-fledged European border guard.² However, the EU's JHA Commissioner, Antonio Vitorino, mooted such discussion, arguing that better training, computerisation and simple improvements such as waiting rooms and restaurants for border-crossers would be of greater benefit for improving the efficiency of candidate countries in these matters.³ In the aftermath of 11 September, this issue has received renewed interest from Schengen states concerned about their security. A meeting in held in Brussels on 13 October 2001, by states interested in this matter (Belgium, Spain,

¹ European Voice *The EU Must Start Thinking Enlarged* Volume 7 Number 45, 6 December 2001 Online Version.

² Centre for European Policy Studies; Report and Policy Recommendations from the Conference on New European Borders and Security Co-operation *Reshaping Europe's Borders: Challenges for EU Internal and External Policy*, Annex II *Friendly Schengen Borderland Policy on the New Borders of an Enlarged EU and its Neighbours* by Joanna Apap, Jakub Boratynski, Michael Emerson, Grzegorz Gromadski, Marius Vahl and Nicholas Whyte, 6-7 July 2001, Online Version

³ Financial Times *Back to the Wall* August 1 2001, Online Version

France, Germany, Italy, Austria and Finland) focused informal political discussion on the possible creation of a common border guard to enhance security in preparation for the next accession period, in 2004.⁴ Whilst not directly connected with terrorism per se, it is quite clear that concern about terrorism has propelled a policy previously regarded by most as unrealistic or unnecessary into a matter of genuine consideration.

Acts of terrorism, such as Munich 1972 or the assassination of the British Ambassador to The Hague in 1979, have been responsible for several significant advances in law-enforcement and judicial co-operation, and 11 September has proven no exception. The EU has already instigated a number of meetings and policies regarding refugees and visas. Such policies are unmistakably intergovernmental in origin; conversely, the concept of a common border guard does not comfortably fit into this category. It would involve creating what in effect would be a supranational unit, with its own funding, training, and esprit de corps. The creation of such a unit would however be out of kilter with the current progress of EU internal security co-operation by finally placing “clear water” between the intergovernmental and the supranational approach in an area of JHA policy. Traditionally the approach taken by the Member States with regard to the Third Pillar has not been sympathetic to adopting supranational solutions to enhance co-operation. A Belgian Interior Ministry official suggested that the most likely outcome of a common border guard policy would take the middle ground between those favouring increased training and co-operation and the outright establishment

⁴ Reuters *Hard Core of EU States Weigh Common Border Police* 5 October 2001 (Online Version)

of a fully integrated unit, typically standardised joint training, common equipment procurement and the harmonisation of external EU border checkpoints.⁵ However, meetings of EU Justice and Interior meetings during the months of May and June 2002 indicated agreement, in principle, to creating a European Corps of Border Guards, with the European Commission's work in producing a blueprint for such a corps, which would eventually become a force with operational powers.⁶

By providing this example of the common border guard discussion it is discernible that policy discussion regarding both co-operative border security and JHA policy in general need not be limited to matters that are solely intergovernmental in constitution. Intergovernmentalism is, however, the favoured approach of the Member States to these matters. This chapter questions the validity of the intergovernmental approach in co-operative border security, arguing that Schengen is a facilitating, albeit regulatory, framework, rather than an entirely new structure. This framework actively encourages bilateral developments, but with its foundations established upon the bilateral regional border agreements – a patchwork of different integrationist building blocks – one should not assume that contemporary co-operative border security within the EU is developing entirely along intergovernmentalist lines. If border security is not entirely aligned with intergovernmental methodology, does this have an adverse affect on the co-

⁵ Ibid.

⁶ BBC News *EU Force to Tackle Illegal Immigration* 30 May 2002; BBC News *EU Ministers Agree to Fortify Border* 13 June 2002; Communication from the Commission to the Council and the European Parliament, Towards Integrated Management of the External Borders of the Member States of the European Union, Commission of the European Communities, Brussels 7.5.2002 Com (2002) 233 final. See in especial Provision No. 50, which provides an insight into some examples of these operational powers.

operative approach, especially in relation to the symbiotic relationship between the Implementing Convention and bilateral collaboration, or is there accommodation instead, and how does this approach relate to counter-terrorism? These answers are determined through the analysis of the bilateral border agreements, and with this knowledge of their integrationist makeup, we can compare the level of intergovernmental co-operation here with the JHA orientated Schengen Implementing Convention.

Another issue that requires address is the increased use of technology, specifically computerised databases, within co-operative border security, and the effect that these are having on our data protection and human rights legislation. The SIS, considered a cardinal flanking measure, has seen its powers increased since 11 September; however, the appropriate accountability measures have not been adopted to match this.⁷ Is this problem with accountability endemic to the intergovernmental approach?

The Intergovernmental Nature of EU Border Security Co-operation

In placing the Schengen Implementing Convention under the integrationist microscope it becomes readily apparent that the Convention has the flavour of an intergovernmental bargain. Numerous bilateral clauses have been attached to the articles, demonstrating difficulties in reaching consensus on common denominator politics.⁸ To provide a compelling account of the

⁷ Martin Baldwin-Edwards & Bill Heberton *Will SIS Be Europe's Big Brother?* in Malcolm Anderson & Monica den Boer (eds) *Policing Across National Boundaries* 1994 pp 140-141

⁸ Hot pursuit, as codified by Article 41, with its numerous bilateral subsidy clauses is illustrative of this, as is Article 40 (surveillance).

intergovernmental policy regarding border security, scrutiny cannot be focused on Schengen alone: it is also necessary to ascertain the strength of intergovernmentalist policy within other co-operative border security arrangements, in particular the provisions of the 1962 Benelux Treaty, which are believed to have had significant influence on the architects of Schengen.⁹

Intergovernmentalist co-operation has been a dominant theme in co-operating against specific terrorist threats. The political challenge to the state demands governmental involvement; no government can pretend that their police forces alone are capable of dealing with terrorism. Admittedly, however, most of the co-operative border agreements have not had to deal with an ongoing terrorist problem. It has not been concerns about terrorism that have shaped the present Schengen arrangements concerning border security. Consequently, the degree to which these are linked to intergovernmental policy and their relationship to Schengen may well have implications for the manner in which such states might tackle a future terrorist crisis under the Schengen aegis.

The 1962 Benelux Treaty

Despite the confederal overtones associated with aspects of the Benelux Union of 1960, the 1962 provisions concerning security co-operation along the internal border have remained largely entrenched within intergovernmental remit. The provisions apply only to the regulation of police co-operation in the common border area – specifically to those forces responsible for this –

⁹ E.D.J Kruijtbosch *Benelux Experiences in the Abolition of Border Controls* in Henry G. Schermers et al *Free Movement of Persons in Europe: Legal Problems and Experiences* 1993 p 37

thereby providing inoculation against any neo-functionalist spillover beyond this geographic area, outside of which national policing continues unaffected. Regulation within the area is particularly strict, emphasising the sovereignty of the state: cross-border executive action for example is prohibited; neither are officers permitted to carry firearms in the event of cross-border meetings.¹⁰ This is further emphasised by the Dutch Secretary of Justice, informing the attorneys-general and the public prosecutors in December 1984 that the Benelux Treaty prohibited action on foreign territory. This included observation without prior permission from the competent authorities of the party concerned, after a dispute with the Belgian government over the actions of a Dutch observation group on Belgian soil. Consequently any agreements at the police level alone are insufficient.¹¹ This “reminder” was aimed at curbing the numerous unsolicited actions of police officers acting outside the parameters of the Treaty i.e. stopping and searching suspects beyond the ten kilometre “hot pursuit” limit, carrying firearms, not possessing a rogatory commission when engaged in cross-border observation, or even interviewing a suspect on the other side of the border.¹² Previous lack of strict enforcement implies that governmental concern was sufficiently relaxed in its attitude believing that a “hands-off” approach could be adopted and that the Treaty’s regulations alone were sufficient to maintain the behaviour of their police force’s co-operation. Such an attitude can be supported by the fact that police co-operation has not “grown spectacularly, to say the least”¹³. The “hot

¹⁰ Cyrille Fijnaut *Police Co-operation Along the Belgian-Dutch Border* in Cyrille Fijnaut The Internationalisation of Police Co-operation in Western Europe 1993 p 122

¹¹ *Ibid.*, p 119

¹² *Ibid.*, p 123

¹³ Cyrille Fijnaut *Police Co-operation within Western Europe* in Frances Heidenson & Martin Farrell (eds). Crime in Europe 1991 p 118

pursuit" clause for example was not defined in any great detail until 1976, and even then it only applied along the Dutch and Belgian provinces of Limburg. Fijnaut points out that little effort has been made at harmonising the police organisations involved in co-operation, with no satisfactory procedure establishing the rules for mutual co-operation in an emergency or major investigation, despite the need for such regulation having been felt for decades.¹⁴ Co-operation does itself vary tremendously throughout the various border provinces; some such as the Limburg-Limburg area are particularly advanced, but regardless of this disparity the co-operation is guided by common regulations, with the governments leaving their forces to work within this remit as they see fit.¹⁵ Additionally, like the Schengen provisions, the Treaty allows bilateral accords to enhance specific areas of co-operation, such as regular consultation concerning criminal investigation between Belgium and Holland demonstrating that the Benelux Treaty is one aimed at a definite purpose and area.

Following intergovernmentalist tradition, the Benelux Treaty permits derogation from its open borders policy (Article 12), although significantly this has never been invoked.¹⁶ However, the Dutch government came close in 1983 when it reinstalled some internal controls through the use of a mobile police brigade and increased controls on trains between Roosendaal and

¹⁴ *Ibid.*, p 117

¹⁵ Fijnaut, *Op. Cit.*, 1993 p 124

¹⁶ Exactly why Article 12 has never been invoked remains a matter for speculation. We can infer however, that derogation is less likely to be invoked within a smaller group of signatories such as the Benelux members than in a larger group (Schengen) on the premise that it is both more manageable, and subject to less external variables. The security of both Schengen and the Benelux members are dependent, to a large degree, upon the measures of their weakest member. Equally, the commitment to the Treaty and developed commonality between the Benelux Countries, many also have had its part to play in refusing to invoke the derogation article.

Rotterdam after immigrants from Surinam were able to exploit a leak in the southern border between Belgium and France, allowing them to join friends and relatives in Holland after arriving in France and passing through Belgium by minibus. The Belgian response, after some procrastination, of reinforcing its checks on the Southern border allowed the Dutch to remove their internal controls.¹⁷

This is a particularly interesting aspect of policy making amongst the Benelux countries in that problems can be more readily addressed because of smaller, and thus more manageable, membership. The reticence to reinstall border controls, suggests an approach akin to communitarian intergovernmentalism, unlike the Schengen example, where France for example continues to maintain its controls along the Belgian-Luxembourg border.¹⁸ E.D.J Kruijtbosch, a former Secretary-General of the Benelux Economic Union, has argued that freedom of movement has never been halted, and that when changes in the common visa policy have been required, unanimity has always been reached, if sometimes slowly.¹⁹ Fijnaut however argues that such unanimity is reached because frequent dialogue is required between the governments to keep problems as manageable as possible. Political, governmental and financial reasons prevent a common border patrol service (one can cite the above border problem as an example of national policy conflicting with common Benelux

¹⁷ E.D.J. Kruijtbosch Op. Cit., p 36

¹⁸ Belgium did however restore its border controls on three occasions during 2000, over fears of immigration flooding. This argument, however, has more to do with the movement of immigrants throughout an open Schengen area than within the confines of a small Benelux Union.

¹⁹ Kruijtbosch, Op. Cit., p 35

policy).²⁰ Kruijtbosch would undoubtedly agree with this point, but the high rate of dialogue made possible due to the small and localised nature of the Benelux countries is not compatible with that of the larger membership of Schengen. Continued intergovernmental negotiation has been the key to problems arising in the Benelux countries.

The Terrorist Border Campaigns: The Anglo-Irish and Franco-Spanish Borders

As already noted above, the manner of co-operation engaged by the police forces in these border areas has been one closely regulated by governmental concern. Independent action between forces has always been restrained, although where possible, Anglo-Irish co-operation has always aimed at reciprocity, with the initial informality of border policing disappearing before the advancement of governmental centralisation and modernisation in conjunction with the pressures brought to bear by the seemingly never-ending "Troubles". Similarly, Franco-Spanish police co-operation has been governed by the overall political situation. French police action against ETA members on French soil was limited until 1986 when new conservative policy no longer regarded them as political freedom fighters. Moreover, when co-operation finally began in earnest in the 1990s it was heavily based on reciprocity. In both cases however the British and Spanish governments have placed national policy as the primary means of defeating terrorism; co-operation, where

²⁰ Fijnaut, *Op. Cit.*, 1993 p 116

occurring, has never been seen as anything other than another string to this bow.

The influence of Schengen, however, on Franco-Spanish co-operation does seem to have modified this approach somewhat, with French co-operation now regarded as instrumental in defeating ETA. With both countries being party to Schengen, the Spanish authorities have forgone any attempt to reintroduce full border controls in the wake of ETA's renewed campaign following its collapsed ceasefire in January 2001. The controls that have been reintroduced in the Basque region's border are aimed at surveillance rather than a return to traditional controls. In seeking not to derogate from Schengen the logical alternative for Spain has been to focus on enhanced co-operation instead. The French response can be measured not simply in terms of solidarity against the terrorists, but because the reinstatement of border controls would also slow down the benefits brought about by creating domestic market conditions by the "four freedoms" that crossed the Franco-Spanish border here.

The approach taken by France and Spain within the Schengen paradigm has been squarely intergovernmental, utilising the bilateral approach. ETA is regarded as a common enemy, but is policed in the traditional manner by each country's police forces, thereby consolidating the national approach with a communitarian outlook, in the loosest sense.

The British and Irish authorities also regard the terror groups as a common enemy, particularly the IRA and its splinter groups. Their co-operation has

been strictly regulated through intergovernmental agreements such as the Anglo-Irish Agreement 1985, designed to control police co-operation, walking a very thin green line to avoid antagonising the prevalent sectarian paranoia and hatred from which the terrorism stems. This practise has altered somewhat, however, because of the ongoing peace process and ceasefire of the major terrorist groups. The restructuring of the RUC recommended by the Patten Report and subsequent governmental reports emphasises the necessity of greater co-operation with the Garda Síochána, not just to facilitate more efficient policing, but also to distance the newly named Police Service of Northern Ireland from the connotations of its Protestant dominated RUC past, a bugbear of Republican ideology whose continued existence was seen as a stumbling block in the peace process. A closer relationship with the Garda would additionally provide the revamped police force with greater degree of legitimacy in the eyes of the aggrieved Catholic community. The intergovernmental drafting, sanctioning and stewardship of these recommendations for greater co-operation is essential, as a relationship perceived to be too close with the Garda by the Unionist community could be equally precarious for the peace process.

The co-operation recommended, though, is advanced, especially in its use of seconded officers with full policing powers (see previous chapters II and III for details), illustrating the need of both police services to catch up with the benefits of practical co-operation practised by many of their European colleagues that have previously been denied them by the political situation within Northern Ireland. However as the previous chapter points out, whilst

advanced, it is also selective, tailored to the politics of the Province as much as to its policing needs. The Patten Report's recommendation of secondments, for example, places them only in specialist fields where most needed, such as drugs and training.²¹ Counter-terrorism, however – the most prominent policing role in Northern Ireland – is not mentioned. Neither government is yet willing to allow a seconded officer from the other's police force an operational role specifically tackling terrorist issues. The agenda of terrorism appears to remain at heart very much a national issue. However, while terrorism per se remains off the agenda, the reality is that officers seconded to drug duties would in all likelihood be engaged against the terrorist groups. This is because these terror groups are associated with over half of the organised crime groups in Northern Ireland, of which sixty-nine per cent are engaged in drug related activities, and approximately half of this activity contains "paramilitary" involvement.²² Consequently co-operation through secondment will have a direct effect on the terrorist gangs. Such an effect however is aimed at the criminality of these groups, not their political connotations. Units with seconded officers would be dealing with them because of their criminal associations, not their "paramilitary" ones. Thus, the British and Irish governments effectively retain sovereign control of counterterrorist strategy, tactics and operations on either side of the border respectively.

²¹ Recommendation 159 - *The Implementation of Recommendations Concerning North/South Co-operation on Policing Matters, Lateral Entry and Secondments – A Joint Timetable by the British and Irish Governments*

²² The Northern Ireland Office's Organised Crime Task Force identifies 43 out of the 78 known organised crime groups as being associated in some aspect to the various terrorist organisations.

Northern Ireland Organised Crime Task Force "Confronting the Threat: Strategy 2001-2" p 8; "The Threat to Northern Ireland Society from Serious and Organised Crime" Northern Ireland Threat Assessment 2001" p 5 & p 14

These two examples of terrorism associated with a common border illustrate that the pace of co-operation ranged against it is one very much associated with the will of the governments concerned. Co-operation was limited while the French authorities refused to see ETA as terrorists or if it would produce political repercussions amongst the communities involved, as along the Irish border. It is left to the governments to forge a path, enhancing co-operation when the political background permits it. Only a change in French governments, from the political left to right, moved France towards closer co-operation with Spain against ETA. Similarly the change in the internal political situation in Northern Ireland has created the conditions permitting co-operation between the Garda and the RUC/PSNI to progress.

It would seem, then, that co-operation against terrorism is only forthcoming under an intergovernmental agenda. Police co-operation in Europe is not exclusively intergovernmentally orientated, but in matters relating to terrorism any other form of co-operation would be at best incompatible with policy, and at worst, potentially dangerous or inflammatory. Taking Northern Ireland as a case in point, Lane's research demonstrated that traditionally the Garda and RUC have maintained strong connections, especially at the local level, away from both Belfast and Dublin.²³ The neo-functionalist supposition argues that co-operation can be actor driven, thereby implying that the border area would be particularly conducive to local neighbouring forces initiating localised agreements to facilitate co-operation on common matters, not necessarily

²³ *Innovation: The European Journal of Social Sciences* September 1998, Vol. 11 No. 3, pp 267-277, Jason Lane, "Police Co-operation and Internal Conflict Resolution Strategies: The Case of Ireland"

restricted to terrorist matters. Following this rationale let us suppose that following the 1974 Warrenpoint bombing, the RUC in Newry began to develop closer links with their Garda colleagues across the border in Dundalk. Issues of "hot pursuit", cross-border surveillance and the exchange of liaison officers, all areas of co-operation occurring throughout the continent, were now given serious consideration at local level. At the practical policing level these issues make nothing but sense, but politically they are potentially explosive. Intergovernmental control of border co-operation prevented the RUC locally, and as a whole, from developing closer co-operation with the Garda. Neo-functionalism policy however does not focus on the whole, rather its approach enables integration to occur at a gradual pace, particularly between the elite-actors within Europe, be they bureaucrats or police officers, whose ongoing communication and co-operation is necessary for the functioning of a Europe moving ever closer. Being elite-actor rather than politically driven, neo-functionalism integration – as a means of police co-operation – can be criticised for being less than democratic, in that the views of the citizens of Europe are largely ignored. Instead, this integrative drive, like intergovernmentalism, has a propensity for advancing the level of integration beyond that with which the population feel comfortable, thus leading to alienation with the European Project. Integration executed through intergovernmentalism is equally guilty in this regard; the crucial difference however is that it cannot neglect either populations or communities that feel particularly egregious towards such policy. Hence the New Labour government, for example, despite the Prime Minister's desire, is unable to

assimilate UK monetary policy into the common Euro currency whilst the majority of the population remain hostile to such a move.

By contrast, a federal system with a strong emphasis on subsidiarity could avoid these problems associated with neo-functionalism. If the level of available subsidiarity negotiated between the Centre and the Member States permitted the latter with primacy in maintaining the security of their own borders – while respecting the continuance of the Four Freedoms – there is no reason why a bilateral policy could not be negotiated between the two Member States, sympathetic to the regional political climate. Interestingly, the intergovernmental approach differs little from the federal perspective, save that the latter would require the enforcement of a mandatory minimum level of co-operation between all Member States, to ensure the security of the Federal Union as a whole – something not entirely unrelated to the role of the Schengen acquis. However, this statement is qualified only through a sufficiently permissible level of subsidiarity. We should remind ourselves that the federal model employed by the USA regards not only terrorism as a federal offence, but also cross-border crime. Therefore, within a federal Europe should we expect a Central authority to respond to cross-border terrorism?

The European project has long been acknowledged as *sui generis*; consequently, any end-point terminus based exactly on the US federal model

is highly improbable.²⁴ Instead, while one would expect to see the Centre taking some role in counter-terrorist affairs within a federal Europe (see Chapters VII and IX in particular), its role in targeting the threat aimed against specific Member States would be marginal. This statement is qualified through the almost certain fact that the Centre would be inexperienced in the sophisticated political nuances and counter-terrorist practicalities of policing a border area utilised by terrorists as part of their strategy. This would be a political quagmire for such a novice. Moreover, federalism, in European terms, has few connotations with the creation of a superstate. The Centre's power has never been expected to rival that of Washington's; consequently, its desire to become involved in counter-terrorist affairs would be highly unlikely.²⁵

Unlike neo-functionalism, both a federal – when qualified together with sufficient subsidiarity – and a governmental approach are equally permissible for developing counter-terrorist co-operation. Both are capable of respecting the political and social minefields of policing the border region in an area associated with indigenous terrorism. However, does this rule differ outside such especially sensitive areas?

²⁴ Michael O'Neill, The Politics of European Integration: A Reader 1996 pp 23 – 25; E. Wistrich, "A federal democracy" from *After 1992: The United States of Europe*, London 1988 pp 97 – 105, cited in O'Neill Op. Cit pp 185 - 6

²⁵ Two particularly identifiable strands of European federalism focus on either on the classical model with a federation of European nations, with the Member States deciding how much sovereignty to cede to the Centre, or a Europe of the regions, where massive decentralisation occurs, with regional administrations making as many decisions as possible, through a stress on subsidiarity. This latter model has closer connections to the Continental European conception of federalism with its social Catholic connotations than the classical Anglo-Saxon model. In neither model is there room for a strong super-state and Centre. See: Nicolas Emilioiu, *Subsidiarity: Panacea or Fig Leaf* in David O'Keefe and Patrick Twomey, Legal Issues of the Maastricht Treaty 1994 pp 66 – 67; Charles Pentland, International Theory and European Integration 1973 pp 181- 4

Supranational led Border Security Co-operation

While policing is a concern for national governments, it is incorrect to imply that they have absolute control over the methods by which their law-enforcement agencies co-operate. Interpol, for example, is an organisation whose membership consists not of governments, but of law-enforcement agencies. Governments, at least insofar as Western democracies are concerned, have very little influence in the day-to-day running of its operation, beyond that of holding the purse strings – a privilege which is itself limited, as Interpol's membership is based upon subscription, meaning, theoretically at any rate, that failure to pay will result in that police agency's suspension from the organisation until it pays its dues.²⁶

Far from the political Centre, the affairs of Europe's border regions differ dramatically. The population of these areas have everyday contact with one another, with regular traffic crossing from one side to the other for occupational, shopping or family reasons; for example 100,000 people cross the Rhine on a daily basis.²⁷ Long before the Europeanisation of political life, border regions adopted solutions reflecting the close economic and social co-operation inherent to them. Markets, for example, have traditionally been a cross-border affair in these areas. Populations living on the periphery generally have more in common with their neighbours than with their fellow citizens within the country's interior, culturally and even linguistically.

²⁶ In practice though, a police authority is not expelled for defaulting on subscription payments.

²⁷ *European Journal of Crime, Criminal Law and Criminal Justice* "Policing Across a Dimorphous Border: Challenge and Innovation at the French-German Border" Detlef Nogala Vol. 9 No. 2 2001, p 135

Consequently the mutual collaboration that occurs between them may not necessarily reflect the official policies advocated by the Centre. Indeed in many border areas the traditional demarcation of a line between two distinct territories is now seen increasingly as a "zone": a grey area where there is no abrupt "end" to one territory. Instead, both sides merge into one another, and the type of law-enforcement co-operation that exists there reflects this fusion.²⁸ From an intergovernmental approach, such co-operation requires sanction through the drafting of a treaty or agreement; the examples of the various levels of co-operation along the Dutch-Belgian border under the Benelux Treaty illustrate how a loose form of intergovernmental policy is capable of securing the individual measure of co-operation required for specific local conditions by leaving it in the hands of local police chiefs. For example, there is a high level of co-operation in the Limburg area because collaboration has not been placed directly under the control of a higher authority, thereby leaving the police authorities free to set the pace, subject to national law. By contrast, co-operation has been impaired in the Schaerbeek and Saint-Josse municipalities in the Brussels *gard de nord* where left and right wing local governments respectively obstructed any co-operation between their police forces for fear that this may have led to loss of the traditional values and methods of their forces.²⁹

²⁸ Ibid.

²⁹ Lode de Witte, *The Belgian Perspective on the Internationalisation of Police Co-operation in Western Europe* in Fijnaut, Op. Cit., 1993 p 88

Neo-functionalism and the Nebedeag-Pol

The Nebedeag-Pol serves as a co-operative arrangement between German, Dutch and Belgian police forces stationed around the Rhine and the Meuse where the three countries meet. It is tremendously important as it represents one of the most successful examples of territorially based co-operative agreements created during the 1960s and 1970s, with co-operation occurring on a daily basis.³⁰ Moreover it stands as a significant source of experience from which bilateral agreements, made possible under the Schengen Convention, may be drawn up, and can be seen as the potential starting point from which police co-operation at the Euro-regional level began, dating back to the 1920s.³¹

The influence of the police chiefs (elite-actors) has been instrumental in developing the co-operation within the Nebedeag-Pol, enhancing its post-World War II form when officers from Verviers, Aken and Vaals developed contact to fight professional and violent smuggling gangs. The German-Belgian and German-Dutch agreements of June-July 1960 concerning police co-operation strengthened these arrangements, introducing a structure, as did the Benelux Treaty 1962, but on the whole the co-operative connections in this area were still loose ones. It was the police president of Aken, E. Dundalek who, by inviting a meeting of the local police chiefs around the border area,

³⁰ One particular example supporting this is the creation of a hand plasticised instruction card *developed for daily use* documenting a résumé of the "hot pursuit" regulations. Fijnaut, *Op. Cit.*, 1993 p 128

³¹ *Ibid.*, p 125

developed these connections into a more formal basis, with the official establishment of the Nebedeag-Pol.

As with the Benelux Treaty, intensive consultation was highly important in developing the co-operation, especially against drug smuggling. However this consultation occurred at the police level, not the political. Co-operation has developed more or less at a continuous pace, remaining true to the gradualist approach advocated by neo-functionalists, reaching the point where the parties know each other well and pursuit actions which end on foreign territory rarely result in problems for the pursuant officers. Indeed, because the existing agreements have been "silent" on the subject of cross-border observation, the parties have had to establish agreement on the issue among themselves, with structural discussions and annual exercises exposing tactical and technical problems and contributing to their resolution.³² Equally, though, the neo-functionalist approach has on one occasion, significantly, albeit temporarily, hampered co-operation, in an example of "spill-back" – the negative form of spillover. The police chief for Aken, F. Fehrmann's effort to make "hot-pursuit" across the German-Dutch and German-Belgian equate with that of Article 27 of the Benelux Treaty in the mid-1970s failed because for some Dutch officers, the memories of German occupation still remained vivid.³³ It was for similar reasons that an attempt by Fehrmann failed to enable officers to interview suspects, search premises and confiscate goods on foreign territory along with ability, following the permission and presence of local

³² Ibid., p 127

³³ Ibid., p 126

authorities. In this particular case, an intergovernmental approach might have been able to overcome the residual suspicions of the Dutch officers.

Neo-functionalism and the Cross-Channel Intelligence Conference 1968

Like the Nebedeag-Pol, the CCIC is also a co-operative arrangement instigated and developed by its elite-actors. It was the brainchild of individuals such as Kent's Chief Constable, Sir Dawney Lemon and the Chief Commissioner of the Bruges *Police Judicare*, J. Matthys. Interestingly enough very close co-operation occurs along this border area despite the obvious geographic barrier of the English Channel. It is a little ironic to think that a natural divide capable of thwarting the ambitions of the likes of Philip II, Napoleon and Hitler actually serves as a conduit for facilitating closer co-operation between police and customs officers. Just as interestingly, this co-operation predates Britain's entry into the EEC, with the initial negotiations occurring during a period when de Gaullist obduracy was making itself felt throughout Europe. De Gaulle vetoed British entry into the EEC in January 1963, and would do so again in 1967 when the CCIC was first tabled, leading to cool relations between the two countries. In 1966 De Gaulle pulled France out of NATO, and the previous year had brought the EEC to paralysis with the Empty Chair crisis. At this stage, though, transnational policing was not an issue of much concern to politicians³⁴, otherwise it is doubtful as to whether or not the CCIC would have got off the ground.

³⁴ James W.E. Sheptycki, *Police Co-operation in the English Channel Region 1968-1996* European Journal of Crime, Criminal Law and Criminal Justice Vol.6 No. 3 1998 p 219

Sheptycki's research into the CCIC has identified the development of a "strong sense of mission" amongst the collaborating authorities.³⁵ Although it would be pushing matters to equate such feelings to a neo-functionalist-driven transference of loyalties away from a national authority to that of a supranational one, it does demonstrate that a sense of purpose in policing something beyond the nation state has developed. Loyalty transfer under neo-functionalist logic is not an overnight process; it occurs slowly and steadily until reaching the point whereby, having worked in some supranational capacity, the elite-actor's labours no longer relate directly to their nation state, but rather to the supranational whole or structure. Hence a police officer of the Kent Constabulary, attached to the CCIC, would perhaps, if he had or, having worked in that capacity long enough, come to regard him or herself as "belonging" more to the CCIC than his/her actual Constabulary. Their working ethos would be more attuned to issues affecting both sides of the Channel rather than exclusively national policing issues. This, of course, is the weakness in this theory: there are few officers left in the same capacity or position over a long-term period; secondment, transfer and promotion provides new blood as a matter of course. Loyalty transfer is therefore not a strong feature within transnational policing, at least as long as the current method of staffing is maintained. This is not to diminish integrationist connotations of the "sense of mission" achieved by the CCIC, but as things currently stand this is as far as this aspect of neo-functionalism can travel in this particular direction. The point to make, then, is that the CCIC is open, in theory at any rate, to the concept of this particular aspect of integration.

³⁵ Ibid., p 225

Neo-functionalist thought and practices have been particularly suited facilitating transnational police co-operation along (non-terrorist campaign strategic) borders, and can be said to be just as instrumental here as intergovernmental policy in ensuring its effectiveness. In the case of the latter, this policy operates at its most efficient when the outlying conditions are at their most conducive: typically a withdrawal of political interference, and a toleration of co-operative autonomy as long as it does not out step national law. The above two examples demonstrate this “partnership” at its most effective. A neo-functionalist orientated collaboration also has significant ramifications in terms of accountability, which will be discussed later.

Border security tends to become more effective when law-enforcement does not suffer from political interference (in its negative sense). Instead, co-operation has the opportunity to develop at a localised level, providing collaboration specific to the needs of the area. Schengen, whilst an ambitious project, is still one tied to the politics of common denominators because of its broad membership. By comparison, developments within the Nebedeag-Pol are more advanced – producing a common police alarm system, something outside of the Schengen Convention – because they can be more specific.³⁶ Localisation, though, is not the only explanation as to why these arrangements have a tendency to be as advanced as they are. Co-operation between law-enforcement authorities cannot simply spring up over night; these localised arrangements are, in many cases, decades old. The co-operation, as dictated

³⁶ Fijnaut, *Op. Cit.*, 1993 p 127

by neo-functional theory, increases gradually. By comparison, Schengen is a mere sapling, but one which has had the most dramatic effect. It is encouraging both neo-functional and intergovernmental co-operative growth; indeed it is accelerating it.

Schengen's Effect on Co-operative Growth

As it stands the Schengen Implementing Convention functions as an intergovernmental structure establishing a basic framework of law-enforcement co-operation and other "flanking" measures to ensure European-wide facilitation of the Single Market goals through the free movement of individuals. Because of its basic framework, owing to the nature of intergovernmental bargaining over a wide membership, some members have been keen to develop it further, employing bilateral measures to enhance co-operation as the Implementing Convention urges. The Mohndorf Treaty 1997 between France and Germany establishing the PCCC is highly illustrative of the desire of these governments to take such enhancing steps.³⁷ Equally the Schengen framework should, in theory, function as an harbour, providing and encouraging bilateral intergovernmental and neo-functional orientated co-operative growth while at the same time dictating its scope and direction, precisely because the framework upon which the co-operation is based is intergovernmental in policy. The flourishing law-enforcement co-operation that has occurred within the Benelux countries since the 1962 Treaty, elite-

³⁷ See Nogala Op. Cit.

actor led under the umbrella of intergovernmental association, provides us with a blueprint.

The creation of the Implementing Convention should also serve as a catalyst for collaboration because it has provided a blanket co-operative minimum throughout the majority of the EU Member States. Areas that previously had little co-operation will have suddenly had to play catch-up, but in doing so, they are establishing greater co-operative links, and in neo-functional theory co-operation begets co-operation through spillover. It is also noteworthy that Schengen has had a particular effect on neo-functional co-operation through its regulatory powers beyond that of ensuring a minimum common standard of co-operation. The UK's partial entrance into the Schengen Information System was due to pressure from some of its Chief Constables, especially Kent's, who were aware that the future of the CCIC had become untenable without either an intergovernmental agreement between Britain, France and Belgium on the issue of information exchange or UK entrance into Schengen itself. The UK's solution was partial entry into the Schengen Implementing Convention, especially the SIS, in 2000 through the "opt-in" clauses provided by the Treaty of Amsterdam. The Implementing Convention then, as an intergovernmental device functions as a co-operative framework or harbour encouraging further growth, whatever its integrationist makeup, is nevertheless incompatible with co-operative agreements which cannot meet all its basic criteria, regardless of how advanced they may be in some areas, particularly those concerned with the exchange of data collated from the centralised SIS databanks. Those agreements not meeting Schengen's

requirements must either adapt or be in infringement of the Implementing Convention.³⁸ In this way, the intergovernmental Implementing Convention has introduced a regulatory element into what has, the Benelux Treaty aside, previously been laissez-faire. In doing so it demonstrates an ability to shape the direction of subsequent growth.

It is important to ask at this stage whether, aside from its regulatory features, Schengen represents a novel departure in terms of policing borders, or is simply an old formula in new packaging with some added gimmicks. Its encompassing nature can be welcomed as an admirable achievement, but there are other aspects that also draw admiration. Cyrille Fijnaut salutes the Implementing Convention's provisions defining the legal position of officers who cross the border, along with enabling technical and operational police action – issues which have not been universal amongst the numerous localised agreements.³⁹ But Fijnaut also points to the fact that research focused on existing police data and the review of current police literature demonstrates that the border controls in the Schengen area make no important contribution to the internal security of the relevant states.⁴⁰ Fijnaut's research, however, centres on Schengen in its infancy, when it was comprised of only nine members; nevertheless, the argument holds that there is little qualitative difference for those areas which have already adopted co-operative border

³⁸ It is a little uncertain, however, as to what, if any sanction the conforming Parties to the Implementing Convention would impose for non-compliance, because the penalties have not been laid down.

³⁹ Cyrille Fijnaut, *The Schengen Treaties and European Police Co-operation* European Journal of Crime, Criminal Law and Criminal Justice Vol. 1 No. 1 1993 p 47

⁴⁰ *Ibid.*, p 39

security agreements.⁴¹ Equally however, his research does not argue that Schengen compromises security; rather the status quo is maintained. In practical terms, though, such a status quo cannot compete against the continual onslaught of organised criminal activities entering the EU from its eastern and southern borders. The collapse of Yugoslavia has exacerbated the situation, with the destabilisation of civil war and the transition period to democracy, causing the exploitation of a law and order vacuum by a growing criminal class. The UK Home Secretary, David Blunkett, said at a press conference in November 2002 that: “the Balkans have become the gateway to Europe for organised criminals”.⁴² The 1988 EU Organised Crime Situation report makes for disheartening reading. Among its conclusions was the fact that the level of organised crime was intensifying throughout the EU, with the threat from Central and Eastern European countries clearly viewed by the Member States with growing concern. The increased use of technical developments by organised criminals has also risen dramatically, enabling these groups to stay ahead of law-enforcement and expand their activities. Noticeably there has been a marked increase in the influence of foreign OC groups within the EU, compared to the activities of indigenous OC groups.⁴³ These groups are typically much more aggressive than their indigenous rivals, which also accounts for their enhanced influence.

Much criticism has been levelled at Schengen’s subservience to intergovernmental political bargaining, typically resulting in a diluted form of

⁴¹ Membership was comprised of the Core in 1990, Italy (1990), Spain and Portugal (1991) and Greece (1992).

⁴² *BBC News UK warning over Balkan gangs* 25 November 2002

⁴³ *House of Commons Select Committee on European Security Tenth Report* 1997 and 1998 Organised Crime Situation Reports 9 March 2000

the original conception, and therefore differing little from other co-operative border agreements. Such criticism however loses sight of the fact that Schengen can be nothing other than a framework for co-operation. To impose anything greater in co-operative substance would be to make the Implementing Convention incompatible with Schengen's embracing encompassment. The practicalities of the "hot pursuit" provisions having to be left to bilateral agreement illustrate the difficulties present in achieving consensus in the current agreement, as for that matter does the Convention's difficulty in consolidating the security of the EU's island Member States with its flanking measures. Tabling a more advanced version would have led either to it falling from the table or more bilateral agreements, establishing a patchwork of agreements rather than a single authoritative one, and thereby defeating the idea of an encompassing Schengen in the first place.

Geo-politics make it a simple reality that no single agreement can possibly guarantee the security of each Member State's borders. Even a federal Europe would require individual bilateral agreements between Member States to adequately tackle the particular nuances of their geo-politics.⁴⁴ Schengen accepts this and consequently encourages bilateral agreements which will accommodate the particular nuances of individual borders. The case of the Anglo-Irish border illustrates the difficulty of fully applying the Implementing Convention to the sectarian politics of the troubled region. Advanced bilateral agreements are becoming more noticeable throughout Europe; the Franco-German border, greater co-operation along the Franco-Spanish border, the EU eastern borders, even the Anglo-Irish border is rapidly advancing its co-

⁴⁴ The example of the Anglo-Irish border being a case in point.

operation, albeit primarily because of the Peace Process conditions, but nonetheless it is still part of the overarching process of progressive co-operative border security.

To re-emphasise a point, the Implementing Convention also acts as a kick-start for those authorities whose co-operative measures were less than adequate. It not only brings everyone up to a minimum level, but additionally “deepens” the process through bilateral encouragement, which is possible precisely because the authorities *are working together*. Intergovernmental or neo-functional, it makes no difference how the authorities develop the co-operation further; they must abide by the regulatory conditions of the Convention. Successful co-operation can only engender further co-operation. This is a highly significant side-benefit of the Implementing Convention aimed at long-term fruition rather than immediate results. The implication is, then, that the instigation of Schengen *will lead* to a better class of co-operative border security.

The other innovative feature of the Implementing Convention is the Schengen Information System.⁴⁵ While the previous chapter focused on the specific strengths and weaknesses of the SIS, it is now necessary to observe the extent to which the SIS may influence the growth of co-operative border-security. The SIS as alluded to earlier has had a most profound effect on the integrative growth in this area, serving as the lodestone upon which all co-operative actions are dependent, because the security provided by the flanking measures

⁴⁵ André Potocki, *Police Co-operation, Judicial Co-operation* in Mireille Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe* 1996 p188

is hamstrung without this technologically sophisticated information network. Yet the SIS itself is dependent upon information input from its members' authorities, the content of which must remain within the parameters of the SIS regulations (Title IV, Implementing Convention). Because of these conditions subsequent bilateral agreements are always going to have an association with the SIS; certainly a more detailed information exchange can be achieved at the bilateral level, but the data must be kept separate from the SIS. The reason for doing so stems from the collective security provided for by the Implementing Convention, of which the SIS is a key component. One cannot forgo the SIS simply because a more comprehensive data sharing system has been established with a neighbour. Certainly such a system would be permitted, but it could only serve in a supplementary capacity; the collective security aspect must be maintained. Consequently the collective security characteristics of the Convention form the most important contribution to the compensatory measures to the dissolution of the internal border controls, and the SIS is the key to this. Without the SIS Schengen could effectively function as a series of bilateral agreements as long as certain standards were maintained, but it is the SIS which necessitates a collective approach. It is the heart of the Convention.

The SIS also stands isolated from any neo-functionalist inspired integrative drive that might occur at a bilateral level, because of this need for collective equality within its gathering and administration of data. Because the SIS is so important as a flanking measure, it must remain a practical part of *all* co-operative border-security agreements. No neo-functional (or intergovernmental) co-operative measure must be allowed to develop a data

exchange system capable of bypassing the SIS without at least providing the same level of data input into the SIS as it would otherwise have done; accordingly data exchange regarding border security will remain centralised until such time as the Member States decide and agree otherwise. If neo-functional theory is unsuitable for dealing with a regulatory system along with the maintenance and utilisation of a centralised database, is intergovernmental co-operation therefore the best approach?

Problems with the Intergovernmental Approach

The present intergovernmental approach adopted by the Member States in their dealings with Third Pillar issues has come under heavy and sustained criticism from civil liberty groups, the European and national parliaments, and academics for the secrecy and lack of accountability prevalent throughout the JHA structure-building.⁴⁶ Schengen's Implementing Convention is no exception. However at this point I do not wish to address the debate in its entirety; that I shall broach at the end of this work when the issues relating to the K.4 Committee and the Third Pillar have been more fully discussed and a comprehensive analysis then becomes both possible and relevant. Rather at this stage a simple raising and discussion of issues specific to Schengen will adequately serve our immediate purposes whilst also drawing attention to these matters in preparation for a final analysis.

⁴⁶ See Peter Chalk, *The Third Pillar on Judicial and Home Affairs Co-operation, Anti-terrorist Collaboration and Liberal Democratic Accountability* in F.Reinares (ed) European Democracies Against Terrorism 2000 for an excellent overview of this issue.

An Accountability Deficit?

The SIS is the Implementing Convention's most puissant instrument by virtue of its monopoly on information accumulation and transfer, and its most desirable flanking measure. As with any other mechanism within the Third Pillar structure, though, the Schengen acquis is let down by poor watchdog provisions. They exist certainly; Schengen has a codified convention that includes detailed regulation on the use of computerised data, monitored by a Joint Supervisory Authority comprised of representatives of the national supervisory bodies (two from each national SIS) (Article 115). Its two responsibilities are to ensure that the Convention provisions with respect to the central SIS are properly implemented, and to examine and mediate on problems arising from the application of the SIS.⁴⁷ Additionally Article 115(1) dictates that this supervision must be in accordance with the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data, taking into account Recommendation R (87)/15, 17 September 1987 of the Committee of Ministers of the Council of Europe regulating the use of personal data in the police sector, and in accordance with the national law of the Contracting Party responsible for the technical support function. Impressive as these safeguards appear, they neglect that of an effective parliamentary control. Under Third Pillar provisions the European Parliament's role is a limited one, far removed from the powers of co-decision and veto which it possesses in legislative and

⁴⁷ Martin Baldwin-Edwards and Bill Heberton Op. Cit., p 142

financial matters in economic and social policy.⁴⁸ Rather the EP is restricted to being informed of police and judicial co-operation decisions, though Member State governments need only actually report on their Third Pillar activities on an annual basis (within the context of a yearly debate). The MEPs may make recommendations to the Council and the Presidency may consult them “on the principal aspects” of activities under Title VI but there is no requirement to follow any conclusions through.⁴⁹ The internal security activities of the Third Pillar occur outside the formal structures of the Community legal framework and therefore outside its system of checks and balances. Consequently the role of the European Court of Justice is also limited. While the Maastricht and Amsterdam Treaties affirm the ECJ’s right to interpret and make preliminary rulings on disputes regarding the application of conventions made within the Third Pillar, neither Treaty obliges the Council of the Interior and Justice Ministers to grant full legal competence to the ECJ with regard to actions and decisions taken with the Third Pillar; it is merely affirmed that the Council *may* grant jurisdiction to the Court if it so wishes, and then, essentially, only over issues of interpretation.⁵⁰

National parliaments, though, are equally hampered, as the workload of their parliamentarians grows ever greater as new spheres of co-operation open up throughout the EU. Under current conditions, this effectively dilutes the democratic accountability aspect as Ministers cannot be expected to have a thorough understanding of the Byzantine complexities of EU legislation, so more and more of the task must be delegated to non-elected officials. This,

⁴⁸ Malcolm Anderson et al Policing the European Union 1995 p 254

⁴⁹ *Ibid.*

⁵⁰ Peter Chalk Op. Cit., 197-8

though, is the inevitability of progress: governing the national sphere is workload enough. Adding a transnational sphere to the equation is a necessity if co-operation is to continue, and nothing short of a radical overhaul of the national electoral and constituency systems responsible for returning MPs to parliament can redress this loss in accountability. What should be remedied though is the offhand manner adopted by the intergovernmental decision-making process responsible for Third Pillar issues towards the role of national parliaments. Intergovernmental policy decisions predominantly neglect parliamentary input until the agreement or treaty has been signed and then put before the parliament for ratification. Lord Tordoff, chairing the House of Lords European Communities Select Committee – Twelfth Report 1998, put a wonderfully laconic rhetorical question to Ms Joyce Quin, a Home Office Minister, on the issue of the UK joining the Schengen acquis, which sums up parliamentary scepticism with intergovernmental decision-making:

How far and in what way do you anticipate involving Parliament in the discussions on these things as the pattern emerges or are you going to come to Parliament and say, this is what we have decided, take it or leave it?⁵¹

Beyond the tendency towards the *fait accomplis* approach there is the fact that much of the day-to-day administration of Third Pillar issues remains outside parliamentary remit, controlled ultimately through its executive co-ordinating committee, the K4 Committee. No effective provisions exist for publishing

⁵¹ House of Lords Select Committee on the European Communities – 12th Report. Session 1997-98 “Evidence by the Minister of State, Home Office, on the United Kingdom Presidency Work Programme on Justice and Home Affairs, paragraph 5

the decisions of the K4 Committee; neither is it accountable to an electorate, as its members consist essentially of senior civil servants. "Policies will be drawn up in secret by unelected bureaucrats, police, immigration, customs and internal security officers. These will then be presented to the Council of Ministers for 'rubber stamping' and only after this will they be made public."⁵²

It is fair to say, then, that the intergovernmental approach does have its discrepancies, primarily due to its reliance on an institutional and treaty-based methodology for administering the Third Pillar rather than parliamentary ones. Specific to the context of the Schengen Implementing Convention, this somewhat cavalier approach to accountability has produced a structure whose data protection provisions are riddled with numerous loopholes. Among the more significant ones are: the SIS's limited ability to induce harmonisation amongst the various national data protection laws; the lack of minimum guarantees regarding information transfer; the consequences of derogating from parts of the Implementing Convention; and the difficulty in removing obsolete or inaccurate information from the SIS.

The lack of any progress towards a genuine EU data protection legislation is responsible for many of the problems related to this area. Article 117, for instance, requires a minimum level of commonality in data protection through subscription to the 1981 and 1987 Council of Europe Acts (as mentioned above). However, most Member States employ national legislation that

⁵² Peter Chalk Op. Cit., p 200

surpasses this in content. The result is that individuals will invoke their national rights (where they exist) rather than rely on the weaker international legislation. Consequently the individuals' data protection rights are wholly dependent on national legislation, and the provisions of Article 117 have little meaning with regard to the SIS (indeed some Member States have yet to ratify the Council of Europe legislation relating to this). The variance within national legislation creates difficulties in arriving at any precise procedure in how data procured for transnational purposes can be regulated.

The ability of a state to derogate from aspects of the Implementing Convention has serious consequences for data protection as the "purpose limitation" principle is designed to ensure that information gathered may only be used for the purpose for which it was obtained (although it is not clear whether this refers to an individual's data record under "reason for report" e.g. criminal prosecution, or to the more general six categories of data file).⁵³ States can derogate from this principle where it can be justified "by the need to prevent an imminent serious threat to public order and safety, for serious reasons of state security or for the purposes of preventing a serious offence" (Article 102). Information regarding terrorist suspects obviously has a very high chance of being isolated from the "purpose limitation" principle. David O'Keefe, who has made a detailed study of data protection under Schengen, comments: "derogation...could render guarantees about the use of data nugatory".⁵⁴ Such provisions permitting derogation are fairly wide in their

⁵³ This is not the only example of lack of clarity existent within the Implementing Convention.

⁵⁴ David O'Keefe "The Schengen Convention: A Suitable Model for European Integration" Yearbook of European law 1992, 11 pp 185-219, cited by Martin Baldwin-Edwards and Bill

interpretation: football hooliganism, for example, is an ongoing concern for Europe's police forces, and one that could be interpreted as a threat to public order. Consequently the scale of derogation is large, especially if one includes members of anarchist and anti-capitalist groups (which have in recent years provided much concern for governments around the globe, and more recently have been classified as "anarchist terrorism" by a Europol report in 2001, charged with setting up an analysis file on the issue).⁵⁵

One particular concern in dealing with computerised data is that mistakes will inevitably occur. Inaccurate information occurs at the national level, but the difficulties associated with this are compounded when this is transferred to the transnational level. To cite one particular example, there is the case of the wrongful arrest of Rhys Boore, a Welsh football fan, in November 1992 by Belgian police. Rhys' and his brother, Gwilym's names had been supplied to the Belgian authorities by the UK's National Criminal Intelligence Service, which in turn had received the information from the Luxembourg authorities, who had incorrectly claimed that the two had "caused disorder" during a security check carried out in 1990.⁵⁶ Aside from the obvious distress caused by the incident, is the fact that neither of the Boore brothers were aware that their names existed on an SIS watch list. Still more egregious was the fact that it took a six-year campaign (with the help of Liberty, a UK NGO) to remove their names from Belgian, British and Schengen records, and it is still possible that the UK Foreign Office has passed their names on to third countries from

Hebenton *Will SIS Be Europe's Big Brother?* in Malcolm Anderson and Monica den Boer (eds.) *The Agenda for Police Co-operation* 1994 p 142

⁵⁵ *Statewatch Analysis No. 10 EU Definition of terrorism: Anarchists to be targeted as "terrorists" alongside Al-Qaeda*

⁵⁶ *Statewatch, Football fans taken off records* July-August 1996 Vol. 6 No. 4 p 5

its separate database.⁵⁷ Such a lengthy process does not correspond with Article 106 which requires that data that is “legally or factually inaccurate” must be corrected or deleted by the Contracting Party “without delay”. The Boores were eventually successful in enforcing their rights under Article 110 (Any person may ...have legally inaccurate data relating to him deleted) through invoking Article 111, which allows the individual to bring the matter before the courts or a competent authority under national law. That it took six years of pressure before the Contracting Parties responsible acquiesced is worrying. This was due in part to the lack of any direct legal remedy for the individual offered by the Convention at either the national or supranational level.⁵⁸

Such problems are not restricted to the SIS; information transfer within the Implementing Convention generally also contains ambiguities. The exchange of information permitted under Article 46, for instance, to help prevent or solve crimes, does not provide adequate guarantees regarding the transmission of information obtained “illegally”, referring only to national law which varies, thereby giving varying levels of protection. The Amsterdam Treaty offers some relief to the situation, but it is restricted. Article 41 provides for an Ombudsman to look into cases of maladministration within JHA affairs, although its powers are limited.

⁵⁷ Steve Peers EU Justice and Home Affairs Law 2000 p 188

⁵⁸ Under Article 106 only the Contracting Party that reported the information in the first place is permitted to make any amendments or deletions to it. Other Contracting Parties may only request that errors be amended or deleted, since it does not serve their interests to have false information in the system. If however the Contracting Parties are unable to reach agreement on this, then the matter is taken before the Joint Supervisory Authority for its *opinion*.

Many of the problems stem from the chaotic mess of the various data protection laws that have difficulty serving a transnational system. Clearly the introduction of EU-wide data protection legislation superseding that of the national is required to rectify the irregularities in the system. None has of yet, however, been forthcoming.

Paralleling these concerns of accountability within the intergovernmental approach are those relating to human rights. The principal concern is that the data being incorporated into Schengen is becoming increasingly focused towards the policing of immigrants as well as criminals. The expansion of SISNET to include such information moves the Implementing Convention in this direction, and consequently becomes negatively skewed against ethnic minorities. Peter Chalk warns of the dangers of associating immigration with the serious criminal activities covered by the Implementing Convention, as it will most likely lead to the unwarranted harassment and surveillance of foreigners. Aside from the obvious abuse of human rights, the identifying "of non-EU nationals as a major threat to internal security will merely serve to promote and reinforce a negative perception of these communities, so facilitating an increase in racist tendencies and sentiments."⁵⁹ The security measures taken by the EU governments in the post-11 September environment include a strong emphasis on immigration and asylum issues, thereby immediately associating these issues with terrorism. Certainly these issues in relation to terrorism must be addressed; the "global reach" of the al-Qaeda network illustrates the urgency of this, but Chalk is correct to draw attention to

⁵⁹ Chalk, *Op. Cit.*, p 201

the dangers of overlooking human rights in pursuit of security, arguing that such discrimination will make these groups:

extremely vulnerable to extremist propaganda and rhetoric. Such a development is not only likely to furnish subversives with a ready-made recruiting ground for activists...it is also liable to provide a passive pool of support that is capable of supplying sanctuary, information and logistical assistance.⁶⁰

This is a lesson that should not be lost on those who study terrorism; the injudicious policy of internment in Northern Ireland (1971-75) for example, served as a powerful recruiting sergeant for the IRA, dispensing as it did with certain fundamental human and civil rights.

This growing association between immigration and terrorism is one for serious concern. There is a genuine link between the two, and this cannot be ignored. The Implementing Convention currently serves as the most efficient tool for administering routine screening on third parties entering the EU, but it requires greater accountability. Specifically, it must be accountable to elements outside of the Third Pillar. Parliamentary scrutiny at both the national and supranational level would adequately provide this. Such an anchoring would move this important area of security concern away from solely in-house watchdogs, affording it the democratic accountability necessary to guard against it abusing the human rights of both EU citizens and visitors.

⁶⁰ Ibid., p 201

The Federal Solution

If the current intergovernmental approach can be said to exhibit a certain lackadaisical attitude towards accountability (as does the elite-dominated neo-functional approach), does the federal alternative provide for enhancing co-operative border security?

As the example of a federal application towards terrorist-haunted border areas has shown, federalist policy is quite capable of matching the security commitments currently provided by the intergovernmental-based equivalents. Consequently, we can readily assume that the federalist approach will work equally well in tackling border security in general. Indeed, Fijnaut's argument above that Schengen's flanking measures make little difference to the internal security of the Member States, presents a strong case against those who would argue that a federal Europe would be detrimental to this security.⁶¹ The premise of subsidiarity ensures that individual Member States are in a position to enhance security beyond the necessary mandatory minimums, through additional bilateral agreements. The Schengen Implementing Convention makes an almost ideal framework for ensuring such mandatory minimums within a federal Europe. The significant difference is that the Implementing Convention, under intergovernmental policy, lacks any enforcement powers to prevent a Member State unilaterally derogating from the Convention and raising their border controls. Within a federal Europe, no Member State could unilaterally reinstall such controls without the express permission of the Central authority.

⁶¹ Cyrille Fijnaut, Op. Cit. (*The Schengen Treaties*) p 47

The EU's current progress in establishing a European border guard for its external eastern borders has significant implications for a federal Europe. A supranational border guard, under Central control, weakens the notion of subsidiarity. The purpose of such a corps is to secure these more porous borders adjoining third-party states, where criminal activity is more prevalent. The value of such measures is immediately obvious, as it shores up the security of the Union by bolstering the security capabilities of its eastern members, especially as many of the new accession states are not yet capable of producing the same calibre of security measures as the established Member States. A fully operational European border guard corps could only be permissible within a federal Europe; no intergovernmental system of co-operation would brook such a breach of sovereignty, unless a Member State within which such a corps would operate was offered significant incentives.⁶² However, the issue of subsidiarity could be addressed by providing those Member States where such a corps would be deployed with additional financial benefits, specifically for the purposes of augmenting external border security, together with training courses for officers and other technical incentives. This returns us to the JHA Commissioner, Antonio Vitorino's vision for such a corps, as outlined at the beginning of this chapter. Actually establishing such a corps, with its own "permanent headquarters staff structure charged with its operational command" and "the management of its personnel

⁶² Equally, though, a poorer Member State might be quite happy to allow the EU to foot the bill for helping to secure its external border.

and equipment”⁶³ within a Europe co-operating intergovernmentally would create a legal and operational minefield.

In addressing the specific issue of problems associated with accountability, created by constant demand for computerised data to feed modern security structures, a federal policy towards border security would resolve the problems currently exhibited by the current intergovernmental course. Accountability is not a matter for subsidiarity; in maintaining a centralised database such as the SIS, it would be under the control of a central authority, representing as it does a pooling of the information provided by all the Member States. Indeed, all such common databases, such as Europol’s TECS (see Chapters VI and VII), would be under direct Central authority. Placing such reservoirs under federal authority allows them to be maintained beneath the umbrella of a single and specific piece of data protection legislation, rather than the hotchpotch of national legislations currently in place. While this would not guarantee the accidental input of erroneous information, it would at least offer an improved system for expunging such details. Federalism’s precondition to establish checks and balances would ensure greater powers for supranational bodies such as the European Parliament and Court; equally, in-house watchdogs would probably be replaced by external ombudsmen and watchdogs.

Critics of a federal approach argue that it would give rise to the sort of delays and inefficiency inherent to a system that separates the functions of co-

⁶³ Communication from the Commission to the Council and the European Parliament, Towards Integrated Management of the External Borders of the Member States of the European Union, Commission of the European Communities, Brussels 7.5.2002 Com (2002) 233 final, paragraph 30

operation and co-ordinating devices.⁶⁴ In terms of dealing with a terrorist threat, this becomes a significant danger, as a fast response is usually required in such cases. This argument, however, can be effectively negated by the fact that federal states maintain emergency provisions in the event of a terrorist incident, just like any other state. Secondly, although a greater separation of powers can lead to problems, it should be remembered that every political system faces similar difficulties. Consider, for example, the problems created by the existence of two police forces in France, and their residual hostility towards each other. Thirdly, greater accountability guards against repressive measures that would infringe human rights, which, as illustrated above, has some practical as well as moral benefit in dealing with terrorism.

Federalism offers few additional security benefits over the intergovernmental approach, other than as an improved regulatory system for managing the SIS database. Border security can never be one hundred per cent effective, and it remains especially porous where terrorism is concerned. Rather, it is the advances in technical innovation such as CCTV technology (see below) and the SIS that can offer support to border security systems, and here federalism provides for the greater accountability necessary in operating and maintaining such systems.

⁶⁴ In a society faced with the need for rapid change, "federalism seems like an invitation to political frustration". Sawyer argues, however, that this "freedom to delay, to think twice and to compromise" is an "unheroic virtue" capable of avoiding friction and relegation of opposing viewpoints within the populace and political system. (William H. Riker *Federalism: Origin, operation, significance* 1965 p183 – 4 cited in R. J. Harrison *Europe in Question* 1975 p 63

Conclusions

Co-operative border security in Europe is something of an amalgamation of different forms of integrationist collaboration. Even the introduction of the regulatory Schengen Implementing Convention has had little effect on altering this situation. Rather it has enforced a minimum level of co-operation throughout, guaranteed by means of intergovernmental collaboration. As we have seen, however, many of the earlier bilateral agreements had effectively reached this minimum, and in some cases, surpassed it. Admittedly most of these were intergovernmental in origin, but in the very loosest sense of policy. The regional agreements along the German-Dutch-Belgian border illustrate how far elite-actors and regional authorities have been able to push co-operation. Schengen does not do away with this; instead it actively encourages further co-operation, and in turn has set the wheels in motion to achieve this through ensuring that border co-operation occurs as a matter of course throughout the Contracting parties. This will bring new groups together, and can only lead to an eventual increase in pressure on the Centre from the elite-actors at the periphery for greater co-operation. As such the Implementing Convention does not alter the original approach taken to border-security co-operation before its arrival, it only encourages it. Where the Schengen Implementing Convention does enforce intergovernmental control is over the SIS, which is something entirely new in the tradition of co-operative border security. Attempting to establish a regional system for enhanced bilateral agreements would be a waste of expenditure, as it is the encompassing nature of the SIS that makes it so attractive to the law-

enforcement bodies of the EU Member States. Moreover, without centralised control, the SIS would cease to function effectively. At present, the intergovernmental-orientated JHA gamut guarantees this regulatory centralisation, although a federal alternative would work equally well here.

Arguably, co-operative border security is something of a curious hybrid. It operates under an intergovernmental pillar, but is not disagreeable to other types of co-operation developing; indeed the structure itself is quite harmonious. Even a strong dose of supranationalism into the structure, through the possible introduction of a European border guard corps, would not alter continued use of the SIS by all concerned, nor for that matter would an all out transformation into a federal Europe. Centralised control remains a necessary condition for maintaining such databases, regardless of the integrative methodology, hence neo-functionalism's unsuitability for developing policy along this area. This is also applicable to the necessary exertion of *national* central authority over co-operative border security in areas of extremely high political sensitivity – in this case, Northern Ireland. Centralised national control has been critical in order to prevent co-operation between the Garda and RUC from actually aggravating the political situation. Federalism is an acceptable alternative, subject to the proviso of subsidiarity.

In the last chapter we concluded by asking the question of where co-operative border security was going within the European Project, and what effect it would have on it. At this stage it might be a little premature to answer that directly; let it suffice instead to mark some signposts. We cannot isolate the

developments within border security from the ongoing JHA events – indeed, it is most important that we consider them. Co-operation along the border at the regional level, although often left to the practitioners’ own devices, still grows within the parameters set by the individual governments. As co-operation increases within other areas of police work, and the judiciary, these parameters must ultimately expand, acknowledging the new developments. The bilateral growth is therefore linked directly to other developments within the JHA field. These bilateral agreements are the building blocks upon which border security is based, with Schengen being the framework that encourages this.

Turning to the more practical developments within co-operative border security, we can see that the developments in technology have had a profound effect on its implementation. The SIS has changed the way borders are policed, employing information that effectively serves as an advanced warning or “lookout” approach throughout the EU. Increasingly CCTV technology is also being adopted at borders, and is capable of licence-plate recognition. Developments in applying this same technology to facial-recognition helped British police identify and arrest David Copeland, the neo-Nazi responsible for three nail-bomb attacks in London during April 1999. This technology is costly, however, and therefore limited to those authorities that can afford it. Consequently, increased technical security in one area is unlikely to deter a terrorist beyond rerouting him/her to an entry area that is less technologically protected.⁶⁵ The fact to which we repeatedly return is that without forewarning provided by high-quality intelligence or a watch-list included within a

⁶⁵ Indeed the same could be said concerning border areas with advanced co-operation.

common databank, even the most sophisticated co-operation at a border is effectively useless against a terrorist.

The issue of technology raises the most problematic concern for co-operative border security: that by addressing the security deficit through technology, the accountability deficit is raised in turn. The current intergovernmental controls are simply not adequate to manage the irregularities that are thrown up by the SIS; a greater level of openness is required to rectify this. Unfortunately, the fallout from the 11 September attacks has exacerbated this through the introduction of measures enhancing the SIS's powers, not least the possibility that Europol may be granted access to SIS II records, including the powers of amending them, thereby effectively doubling the current problems with the system in this area. The checks and balances required for addressing this deficit would, however, impinge upon the secrecy enamoured JHA gamut, which remains reluctant to open itself to the full glare of public scrutiny. Here the intergovernmental approach is flawed. The federal alternative addresses these contentious issues through its characteristic methodology of power separation. We must acknowledge, however, the difficulty in reaching a federal accommodation within the EU as the political climate remains, in both the short and medium terms, non-conducive to a federal outcome. Even its long-term potential is unforeseeable. Nevertheless, it would be possible for some Member States to engage in a federal union if they so chose, and still work effectively with their intergovernmental partners under the umbrella of Schengen, as long as the SIS was maintained equally by all Member States, or

rather the Central authority belonging to the federal union and the remaining Member States.

Co-operative border security, as this conclusion stated at its beginning, is conducive to all three of the types of integrative methodologies under examination within this thesis. A federalist policy would be able to address all the issues associated with border security, assuming that the Member States are prepared to cede their right to unilaterally reinstate their border controls if they feel threatened – as France has done, concerned about incoming drugs from the Netherlands. We have also found that intergovernmentalism is more relaxed than we might have expected in many of the examples given of border co-operative agreements. Here we see a form of symbiosis between neo-functionalism and intergovernmental practice, resulting in border authorities being the driving force of co-operation in this area, acknowledging the importance of national sovereignty. Only with Schengen have the national governments overtaken these units to control the pace of border control. It should also be noted, that even under a federal structure, neo-functional co-operation would still be able to occur, with refinements made by local and national bodies to individual bilateral agreements.

Border security will never provide an effective prophylactic against terrorism; nevertheless, the EU governments continue to take measures that will harden their frontier defences. Fundamentally, border security is sentinel-orientated in its approach, yet studies of terrorism show that static defences are inappropriate responses to the threat – they are easily overcome. The most

effective response is proactive policing and intelligence, as opposed to reactive. Border security must be seen as the last line of defence, not the first.

Chapter V

Co-operative Investigation against Terrorism

Part I: outside the EU structure

Crossing a state's frontier undetected is an essential trait of a successful terrorist group. Those groups capable of this enjoy the option of opening up a new front as part of their strategy if necessary, as well as seeking training from other terrorist groups or sympathetic regimes; rest and recuperation or "lying low" for members; and the buying and transportation of weapons and ordnance amongst others. Travelling undetected is a key survival skill for any group. Even indigenous groups, such as the IRA, have operated beyond Ireland and the British Isles: targeting British targets on the European mainland; engaging in training-camps in the Middle East; sending IRA members "on the run" into the Irish community of the United States; and advising the FARC in Colombia – thus exemplifying why strategy cannot be limited exclusively to the "front line", even in cases of national separatism. Groups capable of developing an international or transnational dimension are proficient in penetrating a state's border. The realisation of the precarious security provided by that border has induced law-enforcement authorities to co-operate beyond the augmentation of their common frontiers, developing a proactive response against the transnational/international make-up of these groups.

The title of this chapter is perhaps something of a misnomer, as it is only within the Europol structure that any true co-operative investigation occurs; for the most part the co-operative structures deal with the sharing or transfer of information through a variety of means, along with occasional meetings and seminars to discuss strategic or operational matters. Nevertheless these types of co-operation serve as proactive measures against terrorist activity through their capacity for facilitating the exchange of intelligence, particularly at a more sophisticated bilateral level than is possible via the SIS due to the often-personal nature of the information and its delivery. This information need not always be raw data; both Interpol and Europol are capable of providing an analytical service, whilst fragmentary data obtained by a department, seemingly unconnected to anything in particular, may reveal itself to be a missing "jigsaw piece" in an ongoing investigation. Because this level of co-operation is particularly conducive to proactive measures, it provides a superior level of counter-terrorist measures to that available to the sentinel approach.

Acute intelligence and its delivery have proven to be a valuable weapon against terrorism; it is the cardinal asset of the counter-terrorist officer, providing a window into the operations and structure of a terrorist group or cell. The state possesses the precision firepower necessary to deal with terrorists, but it is good intelligence that is required to direct this offensive arm. Without adequate intelligence, the state's counter-terrorist capabilities lose any proactive capacity, and must wait upon events or luck. For this reason it is so important that strong co-operative ties exist between law-

enforcement agencies to facilitate the exchange of this precious commodity generated by the transnational aspects of terrorism. The stronger the ties, the easier it is for a law-enforcement or security organ to pass on sensitive information. Such linkages are important beyond the transfer of information – active co-operation in investigations is also required. The Lockerbie investigation, for example, spanned 16,000 witnesses in fifty-three countries over four continents¹, demonstrating the importance of good working relations between the police forces of the EU Member States, despite the difficulties induced by the problematic relationship between the German BKA and the Scottish Dumfries and Galloway Constabulary.

The close relationships enjoyed through membership of the EU have yet to provide for a common perception of terrorism as *hostis Europa civis*. Rather most groups have been perceived as enemies to specific Member States (or indeed a state outside of the EU, as much of the Islamic-orientated terrorism that has occurred on European soil has been aimed at Israeli targets).² While this view persists, terrorists are free to move in another Member State as long as there is no outstanding Interpol arrest warrant or a Member State decides to prohibit entry or carries out expulsion. The movement of terrorist suspects, however, is one in which the authorities of the Member States take a close interest, regardless of who the groups profess to be their enemies. A state has a right to be concerned when terrorists enter their soil. The IRA's continental European campaign in the 1980s demonstrated their flagrant disregard for the

¹ David Leppard On the Trail of Terror: The Inside Story of the Lockerbie Investigation 1991 p105

² The 11 September attacks have begun to challenge the old view, with international opinion becoming more hostile against terrorism in general, whilst Western States have been quick to recognise al-Qaeda as a common threat.

laws of supposedly “neutral” countries. It works the other way, too: a meeting between a known terrorist suspect and an unknown foreign guest for example might remain inscrutable unless the national authorities of the “unknown” are contacted, leading to a possible insight into why such a meeting or contact occurred for both parties concerned. The arrest in Colombia in August 2001 of three suspected IRA members developing links between the IRA and FARC was due in part to a warning from Spanish intelligence at the beginning of June 2001 that FARC had been attempting to recruit help from ETA. This consequently led to a greater scrutiny of visiting Europeans entering the country, particularly towards a trio of visitors (two men under a British passport, and one under an Irish) who arrived two weeks later (Niall Connolly, Edward Monaghan and John McCauley).³ The Colombian army were suspicious of the men’s journey into FARC controlled territory and contacted the British embassy – which also represents Irish diplomatic interests – asking for help in establishing any political affiliations or outstanding warrants. It was discovered that all three were travelling on false passports, and on emergence five weeks later from the guerrilla held territory they were arrested on arrival at Bogotá airport, charged with entering the country illegally. The repercussions of this are significant across both sides of the Atlantic, questioning the IRA’s commitment to the Peace Process, as well as having allowed it the opportunity to test and modify its weapons in an secure area away from the attentions of any security forces (Monaghan and McCauley have been described in security circles as highly skilled weapons experts). From the Colombian authorities’ perspective it introduces the worrying

³ *Sunday Times* Focus *Rumbled in the Jungle* 19 August 2001, pp 14-15

possibility that the IRA suspects were training the FARC in new mortar weapons technology, tactics, and improving their accuracy,⁴ allowing them the force projection, for example, to destroy rural police stations rather than, as has often been the case, the civilian homes around them. This training was recently put into devastating practise with a mortar assault on the Presidential Palace during the swearing-in of the new president, Alvaro Uribe, in August 2002, which left fifteen dead, and bore the hallmark of IRA tactics.⁵

In this particular example surveillance of the foreign suspects was “lost” when they entered the demilitarised zone – 42,000 square kilometres of rugged hinterland from which the Colombian army withdrew in November 1998 as part of an attempt to encourage peace talks, leaving it effectively under the control of FARC – allowing them a unique advantage in enabling them to easily avoid surveillance.⁶ Despite the five-week gap, the authorities were, if not able to actually prevent the damage created by this liaison, at least aware of the probable type of terrorist collaboration occurring, thanks to the co-operation occurring between the authorities of both countries.

It is this willingness to co-operate with other agencies involved in counter-terrorism which proves so important in raising the effectiveness of the work concerned. This chapter is concerned principally with the structures and organisations outside the direct scope of JHA affairs that have been put in

⁴ Ibid.

⁵ [BBC News](#) *Deadly welcome for Colombian head* 8 August 2002; [BBC News](#) *Colombian attacks “have hallmark of IRA”* 11 August 2002

⁶ The demilitarised zone was revoked by President Pastrana in February 2002, following FARC’s kidnapping of Senator Jorge Gechen Turbay, president of the senate peace commission, along with a nationwide campaign of bombings, leading to the collapse of the peace process. [The Guardian](#) *Colombia Bombards Rebel Enclave* 22 February 2002

place to facilitate greater co-operation between the EU Member States' police forces at the investigatory level, observing not just the degree of co-operation, but also the co-ordination of efforts which these structures are capable of inducing. In ascertaining the effectiveness of these structures one is able to discern the extent to which the Member States judge it necessary to refrain from a more comprehensive integrated European approach. When compared with the analysis of the next chapter, which focuses on structures within the JHA sphere, one should be able to determine whether one area holds more sway over the other in terms of policy.

To this end, a chronological approach to the analysis has been adopted in this chapter, continuing the evolutionary analytical theme, so necessary to a comprehensive understanding of JHA co-operation today. We therefore open with an account of Interpol's role in counter-terrorism, followed by the European structures of Trevi and the Police Working Group on Terrorism, and the Security Services. Although the latter are not strictly law-enforcement bodies, they do play a key role in the investigatory co-operation against this threat, the gathering of intelligence being one of their most basic features, and it is interesting to observe how exactly they fit, or do not fit, into the bigger picture of JHA co-operation.⁷ Providing an account of these co-operative options available to the EU Member States outside the JHA gamut allows us not only to compare them with the structures offered by the EU in the next

⁷ Stella Rimington's pushing of the UK's Security Service into the open with a public lecture - *Security and Democracy - Is there a Conflict? The Richard Dimbleby Lecture 1994* - provides an acute insight into this organisation's desire to engage organised crime, following the receiving of its mandate against terrorism.

chapter, and consequently rate the EU's efficiency, but also to understand the EU measures through the template provided by these initial structures.

Interpol

The International Criminal Police Organisation, more commonly known as Interpol dates back to 1914. It is not an international organisation in the usual sense, but rather an international police association. Its primary purpose is to serve as a forum to facilitate the exchange of information and requests from other members, undertaking police and judicial enquiries as long as these remain within the parameters of Interpol's constitution (the present constitution having been laid down in 1956). No operational role is assigned to Interpol, and it was initially seen as a "talking shop" or "post box", unable to undertake any self-appointed initiatives or judicial enquiries. This perception is somewhat outdated now, as recent years have seen the launch of additional services such as DNA profiling, a fingerprint database, a stolen travel documents database and a terrorism watch list as well as analysis capabilities.⁸

The investigation of a criminal incident that requires information or assistance from another state's police agency will require a point of call to the National Central Bureau or NCB of Interpol located in the country concerned. The NCB, of which there are currently 179, represents Interpol in that country,

⁸ Interpol website homepage www.interpol.com

linking the national police force to Interpol, and thereby to other member police forces, and is commonly known as Interpol: Washington, Interpol: London etc. Its purpose is to serve as the conduit for information transfer and requests, as long as these remain within the parameters of its Constitution. Information is inputted into the Interpol's Headquarters at Lyons where it can be stored.

Interpol has had a somewhat chequered role in counter-terrorism. Initially prohibited due to Article 3 of its 1956 Constitution forbidding involvement in crimes of a religious, racial or political nature, Interpol was unable to assist in terrorist investigations. This finally changed in 1984 following an amendment to Article 3 permitting Interpol's involvement in cases where terrorists were acting outside their home territory. While not perfect (it does not for example provide for incidents occurring inside the conflict area, i.e. a British citizen killed in the UK by Northern Irish related terrorism), it is recognition by an international organisation that terrorism is not necessarily equated with legitimate political struggle.⁹ However, the fact that Interpol was prohibited from involvement in terrorist incidents did not attract much enthusiasm from its members. Being an international organisation, Interpol's membership includes some countries that share an unsavoury past when it comes to terrorism – Libya, Iran, Iraq and Syria being prominent examples. During the Entebbe crisis, it was alleged that Israel, having asked Interpol for help, forwarded information to Interpol's then Headquarters in Paris, later discovering that some Arab members had got hold of this information and

⁹ Such international recognition was the first of its kind, predating the United Nations decision to tackle terrorism directly in 1994 – *Declaration on Measures to Eliminate International Terrorism*.

passed it on to Arab terrorist groups. Members such as the UK would be especially reluctant to pass on information about the PIRA when members such as Libya have provided significant sponsorship to the terror group. Indeed, one British officer was quoted as saying that he would as soon hand over operational information to Interflora as to Interpol.¹⁰ Such preconceptions stem from the days when Interpol relied upon card indexes and Morse code as a means of functioning. This cannot correlate with the introduction of secure telecommunications and encrypted computer databases in the mid-1980s and the subsequent advance in computerised cryptology which ensures that information travels only between the NCBs concerned, and that no third party may observe the material. Despite these advances Interpol unfortunately remains tarnished from a past that it has attempted to put well behind it.

The other particular criticism within counter-terrorist circles is that staff of the NCBs are not of a high enough calibre to be entrusted with such sensitive information. The Metropolitan Police Special Branch in its submission to the Home Affairs Committee Enquiry concluded that "Interpol staff are not experienced in affording proper protection to classified material, do not possess the requisite security clearances, and the politics and motives of some of its member agencies are, to say the least, questionable in this context". This security concern is a legitimate grievance, but one that is not the responsibility of Interpol, but rather its NCBs. The Member States staff these, not Lyons,

¹⁰ R. Woodward, "The Establishment of Europol: A Critique" paper presented to the Cyprus Police Academy International Seminar, Nicosia 20-22 April 1990 (CSPO: Leicester University 1993) cited in *Transnational Organised Crime* Vol. 2, No. 4 1996 pp 106-130 Paul Swallow "Of Limited Operational Relevance: A European View of Interpol's Crime-Fighting Role in the Twenty-First Century" p 117

therefore it is their responsibility to employ sufficiently qualified personnel to process such intelligence. Here, therefore, is an opportunity for the EU Member States to establish an agreement between themselves, affirming that each will provide fully qualified operatives for NCB work.

Interpol has taken measures to address these concerns by establishing the "TE Group", a specialist Anti-Terrorist Group set up in January 1987: a small unit based at Lyons whose purpose is to act as a safeguard filter on incoming information regarding terrorism, and as a threat assessment centre. Composed of a small group of counter-terrorist experts and operatives, the TE Group manages a computerised database of terrorist related data provided by Interpol's members, who will have consulted Interpol's Terrorist Manual for the detailed procedures required for the input of such data, helping them to deal with the constituent aspects of terrorist acts vis-à-vis the amended Article 3.¹¹ By collating such regulated data, the TE Group has been able to provide warnings to members of potential terrorist attacks or activity. In 1989, for example, the TE Group sent out eighteen alerts or warnings relating to attacks on aviation, embassies and diplomats.¹² After a member has approached the TE Group for assistance, its records are searched and if they find that an incident has a number of matching points with one in another country, they can then suggest that the enquiring NCB might wish to get in touch with the NCB of that country and discuss the incident further.¹³ By operating in this way, Interpol does not divulge any investigative information, leaving that

¹¹ The first manual released in March 1987 to the NCBs at 62 pages long and officially entitled "Guide for Combating International Terrorism" Fenton Bresler Interpol 1992 p 257

¹² *Ibid.*, p 260

¹³ *Ibid.*

decision to the requested NCB, and thereby not infringing on sovereignty. In furtherance of this point the TE Group may, if asked to do so, offer one of its officers to the requesting police force to assist them in an investigation. One successful case saw an Italian officer of the TE Group seconded to assist the French police in tracing down Italian terrorists hiding in Southern France. Actual arrests, however, are left to the local police, as the seconded officer has observer status only.¹⁴

As the example shows, Interpol's record in terrorist cases is not one that should inspire gloom. It has had numerous successes in facilitating co-operation in this area. In the wake of the IRA bombing of the Grand Hotel in Brighton for example, the UK NCB made around 1,000 enquiries to approximately forty countries, including Libya, with only a one per cent failure rate to these requests.¹⁵ Interpol's role in the Lockerbie investigation has also been important. It was able to link the fragment of the IED's timing device to Libyan intelligence agents through a request for help put out on the network by Scotland Yard in accordance with Interpol's anti-terrorist manual. This put detectives onto the trail after the NCB at Dakar in Senegal, reported that two Libyan nationals had been arrested after they disembarked from an Air Afrique flight on 19 February 1988 from the nearby state of Benin. They were using false Lebanese passports and carrying nine kilos of Semtex and ten digital timers of the same Swiss manufacture found in the Lockerbie wreckage.¹⁶

¹⁴ Ibid., p 266

¹⁵ House of Commons Home Affairs Committee 7th Report Practical Police Co-operation in the European Community Session 1989-90 363-1 p 31

¹⁶ Bresler, Op. Cit., p275

Interpol also organises symposia on terrorism through the TE Group. These meetings began in 1988, later becoming annual events. The symposia tend to focus on regional issues, new directions in terrorism, and recent crises. It was, for example, at the thirteenth symposium in Palma that the General Secretariat gave a preview of the new guidelines to the revised Interpol Terrorist Manual, reflecting the changes that had occurred in terrorism, especially the closer linkage between terrorism and other international criminal activities, and hence the need for a multidisciplinary approach. The sixteenth symposium in October 2001 naturally gravitated to the events of 11 September.¹⁷ 110 experts from fifty-one countries discussed long-term anti-terrorism initiatives, such as:

- Interpol's planned new identity/travel document database designed to help customs, border patrols and immigration services share police information and verify the authenticity of documents;
- the feasibility of setting up a special aviation database;
- the financing of terrorism – expansion of anti money-laundering measures and studies of alternative remittance systems such as the Hawala/Hundi system.¹⁸

Essentially the symposium utilised the international repugnance of the 11 September attacks to enhance Interpol's counter-terrorist powers, however it

¹⁷ 16th Annual Interpol Symposium on Terrorism, 22-23 October 2001, France, Lyon, Opening remarks by Willy Deridder, Executive Director of Interpol, www.interpol.com/Public/ICPO/speeches/20011022b.asp

¹⁸ Both words refer to the same system, which originated in India and is designed to transfer monies across continents to individuals, avoiding costly banking by operating on an informal basis. Consequently, it is a very useful procedure for terrorist groups, as no records of transactions are left behind.

should be stressed that elements international assistance remain dependable upon political will, which ebbs and flows according to the international climate. As we can therefore see, much of this symposium's work is aimed at developing new structures for Interpol, which can weather changes in such the fickle international climate.

Interpol's financial situation, however, has been a continuous problem in the implementation of its services.¹⁹ Ronald Noble, who became Secretary General of Interpol in 2000, wrote a scathing article in the *New York Times* in September 1998 after the Embassy bombings in Kenya and Tanzania. Noble criticised the lack of funding provided for Interpol, which invariably hampers its efforts against terrorism, pointing out that the Headquarters in Lyons could only afford to operate on regular business hours.²⁰ Interpol operates a subscription service based on a unit block system corresponding to each country's GNP, with a current annual budget of €30 million (\$28 million).²¹ In real terms this provides only limited resources for Interpol's international requirements. Interpol's Automated Finger Print System, for example, had to be put on hold in 1996, as it could not be funded entirely from the budget; instead, the General Secretary had to ask its members for voluntary contributions to complete the project. The situation is further complicated by the problem of some members backsliding on their subscription payments. Theoretically, this should lead to a suspension of membership, but this has

¹⁹ Interpol was seriously under-funded up until 1987, when an influx of American funding (10 million Swiss Francs) for a 5-year modernisation plan.

²⁰ New York Times, Ronald Noble *A Neglected Anti-Terror Weapon* 9 September 1998

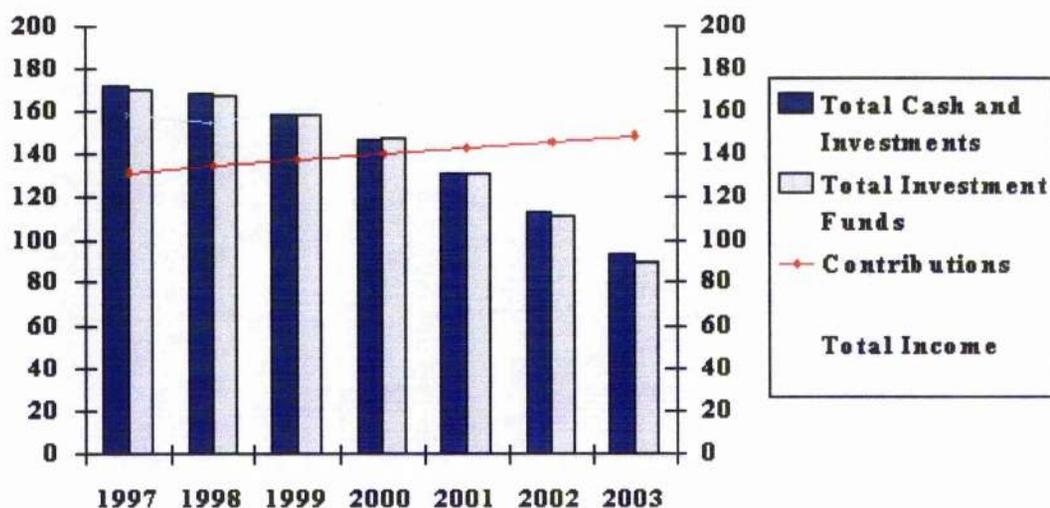
²¹ Interpol Fact Sheet [Interpol – an overview](http://www.interpol.com/Public/Icpo/Factsheets/FS200101.sap#5)
www.interpol.com/Public/Icpo/Factsheets/FS200101.sap#5

never been enforced, as it would be detrimental to all concerned.²² Current projections by Interpol illustrate a slow rise in income combined with a falling reserve position driven by future NCB and General Secretariat capital expenditure commitments (see table VI).²³ While this expenditure has dramatically increased the services available to the membership, it also raises concerns over Interpol's dwindling reserves and how it might replenish these before it overreaches itself.

TABLE VI

Projections developed from Interpol's current proposed budget provide insight into future trends in costs and existing funding arrangements.

Current and projected funds and cash reserves in current budget projection



From the perspective of criminal analysis, Interpol's databanks are now seeing relatively new usage through the decision in 1993 to establish a fully

²² The exact amount of Interpol's debt is unpublished, as is the identity of the non-payers, but it an increase of debt by 765,952.58 Swiss Francs (£400,000) was reported in the 1993 financial year. Paul Swallow *Of Limited Operational Relevance: A European View of Interpol's Crime-Fighting Role in the Twenty-First Century* Transnational Organised Crime Vol. 2, No. 4 1996 p 122

²³ Interpol's Strategic Development Plan (Final Report 1999) Part 4 Strategy, Options and Recommendations 4.1 www.interpol.com/Public/icpo/sdp/default.asp

operational criminal intelligence analysis capability at the General Secretariat – the A.C.I.U or Analytical Criminal Intelligence Unit – as a means of further enhancing co-operation.²⁴ In doing so Interpol offers its members a new and quality product: operational short-term and strategic long-term analysis. The A.C.I.U adopts the European approach (see below) of breaking down each of the two types of analysis into three groups depending on the focus, which could be:

- criminal incident(s),
- offender(s) or victim(s) or
- the methods of controlling crime.

Technicalities aside, Interpol's placing provides it with a potential wealth of information from which to work. Its product no longer remains essentially a reactive one, but one of proactive analysis, beyond that of the putting out of simple alerts. International crime is increasingly reliant on modern technology to facilitate its activities; Interpol is now reacting accordingly. Analysis is more important than ever today, representing as it does proactive policing.

This, then, is the current model of counter-terrorist activity within Interpol. It is not designed as a means of tackling terrorism in itself, nor even as a co-ordinating body, but rather as a regulated channel for the transfer of information. It is however only as good as the information put into it by its membership. Its global membership places it in a unique position for

²⁴ Criminal Intelligence Analysis: The technique of criminal intelligence analysis as used within ICPO-Interpol, www.interpol.com/Public/cia/default.asp

providing assistance to an investigation involving international terrorism, as demonstrated through the Lockerbie incident. Interpol's advances with technology ensure that it has finally moved beyond being a sophisticated operator service. The stolen travel document database, Interpol's most recent innovation, is of significant use in counter-terrorism, as these documents are often key components in the planning and implementation of terrorist missions. Details of stolen passports may be recorded directly into the database by the issuing country, which can be accessed twenty-four hours a day, seven days a week by member countries.²⁵ The problem that it has always faced has been in shaking off the old image of a leaky system, under which only the least sensitive information was passed, which is not conducive to the maximisation of co-operative performance. Ironically, the 11 September attacks may finally have laid this ghost to rest because tackling the global network of al-Qaeda requires co-operation at an international level. No other structure exists which is capable of facilitating this requirement, thereby placing Interpol in a unique position: it has to be used. Greater traffic in information on terrorism is now passing between the world's law-enforcement agencies than at any other time, and Interpol serves as a principal conduit in this. By utilising this service, its members' awareness of the product offered by Interpol is raised. Concurrently if Interpol can also maintain a high degree of quality in the services it offers, it will have greater reason for justifying its claim to have moved on from its past.

²⁵ Interpol Press Release 26 June 2002 *Interpol launches new database on stolen travel documents*

Trevi

Interpol's reluctance to address the issue of terrorism until 1984 was fundamentally responsible for the European Council meeting in Rome, December 1975, where a British proposal was put forward that "Community Ministers for the Interior (or Ministers with similar responsibilities) should meet next to discuss matters within their competence, in particular with regard to law and order".²⁶ Concern was growing regarding the increasing number of terrorist incidents throughout Europe and the lack of any effective co-operative mechanism to address this. If Interpol, as the most suitable vehicle available, was unable to deal with the issue, then the Europeans would develop their own instrument. The fruition of this meeting was the invitation of the EC's Ministers of Justice to Luxembourg on 29 June 1976, in what was to become known as the Trevi Group. Essentially this was an informal body operating at an intergovernmental level, composed of Interior and Justice Ministers, and police and intelligence officers of the EC Member States, designed to "advance co-operation on the ground".²⁷

Trevi was designed very much as an informal organisation that promoted a "club type" atmosphere. Douglas Hurd, a former British Home Secretary described "much of Trevi's value is in its ability to foster contacts and expose national delegations to each others' problems and preoccupations," and that "the exchange of timely, quick, efficient information is the key to the whole

²⁶ Timothy Bainbridge with Anthony Teasdale The Penguin Companion to the European Union 1995 p 450

²⁷ House of Commons Home Affairs Committee 7th Report Practical Police Co-operation in the European Community Session 1989-90 363-I p 5

thing”.²⁸ Trevi maintained a secure telecommunications system via the Trevi Secure Fax Network (TSFN) established in 1987 (although towards the end of Trevi’s existence, this was in need of replacement due to the rapidity of technological advancement), which helped improve the “gathering of information on terrorist movements and the immediate exchange of information following a major terrorist incident”.²⁹ With the rapid exchange of accurate information, the French authorities were able to intercept the Panamanian ship, *Eksund*, containing some 150 tonnes of weaponry for the IRA, from Libya in 1987. Additionally Trevi provided for regular joint analysis meetings of the terrorist threat within and outside the EC, which gave an overview of counter-terrorist tactics and strategy. By drawing attention to potential threats, the Trevi machinery was particularly effective in reacting to the IRA’s campaign of operations in Europe 1988-89.

Principally, though, it was the informality within Trevi, breeding a particular bond of trust between the participants, which has proven so influential when dealing with the political controversies of terrorism. Trust is a fundamental factor when sharing sensitive information. This becomes all the more important when one considers that by incorporating a blend of both ministerial and operational personnel into Trevi’s structure, it brings political weight into the organisation.

The EC Member States judged Trevi a success and were keen to expand its mandate beyond the terrorist concerns of its initial working group. In all, four

²⁸ Ibid., p 43

²⁹ Lisa Riley Working Paper X: Counterterrorism in Western Europe. Mechanisms for International Co-operation A system of Police Co-operation in 1992, 1992 p 37

Working Groups were formed: WGI (1976) focused on terrorism, WGII (1977) on public order and technical training, WGIII (1985) on serious and organised crime and narcotics trafficking, while WGIV or Trevi '92 (1989) was concerned with policing issues in Europe once the TEU came into effect. So attractive was membership that Trevi expanded beyond the EC Member States to include regular contact with the "Friends of Trevi": Austria, Morocco, Norway, Sweden, Switzerland, the USA and Canada. Its dissolution came at the end of 1992, making way for the fledgling Europol Drugs Unit, which was initially under Trevi's stewardship via the Ad Hoc Working Group on Europol, established in 1992, with its work being shadowed in the interim period by the K4 Committee, until the TEU itself came fully into effect in 1993.

Criticism of Trevi has been aimed principally at its lack of democratic credentials, with a veil of secrecy ensuring that few of its deliberations were made public, along with a lack of affiliation to any EC institution. This latter issue was rectified, to a point, in 1985: the European Parliament discovered the existence of Trevi, and complained, resulting in the decision that once every Presidency the minister currently chairing meetings of Trevi would have to report to the EP's Committee on Civil Liberties and Internal Affairs. This was clearly a sop thrown to the EP, who had no jurisdiction in internal security matters; in any event, because Trevi was not an official Community body, the Ministers were not obliged to answer the questions relating to their Trevi activities. In 1987 the European Commission was also afforded an insight into Trevi when it was granted observer status to the bi-annual meetings; again

however, while the Commission may have been given a voice, that voice could easily be ignored. Trevi would remain entirely under intergovernmental control.

In providing a critical assessment of Trevi, one can see that it was instrumental in providing the co-operative foundations necessary for establishing the more advanced Europol structure. Trevi's network of contacts and meetings on terrorism provided the first steps of any real co-operative efforts between European States in tackling terrorism. Its informal style was conducive to the passing of sensitive intelligence in these early days of co-operation; however as we shall see later, this could also be very limited in its effectiveness. Trevi was not seen by all as a sufficiently adequate tool to counter terrorism; many police officers regarded it as too political, having to "operate from the top down" – this, they felt, hindered their work.³⁰ Their solution, therefore, was to create a more informal structure providing a "needs-orientated forum" which would cater to the operational requirements of police officers. The assassination of Sir Richard Sykes, the British Ambassador to the Netherlands and his Dutch footman, in the Hague, 22 March 1979, by the IRA, prompted a meeting of representatives of the Special Branches of the Belgian Gendarmerie, the Metropolitan Police, the BKA and the Dutch criminal bureau, in the Hague.³¹ It was at this meeting that the decision was taken to create the Police Working Group on Terrorism (PWGOT).

³⁰ Ibid., pp 40-45

³¹ The shock of the death of a high ranking British official illustrated to the continental Europeans the ferocity of "The Troubles" and that the IRA was no longer content to restrain its attacks to the Province or the British mainland. Sykes' murder was the catalyst for the creation of the PWGOT, following a series of high profile terrorist events on the continent including the kidnapping and subsequent murder of the former Italian Prime Minister and

The Police Working Group on Terrorism

The PWGOT is comprised of the fifteen Member States and Norway, who meet every six months in a different European capital, The PWGOT operates as an informal "alliance of Western European Special Branches, similar police agencies or security services with the police powers to hold national, executive counter-terrorist responsibilities within their own countries".³² Chiefly the PWGOT focuses on the practical and operational aspects of counter-terrorism, able to operate independently of Trevi. Indeed, it was the successful employment of its coded facsimile system in 1988, providing regular, rapid and secure exchange of information, which caused Trevi to apply it to its own network. Like Trevi, its most important attribute lies in its informal nature. A European Liaison Officer³³ of the MPSB stated:

I cannot stress too much the importance of the police-working group across the whole field of terrorism in Western Europe,

Christian Democrat Party leader, Aldo Moro, in the spring of 1978, traumatising European society. Eight days after Sykes' murder, the IRA assassinated the British Government's Spokesman on Northern Ireland, Airey Neave MP, with a car bomb in the underground car park at Westminster. Such attacks, so close to the heart of government, demonstrated the urgent need for a reassessment of this problem.

³² House of Commons Op. Cit., 363-II p 43

³³ The European Liaison Section of the MPSB was established in January 1976, and in 1977 it was formalised with its incorporation into Trevi. The ELS was given the responsibility of liaising with UK Constabularies, the Special Branch equivalents and security services in other EC countries, after Scotland Yard's Anti-Terrorist Branch found that there was no easy mechanism for contact with other EC police forces in its investigations of international terrorist incidents: "It was then decided to set up a dedicated unit, staffed by linguists, which could liaise directly with Special Branch or equivalent agencies on the continental mainland in order to obtain speedy responses to anti-terrorist matters" (*HCHASCR 363-II*, p42). Being police officer-orientated, the ELS works in closer tandem with the more informal PWGOT. It was responsible for the first instance of Spanish and French police officers giving evidence in a British terrorist trial involving the PIRA, when it aided RUC officers to interview witnesses in these countries in relation to the murder of two British army corporals in Belfast on 13 March 1988. The ELS network includes the EU 15 plus Gibraltar, Norway, Malta and Switzerland.

including Northern Ireland. We know these people, they come here to the Yard when they happen to be in London. We make contact with them when we go abroad, regardless of what we are going for. It has become a solid group of working colleagues. We trust each other implicitly and pass information to each other without question³⁴

Like Trevi, the PWGOT is firmly wedded to the concept of informality; the question to ask is why these early facilitatory structures against terrorism were so enamoured with this methodology, and to question the wisdom of establishing a second structure (PWGOT) of such similar standing to the first.

For the first part, informality builds up the level of trust conducive to passing intelligence related to terrorism, and it is important to remember that this was the first type of structure to be devised capable of facilitating this type of transfer. Membership does not commit governments to any particular policy; even Trevi's political input was not aimed at establishing ministerial commitments.³⁵ Rather, Trevi's purpose, aside from building up its contact network, was to discuss terrorist related issues and propose new ideas. The summit meeting of 21 June 1985, for example, discussing the outbreak of international terrorism that troubled Europe in the mid-1980s led to the drawing up of new proposals for counter-terrorist co-operation. However,

³⁴ Bresler, *Op. Cit.*, p162

³⁵ Membership of Trevi's Working Group I resulted in only one policy commitment of any true political note; that was the commitment of refusing to make concessions to terrorists, a commitment which was reaffirmed at a meeting in London on 25 September 1986, convened at France's request, concerned as she was with a spate of recent bombings in Paris. Lisa Riley *Op. Cit.*, p 36

none of these represented any change in policy. The Member States viewed it as important to avoid political commitments in their co-operative dealings against terrorism because terrorism was seen solely in terms of a problem requiring a national response. No government wishes to be in the position whereby "undue" influence could be placed on their counter-terrorist policy. A more permanent body dealing with these issues would also require alterations to the judicial systems of the Member States, and in this early stage of European Political Co-operation (EPC), integration was not yet advanced enough to be able to accommodate moves in this direction. Such matters remained the sovereign concern of the state, recognised by The Treaty of Rome and the European Union Treaties of Maastricht, Amsterdam and Nice.³⁶ The informal nature of Trevi and the PWGOT effectively precludes any possibility of such infringement of sovereignty. Neither the PWGOT, which concerns itself with operational matters and tactics, nor Trevi, which was seen as a type of "old boys club", were of any threat to the status quo.

Although the regulations of the European Union treaties emphasise the sovereignty of the state in these matters, the Member States have come to recognise that co-operation has become essential to countering terrorism rather than serving merely as a useful tool. Consequently, most Member States agreed to provide the new flagship of European police co-operation, Europol, with a mandate in counter-terrorist matters.³⁷ The incorporation of such a structure into the European Union sphere, as opposed to maintaining it

³⁶ "This title shall not effect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" Article K.2(2) TEU; Article K.5 Amsterdam and Article 33 Nice.

³⁷ See Chapter VIII for a more detailed discussion.

outside, illustrates the perceptual change that has occurred over the past twenty-five years. There is a recognition that a more formalised, permanent and regulated approach is required, although this in no way implies an infringement upon the actual policing of a Member State's internal security. Europol, as we will see in the next chapter, does not have this capability. However, whilst discussing this matter it should be remembered that the Member State's ratification of the European Convention on Human Rights does place parameters on its policing methods. This was demonstrated when the European Court of Human Rights, on 18 January 1978, found the British Government guilty of breaching the Convention through its interrogation techniques on IRA suspects which they found to be "inhuman and degrading treatment".³⁸

With the dissolution of Trevi, European co-operation has moved steadily towards greater regulation, although with the PWGOT still in existence, a degree of informality still exists. The negative aspects of the informal structures stems from their fragility; a senior British police officer within the International Association of Police Officers commented: "If I'd drop dead now, the chain would break".³⁹ The obvious problems with this philosophy are that a new individual filling such a gap, or indeed just taking over, would take time to reach the same level of trust perpetuated by his or her predecessor. Consequently, the chain could not operate at one hundred per cent until this maturation period; a formalised system, on the other hand, has a

³⁸ This verdict overturned that of the earlier 2 September 1976 ruling by the European Commission on Human Rights, which also found the government guilty of torture. Peter Taylor *Brits: The War Against the IRA* 2001 pp 73-74

³⁹ Benyon et al *Policing Co-operation in Europe* 1993 p 38

network of support preventing it from suffering this problem to the same degree. When, for example, the term of the head of Europol's Counter-terrorist Unit is due to expire, he will spend around three weeks briefing his successor, to facilitate a smooth transition.⁴⁰

This heavy reliance, though, on a dual co-operative system based on an informal network revealed its Achilles Heel during the investigation into the bombing of Pan Am 103 over Lockerbie, 21 December 1988. These structures, designed to facilitate co-operation, were unable to prevent the relationship between the investigating Scottish Lothian and Borders Constabulary and the German BKA becoming severely strained over the issue that the IED might have been placed onboard the *Maid of the Seas* at Frankfurt Airport, before continuing its journey to Heathrow and from there onwards to John F. Kennedy in New York. This thinking stemmed from the fact that two months previously, the BKA's Operation "Autumn Leaves" had arrested sixteen suspected Popular Front for the Liberation of Palestine – General Command (PFLP-GC) members, whom it was believed were preparing to bomb an airliner. Despite strong suspicions, all sixteen were released due to lack of secure evidence, despite the discovery of "weapons of warfare and explosives"⁴¹. The suspects then promptly disappeared, "going to ground". After the Lockerbie bombing this event was discovered by the Scots and the FBI, but the BKA were hesitant, and delayed handing over copies of the

⁴⁰ Personal interview with Mariano Simancas, Head of Europol C-T Unit, 30 May 2001 The Hague.

⁴¹ Dr Christine Rinne, the investigating judge, at the Federal High Court in Karlsruhe, who deliberated the charges made by the federal prosecutor against Marwan Abdel Razzack Khreesat (a highly-skilled bomb-maker), following his arrest as a result of Autumn Leaves, Leppard, *Op. Cit.*, p 13

Autumn Leaves files to the point that the Scottish Senior Investigative Officer, Detective Superintendent John Orr, suspected deliberate obstruction.⁴²

Marring the co-operative relationship were rifts caused by a variety of factors: from the different mindset and investigative techniques employed by each police force, which neither could comprehend, to the fact that the BKA could not accept that the bomb may have placed in Frankfurt, and therefore focused their side of the investigation around this concept. The Scots were particularly riled by the debacle concerning Khreesat's (the PFLP-GC bomb-maker) hidden IEDs and the length of time it took the BKA to discover them, despite continued urging from Scotland to search Hashem Abassi's apartment in Neuss⁴³. Moreover, the accident, which occurred at the BKA headquarters in Wiesbaden, whereby one of these two devices exploded whilst they were attempting to disarm it, killing one technician and seriously injuring the other, further exacerbated the situation.⁴⁴ This tragedy was compounded by the BKA destroying the remaining device, fearful that it too might explode. In doing so, ignorance destroyed this important piece of evidence. Despite having only one remaining device in their possession, the BKA produced a "scientific" report, entitled "Comment on the Ignition Devices". This was

⁴² Ibid., p 98

⁴³ Khreesat's Autumn Leaves statement indicated that he was certain that he had made five bombs, and that they were probably still in Abassi's apartment. Abassi's apartment had been under surveillance during Autumn Leaves, because of his houseguest, Hafez Dalkamouni (a senior figure in the PFLP-GC going under the name of Hafez Mohammed Hussein). Consequently, both the Scots and FBI saw Abassi as a prime lead, and made their initial request for the apartment's search in late February (the BKA had already searched the apartment twice) along with seven other locations where the devices might have been hidden. Two IEDs were eventually discovered in the cellar of his grocery shop where on April 13, having been stored there by Dalkamouni following his arrest. Steve Emerson and Brian Duffy *The Fall of Pan Am 103* 1990 pp 140, 204-5, 238-9

⁴⁴ Personal interview with John Boyd QPM CBE, former Chief Constable of Dumfries and Galloway Constabulary 1 March 2001 Lochwinnoch. Boyd was the outgoing Chief Constable when the bombing occurred, having been promoted to the post of Inspector of Constabulary for Scotland, and took up the post in June the following year.

seen by the Scots and FBI as a “compendium of fudge and obfuscation” which concluded that all three devices had a time delay of between thirty and forty-five minutes (despite the fact that the two others were destroyed) thereby concluding that the bomb must have been placed onboard at Heathrow, not Frankfurt.⁴⁵

International co-operation was essential in bringing those responsible for the bombing to justice, but a reluctance to be fully open with intelligence hindered the investigation, and caused a serious rift to develop between the Scottish police and the BKA that would take time to heal. To this day, the BKA remains sensitive regarding the failure of Autumn Leaves (the most expensive counter-terrorist investigation ever carried out on German soil) and the subsequent co-operative problems with their Scottish colleagues. Political reasons go part of the way to explaining the friction that developed; it was a major international incident, so consequently international politics were involved. Boyd also felt that the problems associated with a divided Germany were manifesting themselves, accentuating the fervent need to dissociate Frankfurt from anything to do with the terrorist bombing. Politics and policing became interlinked, and this created difficulties. Pressure was being placed on Orr from the Cabinet Office’s joint intelligence steering group, which co-ordinated British intelligence and security policy to resolve this row, because Britain’s Secret Intelligence Service, MI6⁴⁶, needed the amicable co-operation of its German counterpart in hunting IRA ASUs on the Continent,

⁴⁵ Leppard, Op. Cit., p 144

⁴⁶ SIS is the official acronym of the more commonly known MI6, but to avoid confusion with the Schengen Information System, this thesis will adopt MI6 throughout.

and the dispute between the two police forces was not helping matters.⁴⁷ Poor relations were further exacerbated by significant differences between the two forces. The Scots were unschooled in the complexities of the German judicial system, which could appear overly bureaucratic, neither were they proficient in the German language. The BKA for their part spoke English fluently, but they had great difficulty in understanding the Scottish brogue. Both sides had a different philosophy to work:

The BKA men consistently refused to speculate when no hard facts presented themselves. For many Scots, both at Meckenheim and Lockerbie, this went against the grain. The Scots, even more than their counterparts in England, liked to work on hunches and instinct. Their instinctive reaction to the early lack of progress and hard evidence in the inquiry was to enhance their dependence on guesswork⁴⁸

The facilitatory mechanisms within the Trevi and PWGOT systems were unable to resolve these problems because of the fact that they were, in a sense, highly centralised structures, as opposed to localised ones. For example, the MPSB and the BKA had mutual contacts, and understood one another's working style, but this counted for little when a terrorist attack occurred over Scottish soil, far from London. A debate was raised between the Lord Advocate of Scotland, Lord Fraser, and some members of the Cabinet as to whether primacy should be given to the small Dumfries and Galloway

⁴⁷ Leppard, *Op. Cit.*, p 146

⁴⁸ *Ibid.*, p 93

Constabulary, who had no experience in this type of crime, or the MPSB. Ultimately, because the crime had occurred over Scotland, and Scotland had a separate judicial system from the rest of Britain, Lord Fraser won his case. With this decision the investigation became effectively isolated from these facilitatory structures. Certainly, Trevi and the PWGOT were both involved in the investigation, as indeed were all possible avenues, but Boyd did not sit in on any of their meetings; instead, he simply received intelligence from them.⁴⁹ Had the bombing occurred over another European country things might have played out differently, with these structures able to influence events to a greater extent, as investigations into terrorist attacks are conducted on a more centralised scale. If it had occurred over one of the German Länder states, the BKA would have been the principal investigating agency; if it occurred over England or Wales, the MPSB's argument for primacy would have been a much stronger one. Nevertheless the political pressure from Bonn to ensure that the BKA proved that the bomb could not have entered the system at Frankfurt, to the point of denying even a possibility, would still have placed stress upon the investigation regardless of these facilitatory structures.

The Lockerbie investigation was a particularly arduous one, and one that the bombers did not expect. A twenty-five minute delay in PAN AM 103's departure meant that the IED detonated over land and not the Atlantic.⁵⁰ In doing so it ensured that evidence would be available for a criminal enquiry. In some respects, the investigation might be viewed as an aberration because it was never supposed to happen, and the odds of it succeeding were forlorn.

⁴⁹ Personal interview with John Boyd QPM CBE, former Chief Constable of Dumfries and Galloway Constabulary 1 March 2001 Lochwinnoch.

⁵⁰ Emerson and Duffy, *Op. Cit.*, p 12

Lockerbie in this respect can therefore be viewed as unique. The structure in place, while not failing, was very hard-pressed. Overall, the co-operative system was not fully prepared for such an event; then again, terrorists rarely play a straight ball.

Intelligence Gathering

The role of intelligence gathering is a fundamental mainstay of counter-terrorism policy, allowing officers to operate beyond a reactive capacity. Obtaining such a precious commodity can be achieved simply by the passing on of information from one force or agency to another. Increasingly however, analysis is being utilised by law-enforcement agencies, supplementing their investigative capacity:

Over the last few years, police activity has shifted its centre of balance away from the reactive investigation after events, towards targeting active criminals on the balance of intelligence. We have investigated much in developing new intelligence practices and skills in analysis.⁵¹

The UK, for instance, has established a centralised structure to provide strategic intelligence to its law-enforcement agencies – the National Criminal Intelligence Service (NCIS) – against serious and organised crime. NCIS was established in 1992 (operational 1994) as part of the UK's quasi-centralisation

⁵¹ David Phillips QPM, Chief Constable of Kent (National Intelligence Model, March 2000, published by NCIS)

of its policing but also to serve as the contact point or “gateway” for UK law-enforcement enquiries to international police bodies such as Europol and Interpol.⁵² NCIS’s aim is to standardise the way intelligence work is done throughout the UK⁵³ and serves as a useful commodity in the fight against organised crime. Its release of a National Intelligence Model in February 2000, for example, creating an integrated intelligence system, was endorsed by the UK’s senior police officers.⁵⁴ However, its mandate does not extend to a counter-terrorism capacity; rather this remains under the amalgamated remit of Special Branch, the Security Service, the Police Service of Northern Ireland and the Army.⁵⁵ By comparison, the German equivalent of NCIS is part of the BKA and consequently does have a role to play in counter-terrorism. The BKA also has an operational mandate, unlike NCIS, and the latter’s frustration of it being “under-funded, under-used and ineffective” led to a formation of an operational arm in October 1995 via the National Crime Squad.⁵⁶ It is, however, a case of the Member State’s individual preference as to who has what role and what powers.

⁵² The UK was one of the first of the EU Member States to construct such an NCIS. This was a requirement of all Member States in an effort to further facilitate JHA co-operation (Article 4.1 of the Europol Convention requires Member States to establish or designate a national unit to serve as the liaison body with Europol), and is one of only four purposely designed units (Germany’s BKA; the Dutch *Centrale Recherche Informatiedienst* CRI, and the Irish National Criminal Intelligence Office). More on NCIS’s role with Europol can be seen in the following chapter.

⁵³ NCIS Website “Introduction to NCIS” www.ncis.co.uk/business.asp

⁵⁴ NCIS Press Release *UK Police Chiefs Hail NCIS’s National Intelligence Mode* 25 February 2000

www.ncis.co.uk/PRESS/03_00_2.asp

⁵⁵ These latter two organisations insofar as the Northern Irish terrorism limited to the Province is concerned.

⁵⁶ 1994 Home Office Report, *Observer* *Police Demand Their FBI to Fend Off M15* 14 November 1994.

Due to accountability reasons, NCIS has been limited to the collation and analysis of data provided by law-enforcement bodies. It may ask regional crime squads or individual police forces to carry out surveillance operations on its behalf, but limited resources have restricted the possibility and utility of such operations. Michael Smith *New Cloak, Old Dagger: How Britain’s Spies Came in from the Cold* 1996 p 241

Analysis has become an important feature of law-enforcement activity over the past twenty-five years (originating in North America in the 1960s), although it is only in recent years that it has become recognised as an important additional support for international co-operation in police matters. The EU Member States adopted the following definition of criminal intelligence analysis as:

the identification of and the provision of insight into the relationship between crime data and other potentially relevant data with a view to police and/or judicial practice.⁵⁷

Analysis, then, affords law-enforcement agencies the ability to predict, or at the very least, understand the nature and growth of a particular strand or pattern of organised crime or terrorism. In turn this permits the establishment of enforcement priorities in respect of these crimes. In the shorter term this is aimed at immediate impact, typically arrests and seizures.⁵⁸

The most productive (and most common) intelligence utilised by those involved in counter-terrorism however is the tactical intelligence produced by informers. According to Commander John Grieve, Director of Intelligence at Scotland Yard (1996):

⁵⁷ Adopted (also by Interpol) in June 1992. Interpol website: Criminal Intelligence Analysis – Frequently asked questions. www.interpol.com/Public/cia/ciafaq.asp

⁵⁸ Interpol website: Criminal Intelligence Analysis – Frequently asked questions. www.interpol.com/Public/cia/ciafaq.asp

Paying informants is very cost-effective, providing that you manage all the risks – all the moral risks, all the physical risks, and all the legal risks. Economically it is a very, very cost-effective way of doing it if you compare the price of one of my mobile surveillance teams, an eight-hour day for them, and then compare that with how much you pay an informer. With an informer, we have got somebody inside the tent looking out. With a surveillance team, you are outside the tent looking in. There are very few jobs with the category of people that I deal with that two or three days work by a surveillance team will get a result. Very usually you will barely be off first base.⁵⁹

Informers afford the most efficient means of providing first-hand intelligence as well as insight into a terrorist cell or organisation. They are potentially the most devastating weapon available to law-enforcement agencies: beyond the mere supplying of information, some are capable of causing intense disruption to a terrorist group. It is suspected that fear of informers was responsible for the Abu Nidal Group's murderous purge of half its numbers during the late 1980s.⁶⁰ The IRA meanwhile adopted a more pragmatic but equally ruthless approach to informers, when it came close to being "closed down" by the security forces in the early 1970s. After its transformation from a brigade to a cellular structure, the IRA imposed an automatic death sentence on informers

⁵⁹ Smith, Op. Cit., (author's personal interview) p 242

⁶⁰ Patrick Seale *Abu Nidal: A Gun for Hire* 1992 p222

The numbers murdered amount to several hundred. The reasons behind Nidal's order will perhaps never be known, but it is known that he suffered acutely from paranoia and feared plots against himself. There was some degree of internal tension within the organisation, but not to the extent to warrant the action taken. Whether or not the Israelis were able to orchestrate and play on these divisions is unknown.

or “touts”: the “execution” of Joe Fenton on the night of 26 January 1989 is a typical example of terrorist housekeeping.⁶¹ The IRA, however, has on occasion issued amnesties to encourage informers to repent, and in some instances they have imposed a sentence of exile rather than death to encourage other informers to reveal themselves.⁶² On the European continent the Red Brigades were decimated by the *pentiti* legislation that actively encouraged defection (although in this particular case, the legislation worked through what the repentant terrorists already knew from the relative safety of a prison cell, rather than sending them back into the group).

Police and law-enforcement agencies run informers and agents as part of their counter-terrorist efforts; however it is the labours of the security services, by nature highly adapt in this area of expertise, that we now turn to. The security services of the EU Member States, for the most part, maintain a role in the state’s counter-terrorist policy, employing their clandestine skills to the best effect. Their actual effectiveness is difficult to ascertain, however, because of their secretive nature. The British Security Service (MI5) works in co-ordination with the MPSB as it does not have any powers of arrest; consequently its role in arrests and operations is often obscured by its background presence – it will let another agency take the credit in order to maintain its preferred standpoint of a low key profile. In most cases the security services do not wish the terrorists to know that they have been involved in penetrating their organisation as this risks compromise on future

⁶¹ Martin Dillon *The Dirty War* 1990 pp 315-327

⁶² *Ibid.*, p 310

To this day, despite the advances made under the Peace Process and the Good Friday Agreement, those exiled by the IRA fear reprisals if they return. *Today* BBC Radio 4, 29 March 2002, Interview with Joseph McCluskie.

operations, because the group will invariably take whatever actions they can to remedy their weakness. One can argue, however, that the role of the security services is double-edged. On the positive side they are well suited to employing their penetrative abilities through surveillance, “turning” of group members, and running agents, who are usually considered more effective than informers; however, the line between this role and *agent provocateur* is decidedly fine.⁶³ The security services have access to cutting edge equipment for surveillance purposes, but most important of all is their access to large sums of money:

...the FRU had a great advantage over Special Branch in that they had more money to offer informants...whenever I needed to recruit a source, I could get the cash...If I wanted £250,000, I could have had it⁶⁴

⁶³ The case of Brian Nelson, a former loyalist terrorist, who was recruited by the British Army’s most secret intelligence wing – the Force Research Unit (FRU) – under orders to supply the unit with intelligence on the Ulster Freedom Fighters (UFF) (Nelson rapidly rose to become the UFF’s Senior Intelligence Officer) but also to encourage the UFF death squads away targeting from innocent Catholics, and instead target suspected republican terrorists in 1983. His involvement in facilitating loyalist murders, whilst also saving many lives, led to his trial and imprisonment in 1992, pleading guilty to five charges of conspiracy to murder. Taylor, *Op. Cit.*, pp 286 –296.

Nelson’s case illustrates the precarious line involved in infiltrating a terrorist group where suspicion is often only avoidable by engaging in the same activity as the group: “Any lack of enthusiasm would be an instant pointer for men already alert for infiltration. The agent must, if discovery is to be avoided, join enthusiastically in the activities of the organisation, even if they are seriously criminal...Subversive organisations will always be on the look-out for agents. In Ireland, the consequences of discoveries are final and very painful.”

A former intelligence officer discussing the Brian Nelson case to the author: Smith *Op. Cit.*, p 270

⁶⁴ Peter Taylor’s interview with a FRU “handler”: Taylor, *Op. Cit.*, p 287

The *Direction de la Surveillance du Territoire* (DST), the French agency responsible for internal security,⁶⁵ quickly paid over the million francs requested by a Tunisian living in Tours in February 1987 in return for information on a Iranian-sponsored cell in France (along with granting him a new life in the USA). Intelligence is after all the key to defeating terrorists, and one whose price is comparable with the lives that it saves.

The most negative attribute associated with security services is their lack of accountability. The French external security service *Direction Générale de la Sécurité Extérieure* (DGSE) has traditionally been seen by its citizens as a group of unaccountable cowboys, and its role in the rogue and botched operation of sinking the Greenpeace ship, *Rainbow Warrior*, in Auckland harbour on the night of 10 July 1985 illustrated the relationship between the state and its intelligence services.⁶⁶ Britain's intelligence agencies have also suffered from this lack of accountability. It is now acknowledged that Peter Wright's memoirs of "bugging and burgling his way across London" were exaggerated, but the Security Service, through the initial Security Service Act 1989, only paddles in the waters of accountability. The Act places MI5 on a statutory basis for the first time, introducing an element of oversight, such as the appointment of a commissioner responsible for controlling the issue of warrants for the planting of bugs or searching of property. However most of the bugging carried out by British intelligence is done so by GCHQ, which is not covered by the act, as the government was unable to legally define or restrict what GCHQ does. Instead, an honour code is relied upon to prevent

⁶⁵ The result led to a wave of arrests. Douglas Porch *The French Secret Services: A History of French Intelligence from the Dreyfus Affair to the Gulf War* 1995 p 452

⁶⁶ *Ibid.*, chapters 18, 19 and 20

GCHQ from using any of the information it obtains against British citizens.⁶⁷ The oversight commissioner does produce an annual report, but in reality, this records little more than the number of warrants issued and the “barest details of any case investigated”.⁶⁸ More authoritative, perhaps, is the Intelligence and Security Committee (ISC), established as part of the Intelligence Services Bill 1994. The ISC is an all-party committee providing scrutiny and regular reports into the expenditure, administration and policy of the UK intelligence agencies. Its weakness, however, lies in the fact that it is accountable to Downing Street rather than parliament, where its reports may be first vetted and censured of anything purported to be confidential or prejudicial to national security.⁶⁹ Many of its critics, including a former MI5 director, believe that the ISC must have the power of a select committee instead. This way it can request documents and persons for interview, and enforce sanctions if these are not forthcoming or the committee is lied to.⁷⁰

These accountability issues stem from the Intelligence Services’ involvement during the Cold War, in what Count Alexandre de Marenches, a former head of the SDECE (the DGSE’s predecessor) has referred to as the “Fourth World War”.⁷¹ In Europe this war was not fought with armies but through subversion. The Intelligence Services spent a great deal of time infiltrating virtually every leftwing organisation in their effort to contain the “red menace”, hunting down spy-rings, both real and imagined. Combatants

⁶⁷ James Adams The New Spies 1995 pp 94-95

⁶⁸ *Ibid.*, p 95

Chapter VII contains a more detailed discussion of accountability.

⁶⁹ Mark Hollingsworth and Nick Fielding Defending the Realm 2000 p 253

⁷⁰ *Ibid.*, p 254

⁷¹ Count de Marenches & David A Andelman The Fourth World War: Diplomacy and Espionage in the Age of Terrorism 1992

engaged in war seldom have time for the niceties of democratic practice, and neither did those involved in the war described by Marenches. Much criticism has been made of the logic, or lack thereof, regarding some of the target choices and the zeal displayed in their execution: MI5's effort to undermine the trade union during the 1978 pay dispute at the Ford plant at Dagenham, for example, or its continued targeting of the factionalised left-wing groups and parties for at least five years after the collapse of the Eastern Bloc in 1989. A former F Branch operative regarded this as a "ridiculous waste of time and money", while another operative saw it as having "nothing to do with subversion and everything to do with status".⁷² These criticisms against subversion pale by comparison with the methods adopted by the Italian *Servizio Informazioni Difesa* (SID) and the *Servizio Informazioni Forze Armate* (SIFAR)⁷³, both of whom were structurally reformed in June 1976 after leaks demonstrated the extent of their compliance with right-wing terror groups. Their successors, the *Servizio per le Informazioni e la Sicurezza Democratica* (SISDE) and the *Servizio per le Informazioni e la Sicurezza Militare* (SISMI) have a far greater degree of democratic accountability, but the taint of corruption and fascist sympathies remained. The heads of both these organisations were found, in 1981, to be affiliated to the powerful right-wing Masonic Lodge, Propaganda 2 (P2), which was banned along with all other secret organisations in July 1981. Several other leading security officials have been imprisoned for crimes such as illegal arms

⁷² Hollingsworth and Fielding, *Op. Cit.*, pp 87-90
F Branch (now defunct) was the anti-subversion section of MI5.

⁷³ Internal and military security services respectively.

trafficking, corruption, embezzlement, associating with organised crime, and subversive association.⁷⁴

The efficacy of the intelligence services in this area is also open to question. François Mitterand sacked his DGSE Director, Pierre Marion in 1982, for reasons partly explained by personality clashes, but mainly because the President was unhappy with the results achieved against terrorism. The DGSE had shown itself to be ill prepared and incapable of competing with other police bodies within France. Criticism was specifically focused on the inability to forecast possible operations of groups scattered throughout the country.⁷⁵ Admittedly the DGSE was very much a new body at this time (Marion had only taken over the year before and much of his energy had gone into the reform and transformation of the SDECE into the DGSE rather than operational issues). In-house criticism has also been directed at the competence of MI5 on counter-terrorist issues. David Shayler, an erstwhile intelligence officer who had worked in T Branch (responsible for countering Irish and domestic terrorism) claims that the entire structure of MI5 is ill-suited to its counter-terrorist role, "handicapped by...over-bureaucratic and inflexible management".⁷⁶ In the wake of the IRA Bishopsgate bombing in the financial heart of London in April 1993, Shayler discovered that but for a breakdown of communications between MI5 and GCHQ, the mainland ASU could have been arrested six months before the bombing. Shayler argues that the bureaucracy of MI5 has remained grounded in cold war strategy and

⁷⁴ Peter Klerks *Security services in the EC and EFTA countries* in Tony Bunyan (ed) *Statewatching the new Europe* 1993 pp 77-8

⁷⁵ Roger Faligot & Pascal Krop *La Piscine: The French Secret Service since 1944* 1989 pp 286-7

⁷⁶ Hollingsworth and Fielding Op. Cit., p 4

tactics; thus the emphasis was placed on analysing intelligence on paper rather than adopting a more aggressive and innovative stance against this new enemy, so different from the “predictability” of the old KGB and subversive threat.

It was farcical. There I was with a fast-moving target – the IRA were planting bombs down the street and our Security Service remained obsessed with pedantic redrafting of documents...I questioned whether time would be better spent investigating these IRA targets...I could see no point in spending days poring over the wording of routine documents”

(David Shayler)⁷⁷

This condition echoes that of the DGSE’s problems in tackling terrorism:

It is difficult to infiltrate terrorist networks that are very tenuous, mobile both in time and in space, very scattered, and capable of sudden disappearances. To take only one example, to disentangle the Shiite connections in the Middle East requires long and minute preparation, as well as luck, and the DGSE has still not mastered this.⁷⁸

These faults suggest that intelligence services in their traditional capacity are ill suited to the new challenges presented after the Cold War, due to an inertia

⁷⁷ Ibid., p 135

⁷⁸ Faligot & Krop Op. Cit., pp 287

developed through fifty years of “playing chess” with the Soviet adversary. The Great Game has been replaced by a new game, one that is both aggressive and fast-paced, with little respect for gentlemanly rules. Simply changing the mandate to accommodate these new threats is not enough; a radical restructuring is required. MI5 was able to adapt and improve its techniques over time, aided by better utilisation of GCHQ intelligence, and by the mid-1990s the IRA’s mainland campaign was “feeling the heat”.⁷⁹ However during the sixteenth-month IRA ceasefire from August 1995, MI5 became complacent, transferring the T2 Branch officers responsible for the successes against the IRA in 1993-4 to other departments as part of their policy of posting officers to a maximum of two years in any particular section. Consequently they were not in place when the ceasefire ended, despite the fact that MI5 had always suspected that it would collapse.⁸⁰

The abrupt end to the Cold War sent intelligence agencies around the world into a frenzy of report writing as they looked for new threats that would justify their existence before their political masters downsized their budgets. Terrorism and organised crime were now seen as threats against the state, replacing the old Soviet one, and accordingly these agencies moved into areas previously regarded primarily as police matters. MI5, for example, has relocated its resources to accommodate these changes: thirty-three per cent of its budget was allocated to international terrorism, and thirty-nine per cent to Irish and domestic terrorism in 1996.⁸¹ Immediately prior to the 11 September attacks the 2001 budget allocated twenty-eight per cent and thirty-three per

⁷⁹ Hollingsworth and Fielding, *Op. Cit.*, pp 139-40

⁸⁰ *Ibid.*, p 138

⁸¹ Smith, *Op. Cit.*, p 73

cent respectively.⁸² Graph I (appendix) illustrates the changes in threat assessment since the collapse of the USSR.⁸³

Continuing with the British example, MI5's manoeuvrings for a greater role in counter-terrorist affairs proved successful in 1992 when it took over the lead role against the IRA from Special Branch, much to the chagrin of the police.⁸⁴ By contrast the French interior security service, *Direction de la Surveillance du territoire* (DST), which already held a secure anti-terrorism mandate, found itself facing a reduction in personnel and resources, and resorted to approaching France's high-tech companies, attempting to persuade them that they needed the DST to protect their industrial secrets.⁸⁵ Germany's Federal Intelligence Service, the *Bundesnachrichtendienst* (BND) which also has a counter-terrorist mandate, is also undergoing significant downsizing, reducing its staff from 6,500 to 4,500.⁸⁶ However, the events of 11 September have acted as a brake on much of the scaling-down of intelligence resources throughout the EU as the Member States reassess the level of the terrorist threat. In many cases, recruitment levels are rising; MI5 and MI6, for example, have both begun a significant recruitment drive after the UK government's decision that its intelligence services were "insufficient to guarantee national security".⁸⁷ By moving the resources of the intelligence agencies further towards the tackling of criminal activities such as terrorism,

⁸² *MI5 The Security Service* 4th Edition 2002 p 11

⁸³ FAS Intelligence Resource Programme Website *Budget and Staff – Security Service MI5* www.fas.org/irp/world/uk/mi5/budget.htm

⁸⁴ MI5 already had a role in Northern Ireland countering terrorism, although not on the British mainland.

⁸⁵ Klerk, *Op. Cit.*, p 71

⁸⁶ FAS Intelligence Resource Programme Website *BND – Budget and Personnel* www.fas.org/irp/world/germany/budget.htm

⁸⁷ *Eye Spy MI6 Increasing Strength to Combat Terrorism* Issue 8 2002 p 71

one does create a paradox between the cloak of secrecy worn during the Cold War and the requirements of the criminal justice system. During the most recent incarnation of the Great Game it was not necessary for such an official/officer to appear before a magistrate and argue a case for the expulsion of an Eastern Bloc diplomat, the decision being a political and not a judicial one. By focusing on terrorism, however, the methods and techniques employed by these agencies are subject to scrutiny from defence lawyers and magistrates under judicial trials. Under the British legal system, for example, the defence must have access to any evidence collected by the prosecution. As it stands police reluctance to disclose evidence that would reveal intelligence sources leads to an average of one court case a week being aborted.⁸⁸ A similar system in Germany enabled the lawyers of RAF defendants who sympathised with their cause to force the prosecution to reveal exactly how evidence was collected, allowing the terrorists to develop counter-measures. To cite one particular case involving evidence relating to fingerprints within an RAF safe house: the RAF were always very careful about ensuring that they left no fingerprints in such houses, consequently the defence lawyers demanded to know exactly where these were discovered. This revealed that the BKA had found them under a toilet seat. The RAF consequently never made this mistake again.⁸⁹

Their particular methods of collection of evidence means that intelligence agencies have a harder time than police in this respect. Stella Rimington, a

⁸⁸ Smith, *Op. Cit.*, p 246

⁸⁹ *Ibid.*

former MI5 director-general described the issue of open court as sometimes acting:

as a constraint on our investigations... There is an inherent uncertainty in judging how the courts may view individual operations and methods which we regard as sensitive. Many such sensitive techniques have to be protected at all costs, because they cannot be replaced. This sometimes means that we are unable to use the most effective investigative methods in cases which may result in prosecution. In some cases, rulings by the judge may cause the prosecution to be discontinued because the material information is so sensitive that it is not possible to disclose it in any form.⁹⁰

Rimmington's disclosure suggests that MI5 has yet to fully comprehend the strategic differences associated with the mandate for which it had lobbied so hard. Preserving the secrecy of techniques and equipment is a both a strategic and tactical necessity, but the validity of maintaining an agency in the lead role in counter-terrorism affairs which is unable to effectively bring some of its cases to trial because its methods cannot be revealed in open court does become questionable. One cannot use the example of MI5's role in Northern Ireland to counter this argument as any evidence it put before a court would be before the closed session of a Diplock Court (introduced in 1973 under the 1973 Emergency Powers Act). A coming to terms with the changing

⁹⁰ Ibid., p 247

environment is necessary, and this requires the development of new strategies and tactics compatible with the criminal justice system. In a sense this would actually bring intelligence agencies into closer resemblance with their police counterparts, blurring the differentiation between them where criminal mandates are concerned, and moving them towards a scenario akin to the internal security mandate held by the American FBI. The alternative scenario is a return to police primacy in the area of counter-terrorism, with intelligence agencies reverting to their support function. In this way, their methods of intelligence gathering are less likely to compromise investigations and trials; additionally this preserves the intelligence agency ethos, retaining its unique identity and capabilities rather than causing it to mutate into a variant of a police agency. Police agencies have become familiar with the use of intelligence gathering and analysis over the past years, so one would question the usefulness of what, in effect, would be a mirror agency. In the long-term, though, this might be a move towards the establishment of a more powerful police force within some Member States.

The level of Co-operation

In accepting the reality that terrorism is a transnational issue requiring transnational solutions, the EU Member States have allowed for the enhancement of police co-operation to target this threat. However whereas numerous agreements and structures exist at the police level to facilitate co-operation, the intelligence agencies prefer a more spartan approach. With the absence of the Trevi Group only three other forums exist specifically to

facilitate co-operation between European intelligence agencies: the Club of Berne (established 1971), the Kilowatt Club (1977) and the new EU Task Force of Security Service Chiefs (2001).⁹¹ All three operate through an informal and ad hoc structure typical of Trevi and the PWGOT, and only the latter has some connection to the JHA process. Each group was established to focus on a particular problem or issue: the Club of Berne initially concentrated on espionage and state security, but with the end of the Cold War it has begun to look at other issues such as terrorism, and also the role of intelligence agencies within the context of European integration⁹². The Kilowatt Club, meanwhile, was established to focus on international terrorism, (although its membership is not exclusively European)⁹³, and the Task Force exists as a reaction to the 11 September attacks.⁹⁴ Consequently all three have a role to play in matters of counter-terrorism.

These structures facilitate co-operation through the traditional means of exchanging intelligence on a voluntary basis. Unlike their police colleagues, however, the secretive nature of their work inhibits the volume of this exchange. Intelligence services need to be certain that any information they exchange is kept secure and will not compromise the source.⁹⁵ Equally the capricious nature inherent to intelligence agencies has its role to play.

Traditional rivalries between the internal and external agencies of a state

⁹¹ Bilateral links are very extensive, however; MI5 for example boasts links with over 100 services worldwide (*MI5 The Security Service* Fourth Edition p 26). Such links allow states and/or agencies with close relationships to continue in this vein, as is the case cited below between MI6 and the DST and DGSE.

⁹² Tony Bunyan (ed.) *Statewatching the new Europe* 1993 p 174 & *intelforum Mailing List Archive Club of Berne* threads <http://lists.his.com/intelforum/msg04402.html>

⁹³ *Ibid.*, (Bunyan) p 174

⁹⁴ *Statewatch Post September 11 analyses; No. 7 EU anti-terrorism action plan: "operational measures"* www.statewatch.org/news/2001/oct/anal7.pdf

⁹⁵ Smith, *Op. Cit.*, p 244

stretch the definition of “competitiveness”, leading to turf wars and occasionally a “beggar thy neighbour” attitude. Porch describes the enthusiasm of the DST in dealing with a request from the New Zealand police investigating the sinking of the *Rainbow Warrior*, gleeful in the embarrassment that this would cause their sister agency.⁹⁶ Hollingsworth and Fielding meanwhile recount an anecdote relating to the relationship between MI5 and the MPSB, after the former had taken over primacy in countering the IRA and had begun to exclude the MPSB from certain covert operations:

During the height of the IRA’s mainland campaign in mid-1993, a group of MI5 and regional Special Branch officers met for a drink in a pub. “By working closely together, we will beat the common enemy,” said one. “Yeah, the Met,” quipped another, much to the merriment of all those present⁹⁷

Such rivalries are detrimental to countering terrorism. Recent criticism suggests that the lack of communication between the various intelligence and law-enforcement agencies within the USA permitted the attacks to 11 September attacks to occur.⁹⁸ Ironically, though, it was MI5’s reluctance to embarrass the MPSB over inaccurate and outdated telephone tapping warrants which caused it to be slow in pursuing certain leads, a consequence of which was the failure to arrest the IRA ASU before the Bishopsgate bomb.⁹⁹ Perversely, relationships with external agencies tend to be warmer than

⁹⁶ Porch, Op. Cit., p 461

⁹⁷ Hollingsworth and Fielding, Op. Cit., p 129

⁹⁸ BBC News *Row deepens over terror warnings* 17 May 2002; BBC News *US intelligence efforts fractured* 18 May 2002 *Eye Spy* 11 September *The Prelude* Issue 8 2002 pp 26- 33

⁹⁹ Mark Hollingsworth and Nick Fielding *Defending the Realm: MI5 and the Shayler Affair* 2000 p 4

intrastate ones. The relationship between MI6 and the DGSE and DST are particularly friendly, fostered by common experiences – in particular World War II, and the Falklands War – but also by working against Irish terrorism (the *Eksund* for example).¹⁰⁰ Countries bordering one another sometimes have common problems; hence a particular level of co-operation may develop. For example, Spain's CGI, whose main task is to combat ETA terrorism, has an external intelligence brigade that exercises surveillance over the movements of foreign terrorist groups and collaborates with allied services, particularly in France. This collaboration also occurs in connection with migratory movements.¹⁰¹

Nevertheless, the same level of camaraderie experienced by police officers is not shared by intelligence officers, principally because intelligence agencies symbolise an area of sovereignty that surpasses that represented by law-enforcement. They embody both the means to defend the state against often unseen external enemies, and also the offensive reach of that state, capable of proactive measures, for example, Israel's "Wrath of God" policy following Munich 1972). Consequently, governments are extremely loath to compromise what they see as particularly puissant instruments of state with enhanced co-operative structures, recognising that the intelligence pooled into a multilateral "pot" would not be of any particular revelation; rather, the informal ad hoc system best facilitates the transfer of useful information as this guarantees who will receive it. The EU Member States are close, but

¹⁰⁰ FAS Intelligence Resource Programme Intelligence e-Prints *The Search for a European Intelligence Policy* Charles Baker www.fas.org/irp/eprint/baker.html

¹⁰¹ Assembly of the WEU Document A/1775 *The New Challenges facing European Intelligence –reply to the annual report of the Council*. Paragraph 52. Submitted on behalf of the Defence Committee by Mr Lemoine, Rapporteur

some are closer than others, and this also extends to their intelligence agencies.

In military matters, however, intelligence co-operation is significantly more advanced due to the structures within both NATO and Western European Union (WEU). It is at this level that Franco-German proposals for an EU intelligence service as a “core element” necessary to supplement the European rapid reaction force were made in December 1999.¹⁰² While this proposal generated some hostility, it was significantly less than that directed at the German proposal in 1991 for a Europol with operational powers.¹⁰³ The UK, traditionally sceptical about such plans, was pragmatic in its response, admitting that it was “logically true” that an EU defence force would eventually require access to its own high-grade intelligence, but declared that its government was not interested in pooling intelligence across the board, only in improving the flow of tactical battle-field intelligence.¹⁰⁴ The recent creation of an intelligence division within the European Union Military Staff (EUMS)¹⁰⁵ illustrates this predilection. This division is staffed by approximately thirty officers who assist with situation assessments and early warning, and provide operational support in the event of a European engagement, although they cannot handle documentary evidence. Its officers are, however, able to contact their own Member State intelligence agencies to request and/or receive information from them.¹⁰⁶ Such measures are more

¹⁰² *The Sunday Times Europe plans its own spy agency* 5 December 1999 p 24

¹⁰³ See Chapter VI for a detailed discussion of Europol.

¹⁰⁴ *The Sunday Times Europe plans its own spy agency* 5 December 1999 p 24

¹⁰⁵ The EUMS was created following the Council of the European Union decision on 22 January 2001.

¹⁰⁶ *Assembly of the WEU*, Op. Cit., paragraph 64

advanced than those in the arena of counter-terrorism, but again this is due to the type of threat and response: a joint military force requires joint intelligence, and the instability of the eastern Adriatic coast has been seen, until the events of 11 September, as a much more serious threat to Europe than terrorism.

If many of the measures instigated by the EU Member States in the wake of 11 September were simply an acceleration of the JHA Tampere Summit conclusions of October 1999, the changes undergone in terms of intelligence co-operation represent something entirely new. The Joint Intelligence Chiefs' Task Force, established post-11 September, contributes little of novelty, maintaining as it does the traditional informal co-operative style. However a meeting of the JHA Council on 20 September 2001 provided the EU with a degree of organised intelligence co-operation amongst the Member States:

The Council would reiterate how important it is for the quality of Europol analyses that the police authorities *and also the intelligence services* of the Member States should quickly pass on any relevant information on terrorism, ... The Council has decided to set up within Europol, for a renewable period of six months, a team of counter-terrorist specialists for which the Member States are invited to appoint liaison officers from police *and intelligence services* (author's emphasis) specialising in the fight against terrorism¹⁰⁷

¹⁰⁷ Ibid., paragraph 57

Such a measure, whilst small, will for the first time place an element of the intelligence services under the partial jurisdiction of an EU intergovernmental body.

The European Council supported the JHA Council's conclusions in this area, calling on it to:

undertake identification of presumed terrorists in Europe and of organisations supporting them in order to draw up a common list of terrorist organisations. In this connection improved co-operation and exchange of information between all intelligence services of the Union will be required. Joint investigation teams will be set up to that end.¹⁰⁸

The political will behind both these decisions illustrates the determination of the Member States to take steps to ensure that their agencies are working together in this matter. In effect this is a declaration of policy. The establishment of joint investigative teams takes co-operation beyond the simple exchange of information and into a new and proactive area. This is avant-garde thinking in terms of European intelligence, and its outcome will prove very interesting.

One should ask why the Member State governments have finally chosen to involve their intelligence agencies within the JHA sphere. The 11 September

¹⁰⁸ Conclusion and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001 page 2

attacks crossed the Rubicon, finally bringing home the concept of “New Terrorism” in no uncertain terms; fear has become one of the driving forces. However, one can also argue that these steps are ultimately symptomatic of the European integration process. If intelligence agencies are going to involve themselves in areas traditionally the concern of police authorities, then they too are inevitably going to be brought into the process at some point; from an integrationist perspective 11 September provided the *raison d'être* for their inclusion. The European Council meeting in Ghent on 19 October 2001 recognised this connection when it called for increased co-operation between the operational services responsible for combating terrorism: Europol, Eurojust, the intelligence services, police forces and judicial authorities.¹⁰⁹ Joint investigative teams bring these elements together, establishing through Europol a multi-pronged European approach. This, though, remains some distance from the declaration made at the Franco-German summit 30 November 1999, in which the two countries committed themselves to work together to enhance their intelligence capability: “we are determined to federalise the existing or future means...in order to create common European capacities”.¹¹⁰ It does, however, indicate the first steps of an EU response to terrorism utilising intelligence capabilities outside that of the military spectrum.

¹⁰⁹ Ghent European Council, Declaration by the Heads of State or Government of the European Union and the President of the Commission Follow-up to the September 11 Attacks and the Fight Against Terrorism Brussels October 19 2001 SN 4296/2/01 page 2

¹¹⁰ The Sunday Times *Europe plans its own spy agency* 5 December 1999 p 24

Conclusions

The facilitatory structures pursuant to investigative co-operation outside the JHA field, although differing in capabilities, represent an understanding of the template employed within JHA. The methodology of the informal European structures has been eschewed by the JHA approach, preferring instead the more structured Interpol model. In developing this structured approach, the EU has learned from the flaws within the informal system, most pointedly demonstrated during the Lockerbie investigation. The informal approach, so valuable in establishing and nurturing the initial stage of European co-operation against terrorism through its building of the trust required to pass on sensitive information, is one incapable of advancing co-operation beyond the structures' competencies. It was because of these limitations that Trevi dissolved itself to make way for Europol. The new European Union presented too many challenges for the old style of co-operative policing. Equally, Interpol's model could not simply be transposed onto the EU, as doing so would induce duplication. Rather what Interpol offered, as a model, was the capacity for information retention and a known port of enquiry. Both of these areas are significant features that have been expanded to create the leitmotif of Europol. The open EU, with law-enforcement co-operation now a security necessity rather than simply a tool for enforcing justice, requires a known focal point for that co-operation. The informal structures were too small and secretive to offer the necessary public persona, neither were they capable of maintaining information on the scale that Interpol and the emphasis on analysis that it and Europol have developed. The EU required a European Interpol, under the control of EU machinery.

This is not to say that the role of integrationist influences can be ignored in this area; again, as with regional border co-operation, collaboration has occurred in Europe precisely because of the closeness and integrative ties that have been developing since the end of World War II. These ad hoc structures were built, in part, by “catching the wind”, created by the drawing together of Europe. Their lack of true regulation is suggestive of a “natural” harnessing of integrative scope to achieve their desired ends; therefore we may well find that the emphasis on co-operation occurring at the coalface, as in the case of the PWGOT, has greater resemblance to neo-functional theory. However, the lack of actual regional commonality has activated a diluting effect, with co-operation singularly occurring against a specific threat, and less emphasis placed on any additional “common neighbouring” threat. By moving towards the JHA regulated approach, however, we can expect to see increased control via intergovernmental policy, building upon what has been developed outside the EC/EU.

Nevertheless, the informal ad hoc structures have not been entirely discarded; they are the preferred tool of the intelligence agencies and the PWGOT. By retaining this ethos whilst also embracing the regulated approach, the best of both worlds remains available to the EU Member States. Counter-terrorist intelligence sharing in some cases still requires the back-door approach, due to particular political sensitivity and the sometimes illicit means of intelligence acquisition. Consequently, gaps in the formalised Europol structure are compensated by the retention of the informal approach, and vice versa. The

successes in smashing al-Qaeda related cells throughout Europe since 11 September illustrate how the system has improved since Lockerbie. Indeed, by November 2001, over thirty significant arrests had been made in Europe.¹¹¹ Curiously, these two systems are not mutually exclusive; both approaches operate within the JHA gamut. Although the PWGOT remains outside this field, thereby isolated from any regulatory tendencies of the European Project, intelligence agency co-operation has tentatively entered into exploratory co-operation. The agencies have retained their informal approach within the JHA field through the Joint Intelligence Chiefs Task Force, whilst also reconciling the JHA's regulatory approach with their involvement in Europol's counter-terrorist teams. How this will play out for the future of intelligence agency co-operation, though, remains uncertain. What we may be seeing now is the emergence of a Trevi-equivalent structure, more regulated than the traditional intelligence agency co-operation, and possibly one which will evolve in a manner similar to Trevi. In any event, though, the co-operative methodology of the intelligence agencies is changing.

Let us not forget, though, the international dimensions of terrorism, once again so brutally reinforced through al-Qaeda's attacks in America and possible links with the Bali bombing in October 2002.¹¹² The development of Europol was always a contentious issue for its critics, who argued, rightly, that many of the threats facing the EU were external to it, and therefore outside Europol's remit; consequently why not concentrate on developing Interpol and its

¹¹¹ *BBC News Looking for European al-Qaeda* 11 December 2001

¹¹² *BBC News The Bali bombers' network of terror* 5 December 2002

European Liaison Branch?¹¹³ This argument however detracts from the exclusive services that Europol is able to provide for the Member States, as well as what it represents from an integrationist standpoint. In building its European Police Office, however, the EU has not neglected its international commitments. Neither has Interpol played a secondary role to Europol; indeed co-operative data-sharing links have been developed between the two.

Interpol remains the co-operative arm through which the EU member States must work with when dealing with external issues. Without the part played by Interpol, with its newfound counter-terrorist role, the Lockerbie investigation could never have resulted in a trial. Neither would the high number of arrests of al-Qaeda suspects within Europe have been possible without Interpol's involvement, as North African police files are a fundamental addition to the tracing and identification of suspects.

The post-11 September environment, though, has introduced some interesting changes to the overall system, perhaps the most surprising of which has been the introduction of intelligence agency officers into the Europol structure. The Council conclusions define this as a temporary measure, hence its review every six months. This should be thought of, however, as a more or less permanent measure, due to the fact that the "war on terrorism" is going to be a long-term issue and therefore this, or something similar, will likely remain in place for sometime to come. Additionally the JHA Council's issuing, if not orders, then statements as to what is required of the intelligence agencies in the new environment demonstrates a European framework being brought to

¹¹³ Cyrille Fijnaut *Police co-operation within Europe* in Frances Heidenson and Martin Farrell (eds.) *Crime in Europe* 1991 pp 106-7

bear on these agencies. Such a framework should prove to be as workable as that introduced into the policing system, due to the fact that the intelligence agencies are engaged in areas traditionally associated with policing, such as terrorism and drug trafficking – and these are ones which require a transnational solution.

The lack of accountability associated with informal co-operative structures remains one of concern. Trevi, as the model for Europol, was particularly lacking in openness. To what extent has this “character defect” been transposed onto its JHA sibling? Equally, how will the accountability-lacking intelligence agencies fare in the new JHA approach? Elements within the JHA spectrum have a tendency to lose national accountability through working in the transnational sphere; it is worrisome therefore that these agencies may actually become less accountable than they already are. These arguments provide ever more ammunition to the call for a greater input from national parliaments into the JHA field to address this deficit.

Recognition of the need to adapt new approaches to crime led to the introduction of a regulated structural approach supporting the old informal style. This same approach is now beginning for the intelligence agencies. It is definitely too early to start talking about a European Intelligence Agency, but as we discuss Europol in the next couple of chapters, it quickly becomes apparent that its ultimate future remains questionable. Could it become a European FBI?

Chapter VI

Co-operative Investigation against Terrorism

Part 2: The Third Pillar Gamut

As the EU grows ever more influential, there has been speculation that it will attract the attentions of terrorists who perceive it as an institutional target, just as left-wing European terrorists targeted NATO. Discounting the handful of bombings carried out by the xenophobic left-wing November 17 against EU buildings in Greece, this became reality with the revelation that German police foiled an attack by an al-Qaeda cell planning to release sarin gas into the European Parliament during a parliamentary session in February 2001.¹ This thwarted attack illustrates in stark terms the transnational capacity of terrorism: a successful attack would have murdered MEPs and staff from all Member States. This episode should also serve as a warning that if the EU institutions can be targeted once, they can be so again. From this perspective, one sees the necessity of a co-ordinated European response to such threats.

This EU orientated response, such as it exists, is more actively illustrated through investigative co-operation rather than the sentinel designed Schengen approach. The European Police Office – Europol – is the showcase of European police co-operation, and unlike Schengen, it includes a specific mandate against terrorism. The JHA sphere also includes a number of other

¹ Daily Telegraph *Bin Laden British cell planned gas attack on European Parliament* 16 September 2001; BBC News *Terror cells "operating in the UK"* 16 September 2001
The date of the attack was planned at some point between 11-14 February 2001.

elements conducive to co-operation: liaison officers, discussed briefly in Chapter II, are becoming a predominant feature within European policing, serving to strengthen the bonds between police forces throughout the EU, especially where the benefit of common experience provided for by a common border does not exist. The Police Chiefs' Task Force established as part of the Tampere conclusions operates as a working party to facilitate co-operation. The European arena is also where the Member States have chosen to coordinate their principal efforts against terrorism in the post-11 September environment. To this end, the Justice and Home Affairs Council, in September 2001, made it clear that Europol would be considered the centre of EU's counter-terrorist programme.² This is no minor task. The successful co-ordination of transnational counter-terrorism at both the strategic and tactical level is something that has continued to elude European governments.

This chapter is principally concerned with the development of Europol, because much of the EU's counter-terrorist initiatives centre on it. Fundamentally, the issue to address is whether Europol is capable not just of providing a service for requesting law-enforcement bodies, but also of acting as an agent able to induce co-operation between these bodies across the board. Europol represents a significant break from the traditional informal style of law-enforcement co-operation, introducing regulations where none have existed before. Does the introduction of a permanent body further co-operation or has it stymied the benefits of an informal system? To this end, the chapter's analysis of Europol will expand to cover these other areas, noting

² *Statewatch* Post 11.9.01 analyses: No. 1 *The "Conclusions" of the Special Justice and Home Affairs Council on 20 September 2001 and their implications for civil liberties.*

in particular the level of co-operation between the Member States and Europol. This is important as it denotes the significance attributed to Europol as a counter-terrorist institution within the JHA gamut. Such attributes in turn would have some inference on Europol's future direction; as the previous chapter concluded, this could have far-reaching connotations for European integration. Europol looks set to become a much more important player in the post-11 September environment; consequently it is necessary not only to analyse its effectiveness in this chapter, but also to prepare the ground for the next, which discusses the directions towards which this area of co-operation should head.

Europol

Europol is not a European FBI; neither can it request the arrest of an individual. Rather Europol is a support structure without operational powers, designed to both facilitate and co-ordinate law-enforcement co-operation between the Member States. Implementation occurs through its headquarters in The Hague and its ELOs (European Liaison Officers) who provide linkage to each Member State's law-enforcement body. Europol's concern lies squarely with serious criminal activities that pose a threat to "two or more Member States in such a way as to require a common approach...owing to the scale, significance and consequences of the offences concerned" (Article 2.1, Europol Convention). Essentially this refers to international and organised crime in the form of trafficking drugs, vehicles, people (especially the sex trade) or radioactive material, paedophilic rings, forgery of monies and

terrorism. It opposes these threats through its principal tasks (as defined by Article 3 of the Europol Convention) which are:

1. To facilitate the exchange of information between the Member States.
2. To obtain, analyse and collate information and intelligence.
3. To notify the competent authorities of the Member States without delay via the national units of information concerning them and of any connections identified between criminal offences.³
4. To aid investigations in the Member States by forwarding all relevant information to the national units.
5. To maintain a computerised system of collected information containing data.

The Schengen Implementing Convention's purpose is to facilitate co-operation and provide an information system to ensure that the compensatory flanking measures necessary for open borders remain functional. Europol provides similar facilitatory measures; is there, then, an element of duplication?

Europol's Computer System (TECS) obtains its data through the same voluntary input as the SIS; consequently, it has the same potential access to a vast host of information, and as such contains a massive database. Here similarities end. The TECS, unlike the SIS, holds criminal intelligence, thereby noting an immediate difference in its utilisation purpose, especially in terms of analysis. The Implementing Convention itself is primarily concerned

³ Europol's equivalent of Interpol's NCB's

with regulating the behaviour of law-enforcement officers at the border points, facilitating co-operation at this level. Europol is not as “technically” orientated. It is not an agreement detailing the mechanics of co-operation; rather it is an organisation, capable of independent judgement.

Unlike the traditional informal approach, Europol is designed as a permanent structure, and hence has the capacity for “memory retention” inherent to most institutions. Information is not merely passed along; it can be retained for analysis by Europol’s staff. This transnational analysis is a particularly rare product by traditional co-operative law-enforcement standards. Before providing an analysis of Europol’s competence however, a brief outline of its history is required.

A brief history

The decision to begin work on a European Police Office began with Chancellor Kohl’s tabling the motion for the establishment of such an office at a European Council meeting on 28-29 June 1991. The Europol project embodied EU co-operation and integration, hence its incorporation into European legislation via Chapter VI, Article K.1 of the Third Pillar of the TEU 1992. It became functional earlier than planned, on 1 January 1994, in a single-issue capacity as the Europol Drugs Unit (EDU). A meeting of the EU’s Justice and Interior Ministers, on 2 June 1993, decided that although work on Europol was far from complete it was felt necessary that *something* be put into the field due to “the urgent problems posed by international drug

trafficking, associated money laundering and organised crime".⁴ During this interim period, the EDU's mandate was limited, unable to utilise any "personal data" in its analysis, because no Convention existed for the EDU. Rather it relied on its utility as a forum for information exchange and its secondment of liaison officers to Member State police and custom authorities. Its remit, though, was extended in March 1995 to include trafficking in radioactive and nuclear substances, illicit vehicle trafficking, clandestine immigration networks, and all associated money-laundering activities.⁵ The extension was due to pressure from Germany, which was concerned about the increasing attempts to smuggle radioactive material from the Baltic States into Germany.⁶ The increased rate of car crime was also cause for concern, with expensive cars such as Mercedes and BMWs stolen from Germany and transported eastwards to the lucrative new market in the former USSR.

Europol proper became functional after the signing of the Europol Convention on 26 July 1995. However, it was not until 10 October 1998 that it was able to subsume the EDU, as a three-month waiting period was required following the final Member State's ratification of the Convention. During this period Europol continued to expand its role, obtaining a mandate against all forms of

⁴ Willy Bruggeman *Europol: A Castle or House of Cards?* in Alexis Pauly (ed.) *De Schengen à Maastricht voie royale et course d'obstacles* 1996 p20,

Work proper on Europol had only recently begun. At the Maastricht Summit in December 1991, the European Council asked the Trevi Ministers to take, in co-operation with the Commission, the measures necessary for the rapid establishment of Europol. As a result of this decision, a project group was formed in Strasbourg, September 1992, to prepare implementation of the EDU.

⁵ Willy Bruggeman *Policing Europe: A New Wave* in Monica den Boer (ed.) *The Implementation of Schengen: First the Widening, Now the Deepening* 1997 p 119

⁶ It has since been revealed, however, that some of the arrests in radioactive material smuggling cases were BND stings, and a subsequent report concluded that of the 182 smuggling cases recorded between June 1993 and May 1995, none had produced any information regarding potential employers. Aside from the BND the market only had a supply side at that time.

Michael Smith *New Cloak, Old Dagger* 1996 pp 264-5

human trafficking, including the sex trade in women and children, in November and December 1996, following the notorious Dutroux case in Belgium.⁷ Its mandate against terrorism came into effect on 1 July 1999, but only after political pressure from Spain and Greece, despite the concept having already been agreed during the November 1993 JHA Council.

The Treaty of Amsterdam provided another significant development for Europol when it was agreed that its powers should be augmented to include the granting of “operative powers” to the fledgling police structure. This “operative” mandate is distinct from “operational” powers, to which countries such as France and Britain are inherently hostile. Rather these “operative” powers permit Europol employees to accompany national police forces on joint operations in an advisory capacity. Amsterdam allows Europol to request information from national police authorities, and if necessary, to conduct investigations on their behalf.

How Europol operates.

Europol receives its information from its ELOs – police officers seconded by national forces – who travel between The Hague and their respective National Bureaux. These serve as the collection point of data input, as well as for requests to Europol. In many ways, this is reminiscent of how Interpol

⁷ This mandate was clarified at a JHA Council meeting on 3 December 1998 following the shocking revelation of a number of paedophile rings operating in Europe the previous year. Traffic in human beings now encompassed the “production, sale or distribution of child pornography material” (paragraph 3). The characteristics of this abhorrent trade revealed networks criss-crossing the Member States, making it a crime well suited to the remit of Europol.

operates. Indeed, some Member States have centralised this aspect of co-operation, placing both their ELOs and ILOs under one roof, as the UK has done with NCIS. By placing a human element at this point, the Member States not only have some control over the information that is entered, but the ELO is in a position to establish personal contacts which facilitate the passing of sensitive intelligence that they would not otherwise have direct access to.⁸

The information passed on by the ELO is stored in the TECS, which is comprised of an information, an analysis and an index system, capable of informing authorised individuals about the existence of specific data.⁹ Like Interpol, its members can request information from Europol, and Europol can issue alerts. However, the main benefit to this information is the heavy focus Europol places on investigative analysis at both the operational and strategic level. Unlike traditional methods of handling the exchange of information, Europol provides concrete measures relating to such exchanges and enquiries on a parallel to Interpol's specifications for terrorist intelligence as stipulated in Title VI of the Convention (Articles 13-25, along with 7-12 from Titles II and III). By employing a "collection plan", Europol's analysts adopt the principle of only selecting the information that is required, as opposed to what *may be* useful in the future, thereby saving time and energy.¹⁰ Europol's analysis is therefore very much service-orientated, generating a product for

⁸ Didier Bigo *Liaison Officers in Europe* in James Sheptycki (Ed.) Issues in Transnational Policing 2000 p 79

⁹ Technical delays have meant that the information system is currently in a provisional operational phase (1 January 2002) with a more advanced system linked to all Member States and accessible in all these languages to follow (Fact Sheet on Europol, 1 January 2003, Europol Website).

¹⁰ Jürgen Storbeck *Co-ordinating the Flow of European Intelligence: Europol's Accountability Mechanisms* in Monica den Boer (ed.) Undercover Policing and Accountability from an International Perspective 1997 p 118

requesting national authorities. The concern here, however, is that in adopting this approach Europol may well discard "dormant" intelligence that could be useful only at a later date, thereby possibly failing to prevent a future attack or threat, due in part to the client-consultant approach it has adopted. However, Europol's analysts are also trained to focus on missing information, as well as the intelligence that they already have; consequently, some gaps and weaknesses in the information can at times be filled in.

The best analysis of course requires the best intelligence, and trust is often a prerequisite in obtaining the most sensitive information. The ELOs are capable of building a certain element of trust; ultimately, though, this is defined by Europol's utilisation of it. Criminal intelligence entering a common pool certainly attracts a great deal more concern from its donors than non-criminal information. Europol has approached this by placing partitions within this common pool.

When Europol conducts an investigation, the analysis produced is derived from the information provided by individual Member States. However, that information cannot be disclosed to any other investigation concurrently underway within Europol, even if it might be relevant. To provide an illustration of this: suppose an investigation by Europol's Organised Crime Unit contains information provided by France, Italy and the UK (Group A) and an investigation by the Terrorism Unit contains information provided by Spain, Portugal and Germany (Group B). Both investigations contain information provided by different groups of Member States, and because of

this there can be no cross-contamination of evidence, even if it were suspected that there was a common link between the two cases (in any case all investigations are run separately). The outcome of the investigation is a product for the agencies of Group A only (and vice versa). The single exception to this is that of the unit dealing with financial crime, which may pass on any relevant information that it uncovers to a counter-terrorist investigation, because the methods used to fund terrorist groups are sometimes unearthed in investigating the irregularities behind financial fraud. This rule may not make for common sense, but there is a necessary logic behind it. By maintaining these strict parameters, Member States and their law-enforcement agencies can be assured that they are retaining an element of control over the often-sensitive information that they input into Europol. Europol currently has the Membership of fifteen sovereign countries; none of these members are recklessly going to throw sensitive information relating to security into a common pot, especially when that information is connected to terrorism. It need not always be a case of how far you trust your neighbours either; often information is dealt with on a "need to know" basis. This system does help garner trust, but as one can see, the price paid impedes the benefits of interfacing between different units, thereby reducing the potential of an internal intelligence exchange that could otherwise aid an investigation. One suspects however that these barriers may become more porous as Europol and European integration develops. Europol faced much initial scepticism from European police agencies when it was first established, and the barriers were necessary to encourage these agencies to provide worthwhile intelligence. However, with Europol now the JHA Council's main instrument against

terrorism, these barriers could be relaxed – altered so that any linked information that is discovered in one investigation can only be provided to another with the express permission of the contributing Member State. In this way, highly sensitive information relating to terrorism, and moreover, how it was obtained, could still be protected.

The TECS

The TECS plays an important role in Europol's analysis capabilities, collating intelligence gathered from sources such as the police and intelligence agencies of the Member States, as well as Third Party sources such as states and international organisations. This information strictly relates to:

1. persons who, in accordance with the national law of the Member States concerned are suspected of having committed or having taken part in a criminal offence for which Europol is competent under Article 2 or who have been convicted of such an offence;
2. persons who there are serious grounds under national law for believing will commit criminal offences for which Europol is competent under Article 2

(Article 8)

It is noteworthy that Clause Two gives grounds to include members of proscribed groups, even if they have yet to commit an actual offence beyond that of membership. This is further enforced through Article 8.3, which

contains a number of devices useful against organised criminal groups: "...the information system may also be used to store, modify and utilise the following details concerning the persons referred to in paragraph 1":

1. Criminal offences, alleged crimes and when and where they were committed.
2. Methods which were or may be used to commit the crimes.
3. Departments handling the case and their filing reference.
4. Suspected membership of a criminal organisation.
5. Convictions, where they relate to criminal offences for which Europol is competent under Article 2.¹¹

Perhaps most interesting is the novel approach taken by Articles 8.3(1) and (4) which allow for the inclusion of inconclusive data. This data includes the details of individuals whom the police "know" to be guilty but are unable to prove before the judicial system. This is particularly characteristic of terrorism and organised crime, where the individuals concerned take precautions against being associated with particular incidents, but is also because intelligence sources/and or surveillance techniques are too sensitive to be revealed in court. Such incorporation provides a level of intelligence previously unavailable on a Europe-wide level, but one essentially limited to researching a background on a suspect; however in doing so it would undoubtedly help trigger "alarm bells" were that suspect engaged in any similar or associated activity. A hypothetical example of the practical usage

¹¹ Article 8.2 provides for basic information on details such as names and aliases, sex, nationality, place and date of birth and physical characteristics.

provided by this system is that of a Spaniard in France suspected of drug smuggling. A request to Europol by the French police would reveal that the suspect also had suspected links with ETA. At this point, the French police would contact their Spanish colleagues and inform them of these developments, and some form of co-operative procedure could be set in motion. Furthermore, these clauses introduce the potential to provide a reference pool that would be extremely useful to a police authority, where a terrorist group, of whom they have no prior experience, has begun to operate on their soil.

One potential problem of including inconclusive data is the different operating procedures of law-enforcement bodies. If one observes how differing operating styles led to tensions between the BKA and Scottish police during the Lockerbie investigation, one can equally ascertain that with no regulations determining what is an "alleged crime" or "suspected" membership of a proscribed organisation, each agency can input data determined through divergent styles of policing. The BKA for example is less likely to include inconclusive data, as their style of policing centres around determining hard facts; but how will they view information from other sources that may be associated more with conjecture?

The second area of concern again relates to the sensitivity of terrorist-associated intelligence entering a common pool. The barriers placed within the analytical process refer solely to the analytical service and not the common database in general. While this information can be accessed only by an ELO,

this does not guarantee which agencies may examine it. One could question for example how far Member States are prepared to place information on Turkish or Middle Eastern terror groups into the TECS pool when this can be accessed by Greece, whose role in counter-terrorism has, until the recent decimation of November 17 in the summer of 2002, been abysmal. The US State Department has described Greece as "one of the weakest links in Europe's efforts against terrorism".¹² Greece was also the European country most sympathetic to the Palestinian cause, while her mutual animosity to Turkey has also led her to develop sympathies with the PKK.¹³ The most practical solution to this has been to mark particularly sensitive information for country X, Y and/or Z only. This of course creates a tiered system, even within the commonality of Europol, ensuring that some Member States will not be in a position to receive the full array of benefits available from Europol. In certain respects, one can see parallels with the informal style of co-operative information exchange emerging here. Greece however, in her desire to host the 2004 Olympic Games, together with the international pressure that was brought to bear on the authorities following the murder by November 17 of the British defence attaché, Brigadier Stephen Saunders, in Athens on 8 June 2000, has recently developed a more aggressive attitude towards terrorism, including close co-operation with the UK and American authorities.¹⁴ In this respect, one might see the closed information circle

¹² US Department of State *Patterns of Global Terrorism 1999 Europe Overview: Greece*. It has been widely speculated that elements within the Greek government and security structure have protected November 17, as it is difficult to comprehend the ineptitude capable of producing zero arrests over a twenty-seven year period. Perhaps the forthcoming trials of the group's members might now reveal the truth.

¹³ Patrick Seale *Abu Nidal: A Gun for Hire* 1992 p 265

¹⁴ *BBC News Viewpoint: Greece's anti-terror troubles* 19 June 2002

opening to the Greek authorities because of this, especially after its success in crushing November 17 during the summer of 2002.

IED Database

Europol's bomb database also serves as an important analytical tool against terrorism. The database functions as a directory of technical details relating to explosive devices. It works on the principle that terrorist bomb makers have distinctive signatures in their construction styles, and consequently it is possible for a counter-terrorist explosives expert to determine who designed the bomb, or at the very least the group responsible for it. The database allows a national authority to input technical information regarding IEDs, which can then be cross-referenced by another police authority entering details of an IED that they wish to identify.¹⁵

The role of liaison officers

Liaison officers, seconded to the law-enforcement authorities from another Member State serve as the "human" or personal element of co-operation within the ongoing development of co-operative structure building:

We put people in contact with one another, overcoming cultural and procedural differences and language problems. We are privileged intermediaries between our home and host

¹⁵ Personal interview with Mariano Simancas, Head of Europol C-T Unit, 30 May 2001 The Hague.

countries...People come to see us as soon as they have to contact someone from our side.¹⁶

Some are seconded on a bilateral basis to other national authorities such as counter-terrorist officers between the BKA headquarters in Wiesbaden and the *Unité de la Coopération de la Lutte Anti-Terrorism (UCLAT)* in Paris or the Metropolitan Police Headquarters (Scotland Yard) in London for example. Didier Bigo estimates that France currently has nineteen bilateral liaison officers seconded to six other Member States and is preparing to cover all fifteen, as well as increasing the number of officers in each country.¹⁷ At the multilateral level, they are provided to structures such as Interpol and Europol. Their purpose is essentially to facilitate co-operation between the national authorities of the Member States. Being the interface point for information transfer is an important aspect of this. The development of trust between such contact points, permitting the exchange of sensitive information has already been described; equally important, though, are the skills developed by these officers in quickly finding the information and sending it where it can be most readily utilised.¹⁸

Beyond these practical concerns, however, is the role played by these officers in the globalisation and Europeanisation of policing. Secondment of liaison officers, while only a sideline issue to the central mission of their respective agencies, does much to introduce a cosmopolitan element into certain areas of policing. These officers experience new outlooks on issues, generate new

¹⁶ Bigo, *Op. Cite.*, p 78.

¹⁷ *Ibid.*, p 77

¹⁸ *Ibid.*, pp 77-8

ideas, develop new contacts; these are then transferred back to the home agency (and of course are imparted by the guest to the host). One senior officer described the importance of secondments for the officer concerned as well as the home force. Fresh ideas and outlooks are necessary to prevent stagnation within a force, and to help it keep apace with ongoing developments in crime.¹⁹ This cosmopolitan influence does not directly affect the average officer “on the beat”; it is directed towards the higher spectrum of policing, where policy decisions are taken. Officers, so seconded, have invariably been marked for fast-track promotion and their European experiences will mean that within a decade or so, a new generation of police officers with, if not a European outlook, then at least an appreciation of it, will have taken their places within the senior decision-making ranks. This outlook of course varies from individual to individual. Some officers remain “national police officers abroad”, who remain untouched by any “Europeanness”, viewing the experience as one limited to increasing the efficiency and effectiveness of tackling transnational crime.²⁰ Surprisingly, counter-terrorist, officers have a greater tendency to fall into this category, despite the fact that it was this discipline, along with that of narcotics officers, which made the first inroads into European co-operative policing, and by the nature of the crime, have been involved in it ever since. One of Bigo’s contacts described their function as “sales representatives, selling the image of our police force abroad”:

¹⁹ Personal interview with John Boyd QPM CBE, former Chief Constable of Dumfries and Galloway Constabulary 1 March 2001 Lochwinnoch.

²⁰ Bigo, *Op. Cit.*, p 79

Too many things keep us apart... We're also competing to sell our police model outside Europe. You can make a packet that way. Criminal investigation police officers are often less aware of national interests than we are... when it comes to terrorism... it's a lot less straightforward.²¹

Certainly, an officer involved in counter-terrorism will soon appreciate the national interest because of the significance of the political connotations. However, does this account for a more cynical approach towards European co-operation? Governments do put great stock in their counter-terrorist systems, as these are designed to confront those who directly challenge their legitimacy to govern. Both Trevi and the PWGOT were the products of a UK approach to counter-terrorism, and the UK's desire to retain the latter as the single vehicle for police co-operation against terrorism strikes resonantly with the counter-terrorist officer's words above.

If counter-terrorism is heavily involved in the national outlook, then its competitiveness at the European level does in fact serve to enhance its efficiency, as it is continually looking to hone itself against competitors. If all the European counter-terrorist systems follow this same logic then they can only ever improve. The danger arises only if some systems actually start to lose the "race" and a foreign system takes over. A single generic counter-terrorist template could not sufficiently account for the nuances of individual policing systems within Europe; ultimately there is a risk of stagnation. This

²¹ Ibid., p 79

competitive edge, then, is actually a positive feature among counter-terrorist liaison officers.

Europol's European Liaison Officers (ELOs) are an important aspect of the structure, as they serve as the approachable face, facilitating information transfer from the Member States to Europol and vice-versa. Additionally Europol operates a policy whereby the ELO handling a case continues to see it through from beginning to end, rather than transferring it to another ELO or another body. This procedure ensures continuity in case-handling. The ELOs are also required to provide twenty-four hour availability, thereby helping to reduce the possibility of an investigation failing simply because there was no one at the other end of the phone. This ensures for an element of continuity and professionalism, encouraging a build-up of trust between Europol and the national authorities.

The co-ordination of counter-terrorist co-operation

The importance attached to a co-ordinated effort against terrorism cannot be emphasised enough. If the willing transfer of intelligence and analysis provides the authorities with the missing piece of the jigsaw, the evidence for a conviction in a court of law, or simply a greater understanding of a group or individual, then the co-ordination of efforts represents the strategic and/or tactical co-operation. At a simple level, the British Army's adoption of its patrol strategy to reflect that of the IRA's sniping teams led to the introduction of co-ordinated patrols, operating to deter the sniper through minimising their

ability to successfully escape if they were to fire on one of the patrols.²² At another level, law-enforcement agencies will, where possible, co-ordinate simultaneous arrests against a criminal or terrorist group, to prevent alerting the other targets to the arrests.²³ “Operation Twins” below, illustrates how such efforts can be transferred to the transnational level.

The transnational aspect of much of the terrorism in Europe demonstrates the necessity of a co-ordinated transnational approach. This approach, however, goes beyond the arrest of terrorist suspects on a co-ordinated transnational scale. The development of a co-ordinated strategy is as important as co-ordinated operations. Al-Qaeda’s achievement in developing a global network is truly staggering, illustrating in the starkest terms that tactical co-operation alone is insufficient to tackle the threat. Strategic co-ordination involves the co-operating bodies determining a co-ordination of efforts beyond that of immediate arrests; specifically the considerations of the longer-term goals become equally as valid. Will the execution of a series of arrests, for example, lead to a significant hampering of the group’s operations, or would continued surveillance generate more fruitful results later on? Alternatively, is a new approach required? Essentially this relates national counter-terrorist issues and considerations to the transnational level as well as the national. The achievement of such a strategy is by no means easy, as it may require a Member State to take a decision that is contrary to immediate national

²² C.J.M Drake Terrorists’ Target Selection 1998 p128; Toby Harndem Bandit Country 1999 p 408

²³ Such arrests often take the form of “dawn raids”, occurring in the early hours of the morning, when the targets are usually asleep and too disorientated to put up effective resistance. Spain’s arrest, for example, of what it described as “almost the entire political leadership of the group (ETA)” occurred in a series of pre-dawn raids on 13 September 2000. (BBC News Basque arrests hailed as a “victory” 13 September 2000)

interests. Both British and German authorities were involved in the series of arrests that thwarted the sarin gas attack on the European Parliament. The Metropolitan Police Special Branch, however, subsequently released the six Algerians arrested in London within days after a request by the Security Service, who had uncovered evidence of further atrocities and wanted to monitor the group. Accordingly, MEPs were not informed of the details, and only an email was circulated warning about lapsed security in the building.²⁴ Being involved in this operation, the consent of the German authorities would have been required to allow the withholding of this information, especially as German MEPs had been equally at risk. Here we see the complexities of “controlled delivery” applied to counter-terrorism.

Successful Franco-Spanish co-operation against ETA illustrates the merits of a co-ordinated approach. France aggressively targets ETA as a group at both the unilateral *and* bilateral level. This level of co-operation goes beyond the French implementation of Spanish arrest requests. It has developed a strategic quality that acknowledges ETA as a threat to Spanish security that requires active French assistance to counter it. France, therefore, can be considered a partner rather than merely a sympathetic state. The level of co-operation requires French involvement in the discussion of Spain’s long-term goals on the problem of ETA. France’s current level of commitment against ETA would be far lower if it considered its strategic involvement to be insufficient. This strategy is demonstrated not only through the wave of arrests that have followed since the termination of ETA’s ceasefire, but also in the systematic

²⁴ *Daily Telegraph* Bin Laden British cell planned gas attack on European Parliament 16 September 2001

approach taken. Many of the arrests occurring in France in September 2000 were aimed at suspected explosives experts and key technicians, imperative in order to neutralise ETA's ordnance capabilities.²⁵ Transferring this successful example of co-ordinated bilateral co-operation to a broader transnational theatre, however, is an altogether more complicated process.

European co-ordination efforts, for the most part, have focused on combating drug trafficking and paedophile rings rather than terrorism. Partially this may be because the mechanics of a successful counter-terrorist operation are rarely divulged, since it is in no one's interests to make life easy for terrorists.

Primarily though it is because of the prevalent perception of terrorism being largely an issue requiring address at the national, rather than the transnational level. This is certainly the case regarding Basque and Irish nationalism, or movements similar to the left-wing ideologies of the Red Army Faction and Red Brigades, who essentially restricted themselves to attacking the authorities of their own state.²⁶ Regrettably, this has also been the approach commonly taken against transnational terrorists. Although the Member States have engaged in establishing information exchange and processing structures over the years, little has been accomplished at the actual enforcement level. Transnational/international terrorists are dealt with by Member States on an individual basis, reflecting policy motivations. Italy's handling of the *Achille Lauro* hijackers in October 1985 succinctly illustrates this prerogative. While the four Palestinian Liberation Front (PLF) hijackers were tried and sentenced,

²⁵ *Guardian Unlimited Arms cache seized as Spain moves to crush Eta* 20 September 2000

²⁶ While the Spanish, British, French and Irish governments have become much more attuned with the concept of in-depth co-operation to counter these nationalist groups, it is still correct to emphasise the priority of the target state to address its own internal security problems and solutions.

the Italian authorities refused America's extradition warrant for the suspected orchestrator, Abul Abbas, granting him instead safe passage from Italy. Italy's motives here stem from a deal she had struck with the Palestinian Liberation Organisation (PLO) promising it non-interference and moderate political support in return for a guarantee exempting Italian citizens and territory from PLO operations.²⁷ The Italian authorities were able to overlook this event despite the *Achille Lauro* being an Italian liner, for three reasons: firstly the PLO had not been directly involved, and secondly the passenger who had been murdered, Leon Klinghoffer, was an American citizen, not Italian. The third is the most important in terms of realpolitik: Abbas, although leader of the PLF, was also a close associate of Yasser Arafat and a senior member of the PLO's Executive Committee.²⁸ To hand over such a senior figure to the US might have jeopardised the agreement or invited retaliatory attacks, especially when Abbas was seen to have negotiated the surrender of the hijackers at Port Said in Egypt. Reasons of State therefore may also have a role to play in such events, circumventing territorial law. A co-ordinated co-operative investigation is more predisposed than the sharing of intelligence to producing circumstances at odds with a sovereign Member State's right to deal with internal security threats as it sees fit. Lockerbie provides a potent reminder of the obstacles that can arise. Traditionally, co-ordinated investigations have never been a particularly strong feature of European co-operation against terrorism, but this is changing.

²⁷ Peter Chalk West European Terrorism and Counter-terrorism: the Evolving Dynamic 1996 p 11

²⁸ George Rosie The Directory of International Terrorism 1986 pp 37-40

Europol's co-ordinating ability

Europol is not limited to processing information; it has the ability to co-ordinate joint operations with the co-operation of Member States as part of its support capacity (Article 5.4). A recent example of this is "Operation Twins", a UK-led operation that smashed a major Internet paedophile ring. Europol played a central role in supporting and co-ordinating the twelve-month intelligence-led operation, processing the information on a daily basis from the participating states –Belgium, Canada, Denmark, Germany, Italy, Netherlands, Romania, Spain, Sweden, Switzerland, USA and the UK – ultimately leading to simultaneously executed dawn raids in seven countries, with fifty arrests.²⁹

Europol has demonstrated its ability to co-ordinate operations against drug and people smuggling, and child pornography rings. With a mandate granted to it against terrorism in May 1999, it has been able to offer this same service. To date however, Europol has yet to issue a press release providing evidence of its involvement in a counter-terrorist operation. This is not because of any desire to keep its involvement secret due to security reasons; it is simply because it has not been involved. Certainly Europol would not release evidence of involvement in an ongoing operation, but there is little evidence of any such involvement prior to 11 September. This supposition is based on the transnational co-operation occurring before 11 September surrounding the Strasbourg Plot, where the evidence demonstrates a lack of Europol involvement in co-ordinating an investigation that clearly required it (see

²⁹ Europol Press Release *Internet Based Paedophile Gang Smashed in Worldwide Police Swoop* 2 July 2002

below). Rather Europol's role in this capacity has been more limited to its custodianship of the Terrorism Skills Directory. This directory was established in October 1996 as a means of maintaining a register of "specialized counter-terrorist competences, skills and expertise in the Member States", and it is updated biannually to ensure relevancy. Initially it was held by the Presidency of the EU (after a preliminary interim year under the UK), but to allow for continuity, Europol was later given these competences. In practical terms, the directory has proved a useful tool in the crisis management of a terrorist situation. The siege of a kindergarten in Wasserbillig, Luxembourg at the end of May 2000 by a lone Tunisian gunman illustrates the practical utilisation of the directory. Upon being alerted to the incident, the authorities did not know if they were dealing with a terrorist incident; but in any event, Luxembourg is too small to justify maintaining a specialist hostage-negotiating team. Consequently, the directory was consulted to see which Member State had such a team, and one suited to the particular circumstances i.e. with translators, but above all, which was nearest.³⁰ The Luxembourg Gendarmerie were not equipped or trained to the same professional standards as their European colleagues in the event that "intervention" should prove necessary. Accordingly, an anti-terrorist unit from Germany assisted in the siege.³¹

In fairness, however, one should also consider the relatively short period in which Europol has been involved in counter-terrorism, weighing that against the actual number of cases of transnational terrorism where its co-ordinating

³⁰ Personal interview with Mariano Simancas, Head of Europol C-T Unit, 30 May 2001 The Hague.

³¹ *BBC News Disguised police shoot gunman* 2 June 2000

role could have been utilised. Relatively few such cases have emerged: the arrest in Naples in October 2000 of eleven Algerians belonging to *Al hidjra wal takfir*, on charges of association with and arms smuggling to terrorist groups in Algeria; and the arrest of six North Africans in Germany and Italy, in April 2001 on charges of arms and explosives smuggling and forging documents.³² In both cases, these arrests revealed interlinkages with similar groups throughout Europe, along with suspected links to al-Qaeda. The prosecutor's office in Naples described this as "part of a Europe-wide network operating in Britain, the Netherlands and Switzerland".³³ In the case of the latter, it is believed that the group were involved with the planned Christmas bombing of Strasbourg, which was aborted after a tip-off to the police. In Italy, these arrests had followed similar operations by police against suspected Islamic extremist groups in the country, demonstrating the prolificacy of these groups. Gerardo D'Ambrosio, an investigating magistrate, believed that the Milan cell might have had contacts with forty or fifty other Islamist recruiters in Europe.³⁴ The connections that these groups had beyond Italy illustrates an opportunity for Europol to test its counter-terrorism mandate in an active role. The measures taken, however, in following up these connections were left very much to the traditional spirit of law-enforcement co-operation against international terrorism.

³² BBC News *Eleven Algerians arrested in Italy* 17 October 2001; BBC News *Police seize "Islamic guerrillas"* 5 April 2001

One other ongoing investigation was that into Djame Beghal's revelations of a plot to bomb the US Embassy on 13 September in the days leading up to 11 September. However, this was primarily carried out by security services of co-operating Member States rather than their police agencies. (Jane Corbin *The Base* 2002 pp 202-3)

³³ BBC News *Eleven Algerians arrested in Italy* 17 October 2000

³⁴ Los Angeles Times *U.S. Sees New Terrorist Threat From N. Africa* 8 July 2001 (online edition)

The Strasbourg Plot

A North African terrorist cell with links to al-Qaeda planned a bombing campaign in the heart of the French border town of Strasbourg in the run-up to Christmas 2000, with targets including the Christmas market and the European Parliament.³⁵ A tip-off led German police to raid an apartment in Frankfurt, arresting four suspects and discovering weapons, chemicals for making explosives and a video of suspected targets in Strasbourg.³⁶

A series of investigations and arrests occurring throughout Europe in the following months illustrated the interlinkage between these cells. The coordinated arrests in April 2001 between German and Italian police led to the arrest of a number of those suspected of involvement in the Strasbourg plot. The thwarted sarin gas attack against the European Parliament by the British and Germans also demonstrates the determination of these terrorist groups to target this institution and the symbolism they have attached to it. The British followed this up with "Operation Odin" in February, aimed at suspected militants involved in the Strasbourg plot, along with a London based group believed to serve as a contact point for terrorist operatives in Europe and as an al-Qaeda recruitment centre.³⁷ These investigations against international terrorists have proved better than past ones in terms of co-operation. D'Ambrosio stated that Italy had received exceptional co-operation from

³⁵ BBC News *Spain to extradite bin Laden suspect* 25 June 2001; Wall Street Journal *Foiled Strasbourg plot underscores obstacles to fighting terrorism* 24 October 2001

³⁶ The Guardian *Al-Qaeda cell in UK "planned attack"* 26 October 2001

³⁷ Corbin, Op. Cit., p 198; Los Angeles Times *U.S. Sees New Terrorist Threat From N. Africa* 8 July 2001 (on line edition)

police and justice officials in other EU countries in their investigations.³⁸

Arrests have occurred in waves in the ten months following the thwarted plot, primarily in Italy, France, Germany and Spain. However the investigations against these terrorist cells throughout these Member States have occurred separately, with a lack of trust quick to pervade, leading to the re-emergence of old divisions after an initially promising start.³⁹ One particular manifestation of this obstacle was after the Italian police informed their Spanish colleagues of an earlier visit to Spain in March by Essid Sami Ben Khemais, one of the Tunisians whom they had arrested in Gallarate. The Italians' grievance was that their Spanish colleagues had not passed to them any information about acquaintances made by Khemais during his time in Spain; indeed, no intelligence was communicated until the Spanish authorities arrested these acquaintances some six months later. Another aspect of the investigation threatened the amiable Franco-Spanish co-operation against ETA when Jean-Louis Bruguiere, France's leading anti-terrorism magistrate, threatened to halt all assistance in this area if Spain did not assist in tackling Islamic groups, after Spanish authorities did not follow up on one of his Muslim-related investigations.⁴⁰

These particular examples illustrate a lack of Europol involvement in any form of co-ordinating capacity; otherwise the problem would not have been as extensive. Prima facie, the evidence does suggest a reverting to type, but this does not take into account the fact that all four countries involved in the

³⁸ BBC News *Police seize "Islamic guerrillas* 5 April 2001

³⁹ Wall Street Journal *Foiled Strasbourg plot underscores obstacles to fighting terrorism* 24 October 2001

⁴⁰ *Ibid.*

investigations are attempting to iron out some of the co-ordination issue through Pro-Eurojust (whose powers have been increased in the wake of 11 September).⁴¹ Their involvement with this agency rather than with Europol suggests that it was judicial problems, not policing ones, which were responsible for the breakdown in co-operation. Belgium's refusal to extradite Tarek Maaroufi, an Islamic preacher, to Italy on terrorism charges, on the grounds that Belgium does not have any legislation specifically targeting terrorism, and that Maaroufi possesses Belgian citizenship⁴² has led to much misgiving from the Italians who argued that Maaroufi is a central figure in the Strasbourg plot.⁴³ Pro-Eurojust will find this particular case difficult to detangle because European states are not obliged to extradite their own citizens. Complications regarding judicial co-operation clearly have played their part here; beyond this, however, the evidence is indicative either of crass indifference or a rivalrous outlook set upon national priorities and pride and a disdain towards "interference" in matters. Spain's refusal to provide the Italians with information about Khemais' contacts, for example, could be construed as an attempt to arrest these individuals without the Italian authorities requesting information or extradition, which they may see as somehow compromising their investigation. Alternatively, it could have been glory seeking or simple incompetence. The lack of Europol's involvement at a grass-roots level suggests that the four Member States still perceived these investigations as essentially national ones, and certainly not problems requiring a transnational solution despite the interlocking nature of the North

⁴¹ See Chapter VIII for details of Pro-Eurojust.

⁴² *Wall Street Journal* *Foiled Strasbourg plot underscores obstacles to fighting terrorism* 24 October 2001

⁴³ See Chapter VIII for a discussion of extradition and this case.

African cells. Under such conditions, Europol would also be regarded as an unnecessary or unwelcome addition to the investigation. Taking these considerations into mind, it would appear that counter-terrorist efforts against international threats have remained problematic for European law-enforcement co-operation. However, it is possible to discern a reversal and redress of these problems in the ensuing global co-operation in the aftermath of the 11 September attacks.

Co-operation and co-ordination in the post-11 September environment

The al-Qaeda attacks against America and the revelation of subsequent planned attacks in Europe have significantly eroded the traditional outlook associated with international terrorism. There has been “unprecedented co-ordination among European security services and police forces” in the months following 11 September.⁴⁴ Numerous arrests have occurred throughout the EU Member States, many of which have been due not only to the increased sharing of information, but also to the number of investigations operating at a transnational level. The arrests on 10 October, in a joint operation between Germany and Italian police, of four men (three arrests in Milan, one in Germany) suspected of being a recruiting cell for al-Qaeda is an early example of co-ordinated efforts against this “new” terrorist threat.⁴⁵ This co-ordination of efforts has continued, including a joint seven-month Spanish, American, French and German investigation leading to the arrest in Spain on 13 April 2002 of Ahmed Brahim, a suspected al-Qaeda financial chief in Europe, and

⁴⁴ BBC News *Looking for European al-Qaeda* 11 December 2001

⁴⁵ BBC News *Police move against Bin Laden suspects* 10 October 2001

leading planner behind the US Embassy bombings in Kenya and Tanzania in August 1998.⁴⁶ Indeed solid co-operation was occurring prior to 11 September against al-Qaeda. A co-ordinated German and Italian police operation arrested six North Africans (five arrests outside Milan, one in Hesse) believed to be have been part of a cell which planned an attack against the US embassy in Rome in January and had been involved in planning the bomb attack in Strasbourg the previous December.⁴⁷

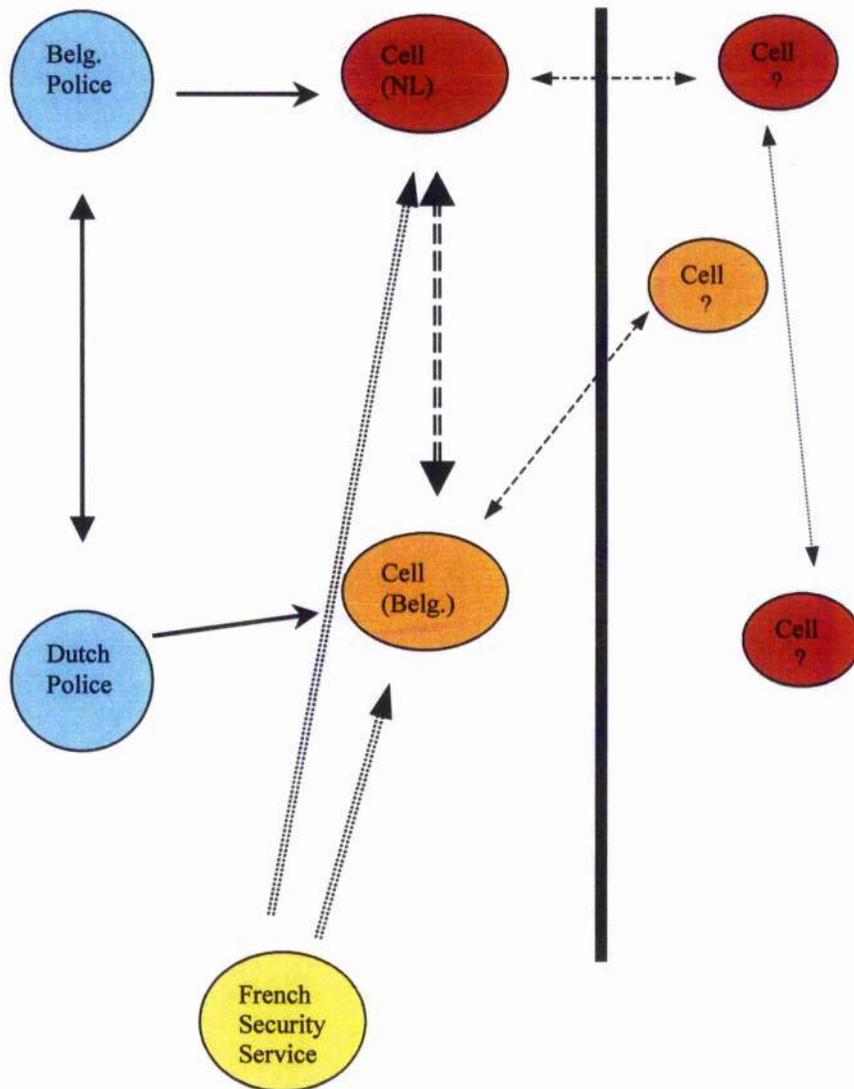
The investigations into these North African cells has taken on a transnational dimension previously unseen in Europe with governments and law-enforcement agencies being extremely commodious in their co-operative efforts. Co-ordination of efforts, however, remains a refined skill, and one missing from the action taken in the immediate post-11 September environment, where re-assuring the public was of key importance. The breaking-up of two interlinked cells by Belgian and Dutch authorities on 13 September 2001 vexed the French who had been trying to infiltrate the groups with informers to generate long-term intelligence; France complained that the Belgians and Dutch had failed to co-ordinate their activities with French efforts.⁴⁸ As diagram III illustrates, this hindered the detection of other cells in contact with the two that had been located. Interrogation rather than intelligence then becomes the only, often unsubtle, option open to investigators to determine if, and where, other cells exist.

⁴⁶ *BBC News Spain holds al-Qaeda finance suspect* 14 April 2002

⁴⁷ *BBC News Police seize "Islamic guerrillas* 5 April 2001.

⁴⁸ Rohan Gunaratna *Inside Al Qaeda: Global Network of Terror* 2002 pp 127-8

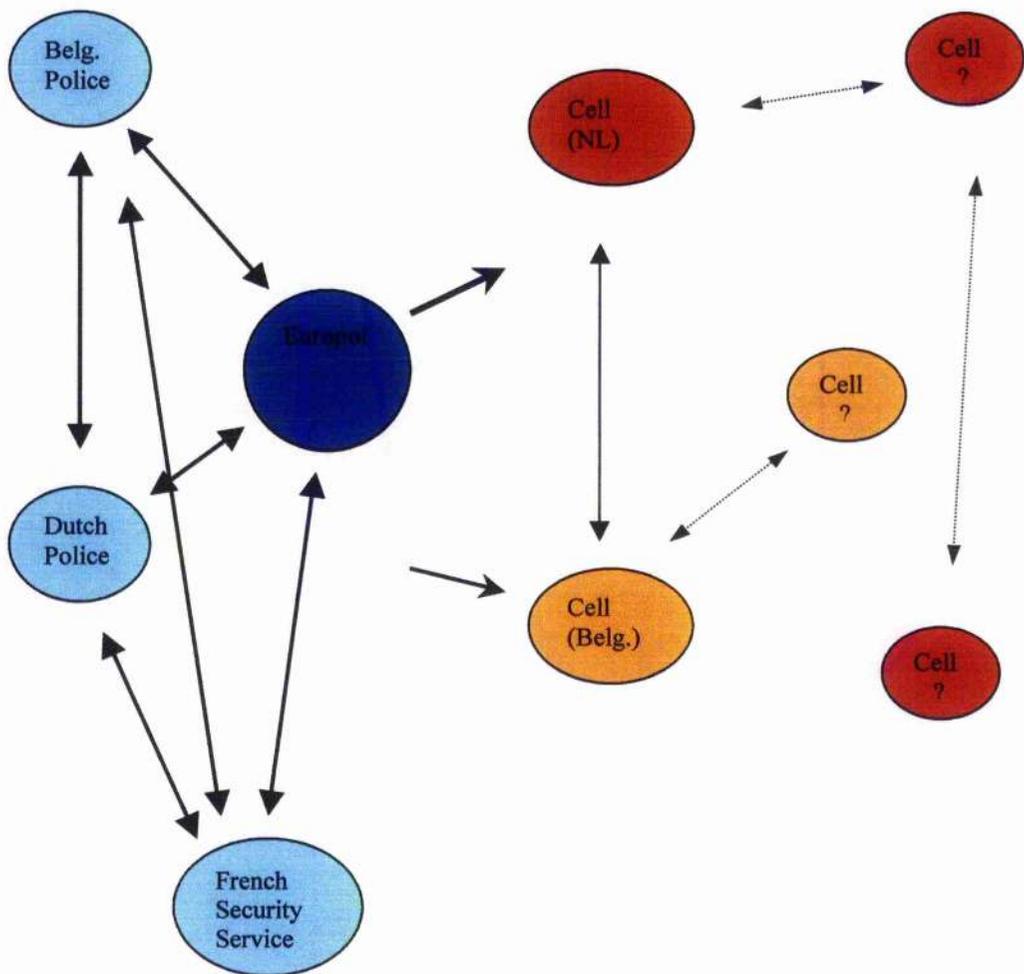
Diagram III



This example demonstrates the need for a more centralised platform co-ordinating these operations. Had Europol been consulted by all the parties concerned, even without operational powers, a greater transnational ethos might have been generated, isolating the national ethos that inevitably overtook the operation at the end. Diagram IV illustrates such a case showing

the greater lines of communication between the French and their Dutch and Belgian colleagues because of the transnational emphasis, possibly leading to a different ending. It should of course be made clear that even in this situation, the sovereignty of the Netherlands and Belgium supersedes all other factors, and they would be well within their rights to take any action they saw fit against terrorist cells operating on or living in their territory.

Diagram IV



Co-ordination of efforts against international terrorism in Europe has therefore made some headway since 11 September. The danger of the emerging network of North African terrorist cells throughout Europe demonstrates the need for a greater co-ordination of efforts at an EU-wide level. As a structure, Europol is ideally placed to provide such a role, especially as the al-Qaeda threat clearly represents the requirement for “a common approach...owing to the scale, significance, and consequences of the offences concerned” (Article 2.1, Europol Convention). The increase in Europol’s powers in the wake of 11 September (see below) is an illustration of the Member States’ recognition of Europol’s potential role in the post-11 September environment. That in this new milieu, no press release from Europol has been issued demonstrating involvement in successful counter-terrorist operations implies a possible distance still being kept by the national authorities of the Member States. The public edition of Europol’s annual report for 2001 (published April 2002) does make reference to the newly enhanced co-ordinating body of an Operational Centre, created on 11 September, providing 24-hour service in the exchange and co-ordination of information and intelligence, along with the production of daily briefing papers. However, beyond this, the report says little.⁴⁹ How successful, then, have been the JHA Council’s attempts to augment Europol’s counter-terrorist role, and put it at the heart of the EU counter-terrorist programme?

⁴⁹ Europol Annual Report 2001, The Hague, 16 April 2002 p 14

Europol augmented

A number of events have significantly increased the scope and powers of Europol over the years. Amsterdam and Tampere enhanced two particular areas: the ability to instigate an investigation and the capacity to request information from national police forces.⁵⁰ Under this remit, Europol has been able to open an analysis work file on “extremist Islamic terrorism within the EU, with the aim of constructing an operational analysis of all information on actual and potential suspects, witnesses, victims, associates and informants”.⁵¹ Additionally suspected and alleged offences; modus operandi and suspected membership of a criminal organisation; convictions, and references to investigations by national police forces are also included. As the Strasbourg plot indicates, however, requesting information and receiving it from a national police force are two very different things. Nevertheless, Europol’s Counter-terrorist chief, Mariano Simancas, was sanguine on the issue of joint investigative teams, pointing out that the initiatory steps were underway, approximately six months after Tampere.⁵² These enhancements present Europol with the option to take a more proactive role than was previously possible. However, as has traditionally been the case, a terrorist event was responsible for the significant leap in European law-enforcement co-operation.

⁵⁰ Treaty of Amsterdam, Article 30.2 (a) and (b). Tampere reinforced these advances rather than supplementing them: Tampere Conclusions, Conclusion 43 and 45.

⁵¹ *Statewatch* Post 11.9.01 analyses: No. 1 *The “Conclusions” of the Special Justice and Home Affairs Council on 20 September 2001 and their implications for civil liberties*. It is also believed that Europol has opened a similar file on eco-terrorism.

⁵² Personal interview with Mariano Simancas, Head of Europol C-T Unit, 30 May 2001 The Hague.

Prior to 11 September, Europol's potential for supporting terrorist related investigations was compromised because of the reluctance of national units to contribute sensitive information to Europol's analysis files or to seek assistance beyond asking for information. The revelation of the threat posed by international terrorism, however, has resulted in a political commitment by the EU Member States to place Europol at the centre of the EU's counter-terrorist programme. To reinforce this position the JHA Council has targeted reluctance amongst the national authorities, instructing them to fulfil their obligations to Europol and authorising Europol's Director to inform the Council of any problems.⁵³

Underlining the commitment of the Council in this area is Europol's housing of a specialist counter-terrorist team, comprised of officers seconded from the Member States, in which Europol officers can also participate.⁵⁴ The inclusion of intelligence service officers also serves as a reinforcement of the Council's commitment. These agencies have obtained a new significance in defeating terrorism in the post-11 September environment. Europol is now the only co-operative law-enforcement forum to include representatives of these agencies in its mandate against terrorism. This team, however, will have an operational role; consequently so will the Europol operatives. This contradicts the Europol Convention and therefore, the remedy required is an amendment to the Convention (see Chapter VII). In doing so Europol is finally crossing

⁵³ Statewatch, Op. Cit., analyses: No. 1

The Europol Convention obliges the law-enforcement authorities of the Member States to contribute the relevant information unless it falls under grounds of national security, protecting investigations or personal security, or specific intelligence activities (Article 4.5).

⁵⁴ The participation of Europol officers in this group has striking parallels with Interpol's TE Group who are able to second their counter-terrorist officers to national investigations.

the ambiguous gap between “operative” and operational powers. Most far-reaching of all, however, is the development of plans to allow Europol access to the SIS II records. The Council charged a working party at the beginning of 2002 to begin preparations on this matter. Under the two-stage EU Presidency proposal, Europol will be able to add and amend data, as well as consulting it. In addition to the massive amount of data that would become available, this proposal would also afford Europol another operational role, enabling it to enter names of suspects into Alerts so that they would be subject to “discreet surveillance” and “specific checks” (Article 99, Implementing Convention). Such changes, if they occur, will again mean alterations to the Europol Convention, as Article 6(2) expressly forbids the linkage of Europol’s database to any other law-enforcement database. The ramifications of merging these databases in terms of data protection and civil liberties, along with the overall direction of Europol, are considerable. If substantial amendments are made to its Convention then Europol will be transformed into a much more powerful organisation, giving greater credence to speculation that has dogged Europol since its inception: that it is moving ever closer towards becoming a European FBI. These issues are essential to the direction being taken by the EU towards internal security, and will be discussed in detail in the following chapter.

Not all expansions related to Europol’s mandates, however, have been bestowed directly onto the organisation. The Tampere summit rectified a gap identified by the EU’s Article 36 Committee (senior officials from the Member States’ interior ministries) between the intelligence and information

on serious organised crime (through Europol) and its translation into operational activity, by establishing the European Police Chief's Operational Task Force. This structure is closely associated with Europol, but stands outside it, comprised of high-ranking police officers as well as representatives from both Europol and the European Commission.⁵⁵ While it covers all areas of police policy, it is essentially geared towards operational aspects and "top priority" organised crime problems.⁵⁶ Additionally, while Europol is strictly regulated by its Convention, the Task Force was designed as a "flexible, evolving and initially informal structure".⁵⁷ By placing the Task Force outside Europol, the intent has been to address the operational aspects of co-operation – something Europol was unable to do, because of its Convention. With changes planned for Europol's Convention, however, these issues will themselves be negated.

Parallel Networks

Europol's assignment by the JHA Council as the central agent in EU co-operation against terrorism may also lead to a finalising of responsibilities in this sphere. Currently three agencies share the responsibilities of facilitating co-operation against terrorism: Interpol and its European Secretariat, the PWGOT and Europol. Prior to Europol's arrival, the PWGOT and Trevi were

⁵⁵ The Task Force has other duties as well. Recently it was given responsibility for the security of the EU's internal and external borders in the wake of 11 September, mandated to draw up a report on additional measures needed at the external border and to implement any decision to reinstall internal border checks. (*Statewatch* Post 11.9.01 analyses: No. 7 *EU anti-terrorism action plan: "operational measures"* Points 15 & 20)

⁵⁶ Al-Qaeda's attacks have placed terrorism as a "top priority", and the task force is currently working with Europol to draw up the operational strategy for the new counter-terrorist unit being established under Europol.

⁵⁷ *Statewatch*, Op. Cit., analyses No. 1, Point 8

the favoured forums here; Interpol, regardless of its reforms, was still not as trusted as the other two. By the same token, Europol's mandate against terrorism placed it in competition with a tried and trusted structure. The reluctance to utilise Europol's services is to some extent explained by the traditional conservatism associated with sensitive issues such as terrorism. Equally, the existence of a "rival" structure, i.e. the PWGOT, is also a factor in this equation, and one capable of inhibiting Europol's mandate if the national police forces prefer to maintain the PWGOT as their principal instrument of co-operation. Europol's Director, Jürgen Storbeck, has warned that Europol will "stand or fall according to whether Member States supply (it with) good quality information" is particularly pertinent to the argument.⁵⁸ Routing key intelligence relating to terrorism through the PWGOT rather than Europol would impinge upon the latter's counter-terrorist performance. However, the JHA Council's emphasis, in September 2001, on Europol's counter-terrorist competencies taking centre stage in this area of co-operation, now allays this fear.

Without this firm commitment from the JHA Council, however it is likely that problems would have arisen in the relationship between Europol and the PWGOT. Europol was designed specifically to avoid the danger of duplication of roles with the existing structures, as it contributed towards the security needs of European integration (unlike Interpol) and acted as a support structure, rather than as an informal forum (the PWGOT). Nevertheless, where Trevi and the PWGOT complemented each other (the former being

⁵⁸ Lindsay Jenkins *The European Police Force – a New Threat*, in CIB Independence No. 40.

strategically motivated; the latter, more focused on operational concerns) Europol and the PWGOT did have a significant overlap. As a support structure, Europol has some functions similar to that of the PWGOT. It serves as a conduit for information transfer, and while it does not (yet) have operational powers, it can be employed tactically by other Member States, imbuing it with a day-to-day practicality. Subsequently one can see that some problems would factor in the introduction of Europol into the counter-terrorism community. The opposition by the UK, France and Denmark to the granting of the counter-terrorism mandate, based on the argument that the political connotations of terrorism would hamper Europol, and that the PWGOT could perform this function equally well, if not better, does therefore have some merit.⁵⁹ To some extent, then, the beneficial relationship that exists between the regulated and informal areas of co-operation jars here. The problems faced by Europol regarding its counter-terrorism mandate could and should have been forecasted and dealt with much earlier, clearly defining its role in the matter. Beyond this, steps should have been taken to address the reticence of the Member States' counter-terrorist investigators, moving the PWGOT closer into the Europol fold either through direct incorporation or by association in a manner similar to that of the creation of the Police Chief Task Force. The recognition by the JHA Council of Europol's position in matters of counter-terrorism may have greater success than previous measures as it provides Europol with a wider range of services that could tempt the national law-enforcement authorities into greater usage. However, this recognition

⁵⁹ Cyrille Fijnaut *The Schengen Treaties and European Police Co-operation in European Journal of Crime, Criminal Law and Criminal Justice* Vol. 1 No. 1 1993 p 52
These countries also rejected any "communitisation" of police co-operation. Additionally the PWGOT was, like Trevi, a UK dominated structure in terms of its design, and it did not want to lose influence in this area of policing.

should have gone one step further. It has set Europol as the hub, but it has neglected to set the PWGOT as one of the spokes.

Conclusions

Europol is the most advanced co-operative law-enforcement structure on the planet. By no means is it perfect. It has yet to fully garner the trust of the Member States' counter-terrorist officers, who have remained suspicious of passing sensitive intelligence on to a centralised agency, rather than to an old friend through the PWGOT's secure telecommunications. Neither has it been able to fully exploit its unique position of being a co-operative investigative structure under one roof. Investigations must be separate and *sub judice*, to preserve the sovereignty of intelligence provided by the Member State. This enforced barrier between investigations, preventing the exchange of intelligence linkage, is a mistake of serious magnitude, given the existing links between terrorists and organised crime. Europol is the only encompassing co-operative structure within the EU to focus on all types of serious transnational crimes, and therefore the structure most likely to detect information relating to other criminal activities when it investigates terrorism and vice versa. If the JHA Council is truly serious in wanting Europol to be the primary EU instrument against terrorism, then this confidence-building measure requires revision.

Where Europol excels however is in the services it offers, principally in facilitating investigations and their co-ordination. These services have been

underused, especially by counter-terrorism departments; this is changing for two reasons. The first is that Europe has grown very complicated over the years, as integration has deepened. This has had a derogatory effect on the traditional informal style of co-operation developed during the EEC, which has now become dated, and is unable to meet the needs of the European Union. The Cross Channel Intelligence Service, for example, soon found itself left behind by developments created by Schengen. As the EU develops so increases the need to utilise Europol to navigate through it. National agencies dealing with drugs and organised crime were quick to take advantage of Europol as these threats developed, but because terrorism was mostly limited to national pockets during the 1990s, counter-terrorist agencies saw little need to transfer their co-operative practices to Europol. This changed with the realisation of the emerging threat posed by Islamic extremists in 2000, and the hard reality of 11 September. The old informal system was designed to deal with a terrorist threat that was at heart, disorganised and sporadic. The threat from 2000 onwards is recognised to be highly organised and enduring, together with a willingness – indeed a desire – to cause mass casualties. This is a threat requiring an organised and regulated response, something unsustainable by relying upon an informal approach. This threat, together with the JHA Council's emphasis on Europol being the principal agent against terrorism within the EU, should enhance Europol's counter-terrorist competencies and their utilisation.

What we are also seeing within Europe is that the Member States are beginning to think "European" rather than exclusively "national" in their

outlook towards the terrorist threat. Member States' law-enforcement agencies are actively co-operating against the terrorist threat, passing on an unprecedented amount of intelligence that would previously have been inconceivable under the more basic co-operative structure during the EEC, regardless of the scale of terrorist threat. The extensive "road map" of counter-terrorist measures and initiatives serving as the reference point to the state of play on the EU action plan to combat terrorism demonstrates the depth to which the Second and Third Pillars are committed to resolving this threat.⁶⁰ They have become much more willing to pass on information as they receive it to their colleagues in other EU states. This has quickly created a network of intelligence shuttling back and forth between the Member States, allowing arrests to occur, which in turn allows new intelligence to be transferred, resulting in new arrests. Europol is the forum that has been chosen as the axis-point for this advance in co-operation. However, one must also consider how much of this improved co-operation is simply post-11 September zeitgeist. Once the shockwaves of this event have passed, will co-operation "deteriorate" to more familiar levels; or has co-operation reached the stage of being able to sustain this current activity indefinitely? Europol has yet to actually prove to the national police authorities that it can successfully negotiate a counter-terrorist strategy. Nevertheless, as has been suggested above, the ongoing European Project should help lock this co-operation into place once the crisis has passed.

⁶⁰ Council of the European Union 10773/2/02 European Union action plan to combat terrorism – update of the roadmap, Brussels 17 July 2002

An area for concern yet again is the issue of accountability. Europol's Convention makes it perhaps the most accountable structure within the JHA field, although it is by no means perfect, due to the fact that its own watchdog is internal. As Europol grows in influence, however, accelerated by the events of 11 September, this becomes an increasing concern, especially in relation to data protection. Europol's intention to merge its TECS with the SIS – a criminal and a non-criminal database – would have profound implications for data protection, in an area poorly protected by weak legislation. Effectively Europol would in a position to dominate internal security co-operation within the EU. No longer would it simply be an important flanking measure. The Member States have been adamant that Europol could never be permitted operational powers, and have provided us with a cast-iron constitution to ensure this. Yet, as we have seen, this seems to be a less secure guarantee, month by month. Has EU co-operation reached a stage where it is ready to conceive of a quasi-federal police force within a union of sovereign states? Europol's position within the integrative process is a curious one because of this question mark continually associated with it. Clearly, the regulatory effects of the JHA process have shifted Europol away from the influences of neo-functional theory, despite the strong role we see played by individuals such as its director. Such an important feature of the JHA process cannot be other than defined by intergovernmental policy; the most telling evidence for this is demonstrated through the "double-locking" of Europol by the JHA Council into a Convention and the Third Pillar. Nevertheless, federal overtones remain. The acquisition of an executive mandate for Europol would shift the balance decisively towards supranationalism; federalism would begin

to make its presence felt in the JHA arena, significantly strengthening the supervisory role required by the EU institutions over Europol. At the stroke of a pen, police co-operation in Europe would be transformed, but as is discussed in Chapter VII, subsidiarity would also be overruled were such an organisation created. The very real implications of this mean that we must fully understand where Europol sits within the integrative process.

Chapter VII

The Position of Investigative Co-operation against Terrorism within the European Integration Process

Whereas the elements relating to co-operative border security within Europe have traditionally been regional constructs, investigative co-operation has maintained a more inclusive approach, through the establishment of pan-European networks. Interpol, Trevi, and the PWGOT are all examples of this methodology. Their co-operation is not directed to a spatial area, but rather to a particular area of policing. The regulatory Third Pillar has solidified this approach with the adoption of Europol as the principal vehicle for co-operative investigation within the EU. Even the reticent intelligence agencies, which have previously maintained a distance from co-operative frameworks, acknowledge the Third Pillar as a co-operative medium.¹ These frameworks are the preferred choice for this type of co-operation because the nature of criminal investigation usually requires assistance in dealing with an issue that transpires beyond that of the frontier, thus negating any such border treaties. While border treaties can be particularly detailed in their co-operation because of the regional commonality, these same agreements cannot extend right across a country. Even the Schengen Implementing Convention only relates to the border areas within the signatory states. A broader approach is necessary instead to tackle issues requiring co-operation outside these areas. Interpol,

¹ While these agencies do utilise frameworks such as the Club of Berne and the Kilowatt Club, their highly informal attitude towards co-operation results in a preference towards bilateral action. Each agency maintains ties of varying strength with its colleagues. Expressly, the sensitivity of the information passed on relates to the level of trust between the individual agencies.

for example, allows police in Austria to work with their colleagues in Poland to help resolve an investigation. By adopting an inclusive approach in establishing these structures, the purpose is to develop a co-operative network that can be utilised by all members, rather than relying on bilateral agreements, for the resolution of tackling general transnational crime. Bilateral agreements are aimed at resolving a specific criminal activity peculiar to the signatories involved. The implementation in 2002 of the agreement between the British and Irish governments discussed in Chapter II, along with protocols between the Police Service of Northern Ireland and the Garda Síochána, is aimed at curbing the organised crime operating across the Anglo-Irish border.² Despite being directly concerned with cross-border incidents, it also establishes liaison officers between Dublin and Belfast; thus its purpose extends beyond the border area in an effort to tackle the common threat.

The encompassing characteristics of these co-operative structures also suggest the possible inclusion of common denominator politics in their makeup, aimed at avoiding including radical and controversial conditions that would otherwise inhibit would-be signatories from partaking. Such constructs tend to be dominated by intergovernmental control, to ensure that their direction remains one favourable to their signatory states. The Schengen Implementing Convention provides such an example. Equally, the issue of terrorism, as Chapter IV demonstrated, requires a firm intergovernmental hand at the tiller to prevent co-operative exuberance from floundering amid particularly

² *The Implementation of Recommendations Concerning North/South Co-operation on Policing Matters, Lateral Entry and Secondments – A Joint Timetable by the British and Irish Governments*

sensitive socio-political policy.³ All the areas of co-operative investigation examined in the previous two chapters demonstrate either an exclusive mandate against terrorism or its inclusion within a broader remit. *Prima facie* one might conclude that intergovernmentalism will dominate this area of co-operative policing. The argument is indeed strong, but one should not ignore the subtleties of incorporating this particular area into the Third Pillar. The concept of counter-terrorism as essentially a national response has been shaken by the events of 11 September. Thrusting additional powers upon Europol by the JHA Council to help counter the transnational/international terrorist threat is a clear indication of the growing awareness regarding the necessity of a European solution. As this thesis argues, placing any aspect of co-operative policy within the “melting pot” of European integration and expecting it to remain uninfluenced and unchanged may be politically naïve. Europol, as we shall see, has been double-locked within an intergovernmental agreement. These enhancements, however, produce a Europol very different from the one established in the 1995 Convention, in effect reopening the European FBI debate, and thereby renewing concerns about a federalist-type entity within the JHA sphere and what this would mean for future law-enforcement co-operation. Current debate as to its future stems from these enhancements, along with the challenges faced by accession.

While we cannot purport to know the future, we can determine with some degree of accuracy how far Europol and the future of investigative co-operation have traversed down the supranational path and whether action is

³ Gaping holes in co-operative policing along the Anglo-Irish border could not be resolved while the socio-political situation in Northern Ireland remained incompatible with measures necessary to resolve this.

necessary to curtail this.⁴ By examining the integrative makeup of investigative co-operation outside pre-JHA, it becomes possible to ascertain the underlying co-operative typology endemic to counter-terrorism. In understanding the raw material, so to speak, it becomes possible to appreciate how it will react to incorporation within an intergovernmental sphere, which itself bobs on supranational “water”. This achieved, we can next determine how secure Europol’s intergovernmental fetters are, and the strength of any supranational pull. Having established this, we are now in a position to clarify Europol’s location within the JHA sphere and any occurring drift. Beyond this, though, we are also able to question whether the intergovernmental approach is the most conducive to co-operation. The previous two chapters have raised some concerns regarding the issue of accountability, and here we shall revisit the argument that addressing the democratic deficit brings us closer to the federalist position. Would a two-speed Europol address some of these concerns?⁵

⁴ The thesis’s analysis of intergovernmental policy via comparison with other integrative theories is a great boon in helping to determine possible outcomes – currently unforeseen – emerging from JHA policy. An awareness that not all areas of JHA policy operate at their most effective under intergovernmental conditions, and that intergovernmental control over other areas, such as certain aspects of border security, is not absolute, allows us to appreciate that changes, neglected on the intergovernmental timetable can occur.

⁵ The concept of a two-tier Europe recognises that not all Member States are able or willing to proceed towards integration at the same pace, and that procedures should be established to administer this. (Tindemans Report, 1975). However, the Member States argued that a two-speed Europe would be damaging to the uniform application of the *acquis Communautaire*, the budget and solidarity. The reality, however, is that while the policy of a two-speed Europe does not exist *de jure*; it is essentially *de facto*. The exchange-rate mechanism and subsequent Euro-currency membership; Schengen; and the ensuing “opt-ins” for the UK, Ireland and Denmark, are just some examples of divergence within EU uniform policy. Additionally, the membership enlargement process of 2004 will require these new Member States to operate at a different level in certain areas of integrative policy. Internal borders, for example, will remain in effect until their “flanking measures” are judged to be sufficient. Insofar as Europol is concerned, could it operate at a deeper integrative pace for those Member States who wished to sign up to this, whilst maintaining its current co-operative level?

Investigative co-operation against terrorism in Europe has been nailed to the mast of the EU's law enforcement flagship in the wake of 11 September. Only by understanding Europol's construction and how susceptible it is to the integrative influences inherent to the European Project is it possible to determine the direction of co-operative law-enforcement counter-terrorist policy in Europe.

The composition of non-JHA Counter-terrorist co-operation

Under this particular heading the co-operative structures discussed in Chapter V are re-examined from the perspective of their placing within the concept of European co-operation, rather than their actual role. Interpol, Trevi, the PWGOT, and intelligence agency co-operation have all influenced, to some extent, the co-operative structure of the Third Pillar.

Interpol

It may seem peculiar to begin this analysis by focusing on what is effectively an international structure, and therefore one possessing tenuous links to European integration at best. Indeed, Interpol's primary function has been to serve as a means of communicating between national police bodies. This would be to ignore, however, the European origins of Interpol, its part as the initial focal point in European police co-operation, and the continuing role it plays.

As explained in Chapter V, Interpol is not a political body; its membership is composed of police agencies, not governments. It eschews politics. Its deformation by the Nazi state for political policing is seared into Interpol's institutional memory, hence its initial constitutional impediment against tackling terrorism. If it is not political, does that mean that it cannot be involved in integration? Interpol does not engage in integration, but it does provide law enforcement with experience in co-operating with one another. This experience on a day-to-day basis, however, is limited to contact through the National Central Bureaus rather than via officers from other national forces.⁶ Interpol is opposed to unofficial contact between forces, arguing that this risks duplicating other investigations, depriving the police of information and potentially even jeopardising their enquiry by failing to comprehend the possible differences between various criminal justice systems.⁷ Some countries try to check such behaviour by prohibiting direct contact, insisting that Interpol can be the only channel for this. Germany, for example, made it an offence for any of its forces other than the BKA to make an inquiry abroad or to respond to such an inquiry from another country.⁸

Such restrictions place Interpol very much as a functional tool. Even its expansion of services to the EEC states via the European Secretariat and Liaison Bureau can be construed as a response to the needs of its key users, as

⁶ The exception being the TE Group, which does "loan" out officers seconded to it.

⁷ Benyon et al Police Co-operation in Europe 1993 p128

⁸ Ibid.

was the inclusion of the counter-terrorist mandate.⁹ One cannot write Interpol off, though, as a “neutral” factor in the integration process. It did advance co-operation, but essentially for reasons of self-preservation. However, it was also kept out of the initial discussions on the formation of Europol because France was against this, believing Interpol to be an American Trojan Horse, and argued that this new policing initiative should be unique and therefore free from “older influences”.¹⁰ This very much restricts the argument that Interpol has had any significant influence in shaping the JHA structures. Neither for that matter is it conducive to facilitating neo-functionalism, due to the minimal contact process between its members. Equally, intergovernmentalism is negated by the very limited role played by governments here. To cite a particular example, although communication between the Baghdad NCB and Lyons during the Gulf War nosedived, within weeks of its end the Iraqis were seeking help in connection with ancient art treasures worth millions of pounds stolen from Iraqi museums under cover of war and spirited onto the illegal international antiquities market.¹¹ Technical imperatives rather than political ones drive Interpol’s expansion: the organisation has expanded its services as new technology becomes available (in addition to the requisite financial

⁹ The disgruntlement from European police forces regarding the quality and range of Interpol’s services, prompted the General Secretariat to establish a European Secretariat in 1985, as part of its reform programme, aimed at enhancing European police co-operation. This expansion continued with the creation of the European Liaison Bureau in 1988 focusing on Euro-specific issues, as well as providing Europe with a liaison unit within the Secretariat. These measures, however, were to make Interpol more attractive to its European members, as it feared the possibility of a new rival policing structure. The figures clearly illustrate Interpol’s concern in addressing these issues: The Council of Europe members account for eighty per cent of Interpol’s usage while the EC Member States (The Twelve) accounted for forty per cent. In funding terms the EC provides a third of Interpol’s income, with an additional twenty per cent above their annual subscription to fund six liaison officers at the General-Secretariat to coordinate drugs enquiries. (House of Commons Home Affairs Committee 7th Report Practical Police Co-operation in the European Community Session 1989-90 363-I pp 3-4)

¹⁰ Anderson et al Policing the European Union 1995 p 70

¹¹ Fenton Bresler Interpol 1992 p 213

resources) displaying the Darwinian necessity to evolve or die. The purpose that maintains and drives Interpol is to serve as a conduit for facilitating international police co-operation only. In this way, it isolates itself from European police co-operation because the structure-building here does not reflect its own specific purpose and mechanisms. Indeed, European advancement in this field is potentially dangerous for Interpol as it creates rival structures,¹² hence the initial criticism that Interpol's General Secretary, Raymond Kendall directed at the creation of Europol.¹³ Interpol's actual influence on European law-enforcement co-operation is therefore limited to the experience obtained by those players participating in Interpol, and transferring it to their own programme.

Trevi

Trevi, as a unique EC construct, provides us with a better understanding of the influences at play within the European context than Interpol, with its European membership subsumed within its international emphasis. As precursor to Europol, Trevi's position in counter-terrorism underlines the approach taken by European governments in this field. This approach is emphatically intergovernmental in origin and administration; although mirroring to some degree the regional intergovernmental border agreements, a significant level of devolution was also granted to Working Group I: counter-terrorism.

¹² In the sense that the EU Member States could use an internal structure to replicate the services offered by Interpol, thereby bypassing Interpol at the regional level.

¹³ Bresler, *Op. Cit.*, pp 391-6

Trevi was the first experiment of its kind to be conducted against terrorism, an issue that greatly concerned the EC governments at the time, as it does so again today. This concern, coupled with the sensitive nature of the work, ensured the exercise of significant government control. The ministerial involvement lay at the heart of Trevi's controlling body, the Trevi Steering Group (although Trevi itself was a non-treaty based organisation). This group's following of the *troika* and later the *piatnika* (1989) system of chairing demonstrated the emphasis on political policy control.¹⁴ Beyond this, though, was the governments' desire not only to isolate, but to hide Trevi's existence from the EC institutions – so strong was their commitment to maintain absolute intergovernmental control. Ironically, although both politically and operationally sensitive, counter-terrorism often tends towards the need for urgency. Consequently WGI developed a “more powerful” bottom level, which could be “mandated to do more” than the other working groups, in order to bypass bureaucratic procedures.¹⁵ This measure of autonomy for the elite-actors of WGI, however, was not sufficient to lead to any influx of supranational influence such as neo-functionalism. By ensuring that WGI was “mandated”, the governments maintained their control; WGI could not undertake measures that had not already been “mandated” in the first instance, rather it was granted the flexibility necessary to do its job. Equally important, though, is the concept of national awareness, imbued in these

¹⁴ The *troika* system was a means of maintaining policy continuity in the EC, introduced in 1977, as an operational necessity for European Political Co-operation, whereby the country holding the presidency along with the immediate predecessor and successor presidencies chaired ministerial meetings.

¹⁵ Lisa Riley Working Paper X: Counterterrorism in Western Europe, Mechanisms for International Co-operation A system of Police Co-operation in 1992, 1992 p 41 (Quotations by F. J. Mulschlegal of the Netherlands Police Studies Centre, and a member of the Dutch representation on WGII)

officers through countering a threat that is directed against the sovereignty of their own country, thereby establishing a form of prophylactic against supranationalism.

The intergovernmental approach does have a particular weakness in the fact that it generally reacts to developments, rather than relying on a continued growth pattern. After 1977, WGI entered a lull in development growth because of the absence of any major new terrorist threat. Only with a flare-up of international terrorism in the mid-1980s did Trevi engage in any new enhancements, following a summit meeting in June 1985. In integrationist terms, this identifies Trevi as reactive rather than organic in enhancing co-operation. A forceful neo-functionalist-orientated approach would have given greater concern to the advancement of co-operation, rather than limiting co-operation to that of a pre-determined level, unable to build upon that without intergovernmental sanction. In other words, even if Trevi were in a position to expand its abilities, it could not do so without unanimous political approval. "Task Expansion" is therefore enacted via intergovernmental policy, rather than through neo-functionalism. From a practical perspective this can hinder counter-terrorism as it becomes difficult for co-operation to evolve at a natural pace, "matching" the learning curve of the terrorist groups, and thereby being unprepared, in co-operative terms, for the next development in the "politics of the latest outrage".¹⁶ However, as we have already noted (Chapter IV), this argument has another side to it: the necessity for democratic accountability. It would have been politically impossible for Trevi to have expanded unchecked,

¹⁶ Paul Wilkinson *The Lessons of Lockerbie* Conflict Studies No. 226 p 7

not so much because of socio-political concerns about terrorism, but because powerful police institutions evoke strong memories in Europe.¹⁷ One can reasonably conclude, therefore, that the development of Trevi was best suited to intergovernmental practice, in the absence of any sophisticated co-operative infrastructure capable of addressing these concerns.

The PWGOT

The PWGOT is another intergovernmental structure, although at first blush its appearance suggests a neo-functionalist dominance, due to the leading role assumed by police officers throughout, especially when one considers that it was disgruntlement with the degree of ministerial control over Trevi that led to the creation of the PWGOT. This, however, would be to ignore the various governmental directives which impose ceilings on the discussions that their police and intelligence agencies may be involved in, frequently stamping information with requirements of “no foreign dissemination”.¹⁸ Beyond this censorship, though, the governments have kept out of the working group’s affairs. In this respect, the PWGOT provides an interesting microcosm of integrationist study. Its initiation, agenda, co-ordination and administration are entirely elite-actor orientated; yet it has remained consistently within the intergovernmental dictate. This outlook reflects the political thinking of the time where neo-functionalist critics such as Stanley Hoffman argued that a distinction existed between “high” and “low” politics, and that integration

¹⁷ German public opinion against the computerised profiling of terrorist suspects (Beobachtende Fahndung ‘BEFA’) forced the government to scrap the programme in 1981, despite its high rate of successes, because it was seen as too intrusive into public life.

¹⁸ Peter Chalk West European Terrorism and Counter Terrorism 1996 p129

affecting the former (positive integration) would compromise the autonomy of the state. Consequently this area possessed near immunity from any impact or “spill over” from the negative integration ongoing in the welfare-economic sector.¹⁹ Even some neo-functionalists such as Lindberg and Scheingold accepted this division, although they did not view it as a timeless one.²⁰ With the EEC entering a decade-long period of integrationist atrophy however, supranational theories looked increasingly dead in the water.

Haas always maintained however that there was no permanency about the qualities of “high” politics: “Whether ‘politics’ is more important than ‘economics’ is an empirical question, not a dichotomy given by nature”.²¹ He saw it as dependent upon the particular individual or group ascendancy for the traversing of this barrier.

The revival of European integration in the mid-1980s, including that of neo-functionalism as a possible explanation for the advances in police co-operation that were beginning, vindicates Haas’s position, but nevertheless cuts little ice with the development of the PWGOT, which has changed little from its initial intergovernmental blueprints.²² The explanation of the PWGOT’s solid adherence to intergovernmental policy rests partially with the politically imposed ceilings on particular areas of co-operation, but equally this could

¹⁹ R. J. Harrison Europe in Question 1975 pp 58-61, 197-201

²⁰ *Ibid.* pp 198-200

²¹ “The Study of Regional Integration: Reflections on the Joy and Anguish of pre-theorising” *International Organisation* XXIV, 4, 1970 pp 629-30 cited in R. J. Harrison *Op. Cit.*, p 199

²² The revival of the integrative process, and its quickening tempo, reflected a renaissance in neo-functional theory, illustrated by the *functional* and *political spillover* occurring throughout Europe. Anderson explains that the former relates to the process of integration, from a predominately structuralist perspective, undermining the effectiveness of existing policy, similar in many respects to the classical definition of spillover. The latter however, is predominately agency-based, occurring where the existence of supranational organisations triggers a self-perpetuating process of institutional development. Policing, as part of the “1992” process typified this integrationist expansion. (Anderson et al, *Op. Cit.*, p 94)

have been due to pressure from below, as police co-operation began to expand within the EU matrix. That it did not implies that no pressure from below was forthcoming, because the ultra-informal “construction” of the PWGOT is not conducive to supranationalism. The PWGOT was created because counter-terrorist officers eschewed the politics and bureaucracy of Trevi (even though the latter was limited). The PWGOT has no real administrative machinery; to advance the PWGOT in further areas of co-operation would be to complicate it, and would require such machinery. It is for this reason that the PWGOT happily stays within the intergovernmental sphere. Task expansion cannot occur without such machinery, due to the sensitive area in which the PWGOT is involved.

Intelligence agency co-operation

Prior to the events of 11 September, the co-operation engaged by the intelligence agencies of the European Member States was very much limited to the intergovernmental approach. This was because these agencies represented what Hoffman refers to as:

the ineffable and intangible issues of *Grosspolitik* when grandeur and prestige, rank and security, domination and dependence are at stake.²³

²³ Stanley Hoffman “Discord in Community” in Francis O. Wilcox and H. Field Haviland, Jr., (eds) *The Atlantic Community, Progress and Prospects* (New York, Praeger, 1963 p 13) cited in R. J. Harrison Op. Cit., p 201

Indeed the mechanisms built to accommodate intelligence agency co-operation have been particularly informal outside the European Project, ensuring inoculation against supranationalism. Only within the confines of military intelligence, has co-operation been particularly advanced, but again these remain within the limitations of intergovernmental policy. Does the recent partial inclusion of intelligence agency co-operation against terrorism within the parameters of the JHA sphere portend a possible breaching of this previous imperviousness?

As intelligence agency co-operation currently stands within the JHA continuum, attached loosely to a counter-terrorist team within Europol, and an informal forum for intelligence chiefs to gather and discuss matters, the probability of supranational influences affecting the co-operation is exceptionally low. The manifestation of the co-operation is extraordinarily simple in its mechanics, mirroring that of the PWGOT, thereby rendering it a particular immunity. Additionally, involvement with intelligence agencies encourages an awareness of national policy, in effect helping to prevent the syndrome of "going native" when involved in the JHA continuum.

Paradoxically, the growth of intelligence agency involvement in countering criminal activity will increasingly bring these agencies into contact with JHA co-operation, opening those departments or units involved in these areas to the possible susceptibility of supranational infiltration over the long-term period.

Conclusions about the composition of the non-JHA counter-terrorist co-operation

Insofar as the co-operative compositions of these structures are concerned, one sees that, for the most part that they all lack any strong display of supranational tendencies. Interpol alone, which owes no allegiance to any state or region, rather to its member police agencies, has shown the ability to expand the services it offers independently – subject to finance.

Consequently, its position lies closer to the functionalism exhibited by the institution of the United Nations than it does to intergovernmentalism. By contrast, the exclusive European structures have been dependent on intergovernmental instruction in their expansion. It is clearly apparent, however, that there is an inbuilt self-checking quality within counter-terrorism co-operation at this level that has encouraged governments to adopt a relatively hands-off approach, confident in the knowledge that their officers have no wish to involve themselves in co-operation building that might threaten the preferred loose networking system that they have developed. This lack of integrative ambition noticeably places this type of co-operation at odds with the development of the EU's JHA field, which is altogether much more "assertive" in its structural design. That is to say, JHA C-T development is one that continues to develop its range and powers, and is squarely associated with the process of EU integration, whereas the more traditional areas of C-T co-operation remain relatively distanced from JHA policy, and less ambitious in co-operative terms. Does, then, the provision of a counter-terrorism mandate to a permanent and regulated structure, located in the centre of EU

co-operation, rather than on the periphery, imply a different outlook, and consequently a different approach?

The composition of JHA counter-terrorist co-operation

Under this heading, the co-operative structures discussed in Chapter VI are re-examined from the perspective of their placing within the concept of European co-operation, rather than their actual role. The principal focus is directed at the European flagship, Europol, which represents the culmination of investigative co-operation to date.

Europol

The precursors to Europol have been comfortable in following an intergovernmental approach to facilitate co-operation against terrorism, and one might reasonably expect Europol to follow suit. Europol, however, is a unique construct in terms of police co-operation, through both the services that it provides, and also the strong latent supranationalism with which it has become associated. No other structure focusing on investigative law-enforcement co-operation has inculcated such associations before. It has the potential to take European policing into an entirely new dimension. The acquisition of the counter-terrorist mandate in 1999 began Europol's push to be at the forefront of co-operative action against terrorism. How secure, then, are the intergovernmental checks, and how potent a force is this latent supranationalism?

Intergovernmentalist Structure Building

Europol was designed as a means of asserting intergovernmental primacy within the sphere of EU law-enforcement co-operation. Its blueprints were decided upon after a protracted period of intergovernmental bargaining, designed to squeeze out any supranational elements inherent to the process. The drafting of a Convention to further secure Europol's intergovernmental position, along with a watch-dog body, illustrate the desire of the Member State governments to retain control of Europol, and not let it fall into the hands of the EU institutions.

Establishing Europol was a particularly convoluted process, resulting in two missed deadlines before the Convention – of which there had been at least seven drafts – was ready to be put forward for signature on 26 July 1995.²⁴ Much of the delay centred on “technical” legal issues, especially the controlling mechanisms such as political accountability, budgetary control and legal protection.²⁵ The thorny question of the European Court of Justice and its jurisdiction over Europol was the bone of much contention.²⁶ Germany

²⁴ Statewatch *EU in disarray over Europol Convention* Vol. 4, No. 6 November-December 1994, p 16.

30 November 1993 and October 1994 were the two initial deadlines.

²⁵ Willy Bruggeman, *Europol: A Castle or House of Cards?* in De Schengen à Maastricht voie royale et course d'obstacles (ed.) Alexis Pauly, p27

²⁶ The Court is one of the supranational institutions of the EU, and ultimate arbitrator of community law. It has described its definitive rationale as to enable “the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States”. It looks behind the wording of texts to the underlying objectives of the Treaties, as expressed in their preambles, with their constant refrain of progressive realisation of the European Union. Where the fundamental purpose of a piece of legislation is broader than its literal meaning, the ECJ generally treats the purpose as overriding specific provisions. On this basis, staunch supporters of intergovernmentalism could have cause for concern, as it would be possible for the Court to revise a particular Article of the Convention, were it brought before it, to an end more attuned with supranationalism than intergovernmentalism.

supported the view that the Court should have uniform interpretation over the Convention, while France and Britain, ever suspicious of supranational expansion, espoused the primacy of the national courts. The position of the Euro-enthusiastic Benelux Countries heightened the debate: they declared that they would not ratify the Convention until the matter had been resolved, their patience over the numerous delays having finally buckled.²⁷ A classic compromise, archetypal of intergovernmental bargaining, resolved the matter through the introduction of an optional protocol, declaring the signatory's consent regarding the Court's jurisdiction in these matters, which was agreed on 24 July 1996. Only the UK did not sign up to this protocol.²⁸

One should understand that if the Member States wished to isolate Europol from all supranational contact, they would have placed it outside the context of EU co-operation as a whole. Doing so however would make Europol little different from the previous structures. The involvement of the European Court of Justice therefore provides Europol with an anchor to the European Project. Unlike an anchoring to the Parliament or the Commission, the Member States' control of Europol remains more or less absolute, because the Court's involvement is reactive, not proactive, and limited to interpretation only. Equally, its jurisdiction was seen as the necessary solution to potential

(Timothy Bainbridge and Anthony Teasdale The Penguin Companion to the European Union 1995 pp 97-100; Rodney Leach A Concise Encyclopaedia of the European Union from Aachen to Zollverein 1998)

²⁷ F. Verbruggen, "Euro-Cops? Just Say Maybe. European Lessons from the 1993 Reshuffle of US Drug Enforcement" in European Journal of Crime, Criminal Law and Criminal Justice 1995 - 2, Vol. 3 pp 150-201, p192

²⁸ Statewatch Europol "compromise" protocol agreed Vol. 6, No. 4 July-August 1996, pp 21-2

future sticking points relating to interpretative disputes between Member States, which could impede both Europol's progress and performance.

The other impediment responsible for the protracted negotiations was the debate over what should be included in Europol's mandate, specifically terrorism. A counter-terrorist role had been stated in Article K.1 (9) of the TEU, as well as agreed in principle by the JHA Council in November 1993, but some Member States retained reservations regarding its sensitivity. Both the UK and Germany wished to maintain the existing Trevi and PWGOT networks, thereby keeping counter-terrorism outside the purview of the JHA Council and the need to report to the K4 Committee.²⁹ Indeed, the meeting of the JHA Council on 30 November 1994, prior to the 9 December Essen Summit, became so involved in protracted argument on this issue that other important issues regarding Europol were not discussed; in total the meeting achieved nothing, resulting in these unresolved issues having to be carried over onto the new French Presidency in January.³⁰ Without dwelling too much on the differing standpoints taken at this particular meeting, its heated nature clearly illustrates the intergovernmental-driven bickering and bargaining endemic to Europol's establishment.

The stand-off was finally resolved in April 1995 after Spain adopted the intergovernmental equivalent of gunboat diplomacy, raising the contentious issue of Gibraltar's status vis-à-vis the External Borders Convention in an effort to force Britain's hand. Spain had long seen Europol as a potential

²⁹ *Statewatch*, Op. Cit., 6 November-December 1994, p 16

³⁰ *Ibid.*

weapon against the ongoing Basque terrorist campaign, and along with Greece (another Member State with an ongoing terrorist problem), it had canvassed for some time to have the mandate included. This pressure led to its provisional insertion in the June 1994 draft. The German Presidency, aware of the pitfalls surrounding this particular mandate, preferred to adopt a gradualist approach, addressing nuclear crime in the initial brief, with other aspects of terrorism to be included later. Spain was unhappy with this approach, and thus resorted to “playing hardball”. The subsequent French Presidency proposed another compromise, one that addressed the complications of this thorny issue. Europol’s mandate would be extended to general counter-terrorism matters two years after the Convention’s signing was completed. This delay was designed to allow a breathing space for Member States to prepare for the incorporation, at the same time granting Europol a “warming-up period in less stormy waters”.³¹ This later changed after the Convention’s adoption, to two years following *ratification*.

Europol’s journey from concept to actuality was an arduous one, prone to delays caused by the intransigence and legal complexities associated with negotiating intergovernmental co-operation. The determination with which Member States engaged in addressing individual national concerns left little place at the table for supranational issues. However, it was also intergovernmental bargaining that produced consensus resolving these issues. The concept of a European police force, involved in tackling political-orientated crime, has touched a nerve not only with those Member States that

³¹ Verbruggen, *Op. Cit.*, p192

suffered Nazi occupation, but also with those who became Soviet client-states.³² So sensitive was the issue of Europol to the Member States that at the Brussels Summit of 10-11 December 1993, the decision was taken to replace the Ministerial Agreement designated for Europol with that of a separate convention within the Third Pillar. This convention reflected Europol's uniqueness, whilst bolstering the intergovernmental foundations within the Third Pillar. No serious dissent was raised over this (unlike with the terrorism issue), but the negotiation process concluded at the Cannes Summit was, in Verbruggen's words, "a painful affair".³³

The Europol Convention

The Member State governments established the Europol Convention to securely fix Europol to the intergovernmental approach. Europol would remain so affixed until (or if) the EU reached a stage of integration where this approach would no longer be sufficient. How then does the Convention maintain intergovernmental control?

As a codification of its mission statement, the Convention controls the direction in which Europol may move. Only with the unanimous consent of the European Council can the Convention be modified, and only then after the matter has first been discussed with the Management Board (see below).³⁴

The amendment may then enter into force once all the Member States have

³² Advances in the EU have reached the stage that some thought must also be given as to how the accession states will be able to incorporate them.

³³ Verbruggen, *Op. Cit.*, p151

³⁴ Article 43 Europol Convention.

ratified the change (Article 45(2)). Significantly, the Convention does not allow Member States to enter into reservations, thereby preventing a fragmented or multi-speed Europol from developing (Article 44).³⁵ Again with the consent of unanimity, the European Council, after consulting the Management Board, can act on the initiative of a Member State to “amplify, amend or supplement” the definitions of criminal acts contained within the Annex, as well as introducing new ones (Article 43(3)). In this way, the Member States are able to expand Europol’s mandate. In this last matter, ratification is not required, merely unanimous consent. The purpose is not aimed at altering the Convention but to establish a speedier process when dealing with alterations to Europol’s criminal mandate.

As we can see, the Convention is not cast in stone; it is open to change. The key factor to note is that unanimity by the Member States is a necessary condition of this change, not qualified majority voting, very much reinforcing the concept of intergovernmentalism. The other EU institutions play no part in forcing such change. Europol has been designed to advance at the pace of its slowest or most reluctant member, and not to leave any behind.

The Convention also details the role of Europol’s Director and Deputy Directors, who are appointed by the European Council (Article 29) and answerable to the Management Board, which has the power of dismissal if necessary. This watchdog is composed of one representative from each Member State (Article 28). Its role includes overseeing Europol’s strategy,

³⁵ The Protocol regarding the ECJ was signed before the Convention became active.

including the Director's performance, finances and the composure of annual reports on Europol's activities. The Board exercises its intergovernmental control in that *it may invite* the Commission to attend its meetings, although its representative has a non-voting status (Article 28(4)). Interestingly, the Board's responsibilities include the one area where unanimous voting is not required: as final arbitrator in disputes between Europol and the Member States, subject to a finding of two-thirds majority (Article 28.1(21)). In support of this watchdog, the Convention also maintains a National Supervisory Body (Article 23). This construct is composed of national bodies designated by Member States to monitor independently, in accordance with respective national laws, the permissibility of the input, and the retrieval and communication to Europol of personal data by the Member State concerned, along with their ELOs and their duties.

The Member States also retain significant sway over Europol by controlling the purse strings. Unlike many other elements of the Third Pillar, which, after Amsterdam, receive their funding from the EU central budget, Europol receives its directly from the Member States.³⁶ By maintaining control here, the Member States are in a position to check Europol's activities (if circumstances were such that this were ever required). When Europol received its counter-terrorism mandate, for example, an increase in its budget allocation was required.³⁷ By connotation, neo-functionalist task expansion

³⁶ Treaty of Amsterdam Article 41.3; European Parliament Session Document 1999-2004, 16 May 2002, A5.0173/2002, RR/469336EN.2doc, Rapporteur: Gérard M.J. Deprez *Protocol on Amending the Europol Convention* (title abridged) Paragraph I, Recommendation 2

³⁷ The 2000 budget was set at €27,446,000, a significant increase from the 1999 budget of €18,896,000. The lion's share of this (€7 million) was required for the new TECS; the remainder for the mandate increases of money laundering and terrorism, as well as new staff.

could not occur without the finances to pay for it; consequently, a supranational Europol could not exist under the current conditions without the support of the Member States. This practice places Europol very close to the Member States. From a pragmatic perspective, this allows a quick response to a crisis via supplementary financing. The counter-terrorist task force, for example, established after the 11 September attacks, cost an additional €3.16 million.³⁸

Equally, though, political measures can also affect such financial arrangements. The UK's threat to block the Europol Drug Unit's funding in June 1996, along with seven other law-and-order proposals, if the EU continued its ban of British Beef, is a case in point.³⁹

One should also bear in mind that the only permanent staff attached to Europol are its administrative and Information Technology (IT) staff: all others are seconded. The absence of any permanent staff in this capacity also serves as an inhibitory factor against supranationalism, particularly neo-functionalism and its elite-actor driven orientation. The process of neo-functionalist *engrenage* has difficulty amalgamating these units into a cohesive integrative force if Europol's staff retains a nationalist outlook.⁴⁰

(29th Council Meeting – Justice and Home Affairs – Brussels, 2 December 1999 *Tampere Follow-up-Preparation of the Scoreboard* Section: Europol: Budget for the Year 2000)

³⁸ Europol Annual Report 2001, p26

³⁹ The UK's contribution amounted to 13% of the Europol budget.

Daily Telegraph *Howard set to block Europol drug budget* 4 June 1996 (online edition)

⁴⁰ One could argue that other EU institutions also contain an element of seconded staff, but these institutions were devised as supranational in the first place. The concept of supranationalism emerging from an intergovernmental structure has yet to occur.

In constructing Europol, the Member States have aimed at wedding it firmly to the concept of intergovernmentalism, designing control mechanisms to keep it securely on this track. Fundamentally, no significant alterations can be made to Europol without unanimous consent. Practically, this approach is well suited to a structure comprising a counter-terrorist role, as it allows the circumvention of much red tape in the event of rapidly changing circumstances. Moreover, it maintains this sensitive policing role in the hands of the Member States. One might say that Europol has been seconded to the EU by the Member States, rather than fully integrated into it. The length to which the Member States have gone to ensure intergovernmental authority over Europol does, however, raise some curiosity as to why this has been necessary.

Dormant Supranationalism?

The “double-locking” of Europol to intergovernmental policy via incorporation into the Third Pillar and through a Convention implies an element of concern by the Member State governments regarding the placement of Europol within the JHA gamut. Originally, the Convention had not been a foreseen requirement, implying that the Member States believed it a necessary requisite later on. Such measures ensured a stronger association with intergovernmental co-operation. Why, though, was it necessary to secure Europol so rigorously to intergovernmentalism? Did the Member State governments fear a “hijacking” by supranational EU institutions or a drifting

of Europol away from intergovernmental control; if so, was this because Europol contained a supranational legacy?

The Legacy

The establishment of a European Police Office had been a vision of German politicians since the 1970s (although not its BKA Chiefs).⁴¹ Their enamour stemmed partially from Germany's "zealous advocat(ion) of official extension of police co-operation with neighbouring countries", and from sharp criticism against Interpol, especially in British, German and Dutch police circles.⁴²

Politically, the view was that an EC federal police force would not only act as a jumpstart to the dormant integration process, but would also serve as another means of alleviating war-guilt as Germany strove to develop her credentials as a good European.⁴³ Additionally the police failure at the Munich Games and the rise in international terrorism demonstrated the appeal of a centralised response.

The "Europol" became a particular *idée fixe* of Chancellor Kohl, and throughout the 1980s it moved ever closer towards official government policy. Kohl's vision differed from Wolfgang Schaüble's, his Interior Minister, who saw it as a support agency, not a European FBI.⁴⁴ The BKA chiefs finally

⁴¹ C. Fijnaut *The Schengen Treaties and European Police Co-operation* European Journal of Crime, Criminal Law and Criminal Justice 1993-1, p 41

⁴² *Ibid.*, p 40; C. Fijnaut *Police Co-operation within Western Europe* in Frances Heidenson and Martin Farrell (eds) Crime in Europe 1991, p 105

⁴³ If the European Coal and Steel Community's purpose was to prevent war between Germany and France through the sharing of these industrial resources, then the thinking was that a European police force would prevent the emergence of a powerful police state within Germany.

⁴⁴ Fijnaut, *Op. Cit.*, 1993, p 42

came onboard for pragmatic reasons. The events of 1989 and the rapid meltdown of the Soviet Union forced a rethink among Germany's senior police officers. Reunification brought with it a mafia class from the East, and the eastern borders were now porous without the Iron Curtain.⁴⁵ Such senior officers discounted Kohl's FBI-style agency as "Zukunftsmusik" (pie in the sky). They could only envisage this as a possible long-term attainment.⁴⁶ Other police forces were equally as sceptical regarding a Europol with operational powers: "Not...in a million years," confided a senior British officer, who saw problems with organisational difference, accountability and sensibility as the underlying factors prohibiting such a move.⁴⁷

The concept of a supranational legacy does not therefore stand the test. Only elements within the German political establishment, spearheaded by Chancellor Kohl, favoured a European-type FBI. Other European leaders and Europe's law-enforcement authorities did not take this view. Certainly the notion of a Europol began as an integrative and federalist concept, but it was held by a minority within the EC/EU who ultimately did not have the strength to force the issue, despite representing one half of the integrative "motor of Europe". Rather Kohl's proposal was adopted as an intergovernmental response to the ongoing progress within the SEA, and as a necessary component of the future European Union. Europol's conceptual origins do not provide it with a supranational latency, but, as an organisation in its own is it

⁴⁵ Berlin for example was considered by law-enforcement officials to be the centre of Russian mafia activity in Europe, with approximately 30,000 ex-soviet citizens as residents. (Christopher Ulrich *Transnational Organised Crime and Law-Enforcement Co-operation in the Baltic States* Transnational Organised Crime Vol. 3, No. 2, Summer 1997 p 124

⁴⁶ Anderson et al, *Op. Cit.*, p 83

⁴⁷ *Ibid.*, p 82

capable furthering co-operation via its elite-actors as defined in neo-functional theory?

The Director and Management Board

“Better to have him inside the tent pissing out than outside the tent pissing in,” was the typically frank opinion of President Lyndon Baines Johnson regarding his FBI Director, J. Edgar Hoover. Whatever his faults, no one can deny that Hoover helped to establish an impressive law-enforcement agency, leaving behind a lasting legacy by stamping his own image on the Bureau. LBJ’s statement acknowledges the power wielded by Hoover. The influence wielded by the Director of Europol, currently Jürgen Storbeck, thankfully cannot match that of Hoover’s, primarily because tenure of the post is limited to a maximum of two four-year terms (Article 29), rather than Hoover’s forty-eight year incumbency.⁴⁸ Nevertheless, the Directorship retains significant scope for influencing Europol’s direction. Much of this depends on the measure of the individual and their abilities. One sees a remarkable difference between the vibrancy of Jacques Delors Presidency (of the European Commission) and the mediocrity of his successor, Jacques Santer, whose Commission collapsed under corruption scandals in its first term. The example of Hoover also illustrates the considerable influence that can be brought into play by a proficient individual. A new institution requires a strong and dynamic leader to captain it through the initial growth period of the first few years. This figure can be decisive in shaping the different tasks, strategies and goals of

⁴⁸ Storbeck was given an initial five-year term as the first incumbent.

Europol's mission.⁴⁹ Storbeck can be considered such an individual (he was once tipped to succeed Raymond Kendall as Interpol's General Secretary).⁵⁰

Whilst Europol is an intergovernmental body, one should bear in mind that Storbeck's background is steeped in federal policing, having previously been deputy BKA chief, and his views and ambitions for Europol reflect this. He expressed the belief in 1994 that efficiency could be improved by equipping Europol with a central computer and providing it with similar powers to the BKA (but without the executive role involved within investigative powers).⁵¹

Later he advocated the creation of "international task forces" whereby national police authorities could take necessary investigative action in their own state, but the investigation itself would be centrally led.⁵² The establishment of the TECS addressed the former concern and Amsterdam and the Conclusions at Tampere addressed, to a fair extent, the investigative requirements, permitting Europol to request national authorities to conduct investigations on its behalf.⁵³ While Storbeck admits that Europol presently stands as "a platform for and an expression of intergovernmental co-operation", he himself prefers to perceive Europol as an "almost federal central police agency comparable with the Bundeskriminalamt (of course without the latter's powers of

⁴⁹ Verbruggen, Op. Cit., p 165

⁵⁰ Bresler, Op. Cit., p 391 and p 388

⁵¹ FECL 21 *Europol Chief Jürgen Storbeck Tells Tales Out of School* December 1993/January 1994

It should be remembered that the BKA was the first European police force to effectively utilise computers in a policing capacity, when it employed the *Beobachtende Fahndung* (BEFA) analysis system against the Red Army Faction.

⁵² FECL *Europol Chief Storbeck on the State and Prospects of his Agency* November 1996

⁵³ Recommendation 45 of the Tampere Summit.

investigation)".⁵⁴ Indeed Storbeck's BKA past is very likely responsible for his advocacy of executive powers for Europol. In a speech to the UK Police Foundation he argued that "the calls for...executive powers may prove irresistible" if the Member States fail to supply sufficient good quality information, and "we may have to go and find it".⁵⁵ Storbeck is sufficiently sanguine on the eventual inclusion of executive powers:

The Convention does not (*yet!*) give Europol any executive authority. Europol officials are not empowered to arrest criminals, carry out searches or seize evidence. There is no EU-wide legal basis (*yet!*) for discharging any such powers⁵⁶

An energetic Director, one must conclude, does have some bearing on the direction of Europol. Does this relate, though, to any supranational influence? Neo-functionalism springs most readily to mind as a possibility: are the Director and his deputies sufficiently powerful to initiate an elite-actor driving force? A reassessment of the Convention's controlling mechanisms in relation to the Director's powers provides something of an answer to this.

Internally, Europol's Director wields an impressive array of powers. The Director, for example, maintains authority over all Europol's employees

⁵⁴ Speech given at the fourteenth Conference of German Länder Ministers Responsible for European Affairs in October 1996. Cited in *FECL* 48 *Europol Chief Storbeck on the State and the Prospects of his Agency* November 1996

⁵⁵ The Police Foundation 1999 Lecture, 21 September cited in *Independence The European Police Force – A New Threat to Britain* No. 40, Autumn 1999

⁵⁶ Storbeck addressing the Garda Síochána Conference *The Challenge of Change – Policing 2000 A Europol Perspective* Dublin 27 September 1999

(although less so regarding the semi-autonomous ELOs). Article 29 (3) details the Director's main responsibilities:

- 1) performance of the tasks assigned to Europol;
- 2) day-to-day administration;
- 3) personnel management;
- 4) proper preparation and implementation of the Management Board's decisions;
- 5) preparing the draft establishment plan and draft five-year financing plan and implementing Europol's budget; and,
- 6) all other tasks assigned to him in this Convention or by the Management Board.

Particularly interesting is the fact that Article 32 extends the Director's powers beyond the propinquity of Europol. The Director may prevent any member of staff from providing evidence in court without his permission, if he judges it "necessary to protect the overriding interests of Europol or of a Member State or States that need protection" (Article 32/3). Indeed, staff possess immunity from prosecution, unless waived by the Director.⁵⁷ The case of the Europol official arrested in May 2001 by the Dutch police for embezzlement of the

⁵⁷ Article 8 of the *Protocol on the Privileges and Immunities of Europol, the Members of its Organs, the Deputy Directors and Employees of Europol, 1997*. Such immunity is a necessary condition of working in a centralised organisation dealing with acts that transgress the national laws of Member States. Occasions may arise when an employee has unwittingly infringed some such law in the execution of his duties. Without such immunity, Europol might well be a hazardous environment in which to work.

Europol budget, however, demonstrates that Article 32 is not expected to be employed other than in a professional capacity.⁵⁸

The counterweight to the Director is the Management Board, but in reality, its powers are limited. The Board's duties as declared in Article 28 provide for a light supervisory touch. Article 28/1.9, for example, "shall examine problems which the joint supervisory board brings to its attention" and allows it to "deliver opinions on the comments and reports of the joint supervisory body" (Article 28/1.8).⁵⁹ These measures are hardly sanctions. Other than its role, along with the Director, in drawing up the budget, the Board has very little influence in the day-to-day running of Europol, or over the Director. Its only real teeth are contained in Article 29/6, but even these are more or less drawn. The Board may only *recommend* the dismissal of the Director to the JHA Council. (No other censure options exist other than the non-renewal of contract if the incumbent is still in their first term). The dismissal of the Director would be very much a political and controversial action (unless he had committed some criminal act) requiring unanimity. Just as no European Commission President has been dismissed, the chances of dismissing a Europol Director are equally as remote. To do so would be to attract enormous critical attention towards Europol as an institution.

⁵⁸ The Director and Management Board became aware of the French official's activities, and promptly informed the Dutch CID, leaving the entire matter in their hands.
Europol Press Release 8 June 2001

⁵⁹ Article 24 provides for a Joint Supervisory Body to review Europol's activities, focusing on the rights of the individual in relation to Europol's data processing, storage, utilisation and its transfer.

We can see, then, that the Director of Europol is an important figure within the JHA continuum. The incorporation of Schengen into the EU framework, bringing its flanking measures closer to Europol's own role (especially with plans to link the TECS to the SIS II) enhances this position. To return to the question of whether the Director has the power to initiate integrative drive, one must express doubt. Ultimate power rests with the JHA Council, and through them the European Council, in terms of instigating change. The Europol Director, for all his influence, is extremely limited in this field, capable really of no more than persuasive argument. He is not the Director of a powerful supranational institution such as the Commission; his role is much more specific, limited to the law-enforcement responsibilities of an intergovernmental Europol. However, as Europol becomes more powerful, especially in light of the post-11 September enhancements, and the developing internal security continuum, so too does the Director's influence. This is a fact that cannot be ignored. The adoption by JHA ministers of a "shopping list" drawn-up by Europol officials of twenty-five amendments that they would like to see made to the Convention, permitted the officials a political mandate to draw-up concrete proposals.⁶⁰ This last point comprehensively illustrates that Europol officials are not simply executors of policy; they are prepared to lobby for change within their own organisation. Strong echoes of neo-functionalism emanate here. An intergovernmental agreement/bargain is first agreed, paving the way for later integration instigated by the elite-actors. The Europol officials demonstrate that politicians alone do not propose the changes in policy regarding Europol.

⁶⁰ *Statewatch Europol: Operational powers and a new mandate* Vol. 11 No. 3/4 May-July 2001 p 24

No compelling evidence has emerged thus far to suggest that Europol is open to transmutational influences beyond that of intergovernmentalism. Certainly, the potential exists, and indeed there are, in situ, active integrative elements other than intergovernmentalism, but these are weak in comparison to the current intergovernmental hold. Why then, scattered amongst the literature and analysis on Europol, like so many tantalising clues, are there numerous references to and remarks about a European FBI?

At the House of Lords Committee Report (12th) on the European Communities, the Minister of State for the Home Office's reply to the question of "what would have to be added to Europol to make it a recognisable fledgling FBI?" was that Europol would "have to be a completely different organisation".⁶¹ This is certainly true, and while Europol has been expanding in terms of mandate (seventeen new crimes have been added since Europol's inception⁶²) and powers, these have not been sufficient to transform it into a "completely different organisation". The proposed changes to the Convention, enabling faster enactment of amendments in the light of both 11 September and the next accession, would actually move Europol even closer to the current style of intergovernmental domination, as these would take national parliaments out of the equation.⁶³

⁶¹ House of Lords Report Committee on the European Communities – 12th Report *Correspondence with Ministers* Session 1997-98, Paragraphs 20 – 21

⁶² Statewatch Press Release *The activities and development of Europol – towards and unaccountable FBI in Europe* 7 February 2002

⁶³ Council of the European Union Amendments to the Europol Convention 6579/1/02 REV 1, Brussels 25 February 2002 paragraph 8
Amendments to the Convention currently require ratification by the Member States, which can take a long time. With accession bringing the total membership to a possible twenty-five in total, one can see that this would increase the duration.

The Democratic deficit: a bulwark of intergovernmentalism

Europol's Convention, while providing it with the highest degree of technical accountability within the Third Pillar, is also its greatest inhibitor against democratic accountability: Europol's watchdogs are internal ones.⁶⁴ Within the Third Pillar, but partially detached from it, Europol has little involvement with the EU's supranational institutions. The European Parliament's role is limited to reading Europol's annual report, and is only *consulted* on any intended amendment to the Convention (Article 34, Europol Convention). The Commission's role is just as limited, while the ECJ, although incorporated via an optional protocol, is restricted to an interpretative role. The intergovernmental argument is that Europol is accountable through the national parliaments of the Member States, rather than through any supranational organ. In truth, however, national legislatures are sidelined as much as their MEP colleagues. An addition to Europol's Annex (the list of transnational crimes against which Europol is mandated for example) is made without legislative consultation, being a matter for the JHA Council (Convention, Article 43.3). Only actual amendments to the Convention receive legislative attention; this, however, would be jeopardised by the Spanish and Belgian proposals for removing the role of national legislatures in this regard, in the interests of reducing "cumbersome" procedures.⁶⁵ Even the legislative influence over Europol's internal watchdogs is limited. National parliaments can only call their own government representatives to account, not those belonging to another Member State. Consequently no direct influence

⁶⁴ Steve Peers EU Justice and Home Affairs Law 2000 p 218

⁶⁵ Council of the European Union, Op. Cit., paragraphs 5 and 8

can be brought to bear over the collective element, thereby further reducing parliamentary authority over Europol.⁶⁶ With no external collective watchdog to oversee this area, Europol is very remote from direct democratic influence.

To address these concerns would be to weaken the intergovernmental grip on Europol. Essentially, the most effective way to achieve a solution would be a redrafting of the Europol Convention that takes greater account of both the European Parliament and national legislatures, and allows for a more authoritative role by both the ECJ and national courts.⁶⁷ This would go some way to silencing the “murmurs of discontent” acknowledged by the Swedish Presidency regarding the less democratic elements of the original Convention. With Europol fast becoming the focal point of co-operative law-enforcement within the EU, it becomes ever more important that sufficient democratic safeguards are put in place. A more powerful Europol, enhanced through its counter-terrorist role, but without due accountability safeguards, is a somewhat ironic choice for the flagship of EU law-enforcement co-operation.

The European Parliament, which has always been concerned about its distance from Europol, has called for a number of changes to its current operating style.⁶⁸ Chiefly these relate to consolidating the requirements of an effective and flexible law-enforcement vehicle with the obvious problems posed by the

⁶⁶ Peter Chalk *The Third Pillar on Judicial and Home Affairs Cooperation, Anti-terrorist Collaboration and Liberal Democratic Acceptability* in Fernando Reinares (ed.) European Democracies Against Terrorism 2000 pp 197-8

⁶⁷ There has been a tendency throughout the process of the Third Pillar of excluding national parliaments from the overall process of negotiation, only bringing them in at the very end to ratify or reject the end result. This is very close to being a “rubber stamp”. Peter Chalk, *Op. Cit.*, p 197

⁶⁸ Treaty of Amsterdam Article 41.3; European Parliament Session Document 1999-2004, 16 May 2002, A5.0173/2002, RR/469336EN.2doc, Rapporteur: Gérard M.J. Deprez *Protocol on Amending the Europol Convention* (title abridged)

enlargement process. As noted, the intergovernmental response to this has been to consider removing national legislatures from this element of the equation. The EP accepts that relying on so many national parliaments will undoubtedly take time (even with the system of "rolling ratification" which allows these annex additions to become active once two-thirds of the Membership have ratified them) and has proposed instead that the European Council dissolves the Europol Convention, replacing it with a Council Decision. Such a measure would be consistent with Article 34 of the Amsterdam Treaty, which permits this. In doing so, Europol amendments would be taken by the Council under qualified majority voting, thereby speeding up the process. Secondly, this would integrate Europol directly into the Third Pillar rather than its remaining on the periphery, as the Convention places it. This would erode the democratic deficit as the European Parliament would have to be consulted before the Council adopted any implementing decisions (Article 39, Amsterdam). If the Council failed to do this, then the Parliament would have the right to bring an action before the ECJ. Additionally Article 35 of Amsterdam would provide for automatic application of the ECJ's jurisdiction to all decisions adopted by the Council under Article 34.⁶⁹

Beyond this, the Parliament has proposed a greater input in Europol's affairs for the EU's supranational institutions; amending, for example, Article 48 of the Convention to include two representatives each from both the Commission and Parliament in addition to the single representative to the Management

⁶⁹ Ibid., Section E

Board from each Member State.⁷⁰ The Parliament's involvement, jointly with the Council, in the appointment and dismissal of the Europol Director is another such proposal put forward by the Parliament. The Parliament also wishes to break the hold that the Member State governments have over Europol's budget, by replacing direct contributions with funding from the EU budget.⁷¹

It seems such a simple measure, replacing the Convention with a Council Decision, as a means of breaking the excessive intergovernmental hold over Europol. Such a measure would not remove Europol from intergovernmental control, which is, after all, symptomatic of the Third Pillar. What it would do, though, is to encourage the development of integration within Europol, by ending the current conditions of the intergovernmental bargaining process. Qualified majority voting would permit a more radical style of development because unanimous consensus would no longer be applicable. The rapid development of a federal-type Europol would remain an unlikely occurrence simply due to the fact that very few of the Member States support the development of such a structure. Rather, by including a supranational input, one would expect certain aspects of Europol's development to reflect this. The ability of the European Parliament, for example, to request Europol's Director to appear before a committee has significant connotations with the US Congress's right of calling the Directors of the FBI and CIA before an oversight committee.⁷² Such measures would enhance the powers of the Parliament, adding to the supranational presence within the EU. One could

⁷⁰ Ibid., Recommendation 4

⁷¹ Ibid., Recommendation 2

⁷² Ibid., Recommendation 4 (an amendment to Article 34 of the Europol Convention)

also argue that such an approach could actually increase the influence of the Europol Director, as he would no longer be under the sole authority of the Member State governments, for the simple reason that no one centre would have power over him. Still more significant would be the concatenation of the JHA process as a whole. The present system is a fragmented one, due to Europol's disassociation with the other "flanking measures" (only with the newly established Pro-Eurojust does Europol maintain some direct linkage⁷³). A Europol, however, that is fully integrated within this process would encourage the development of approaching internal security matters from a JHA perspective, rather than a solely Schengen or Europol-orientated one, for example. As this thesis has illustrated, terrorism affects many areas of the internal security gamut, the border, investigative law-enforcement and judicial measures being three of the principal ones. A fully cohesive approach or "joined-up internal security co-operation" would be a definite improvement to the system.

By loosening the restrictive intergovernmentalist hold on Europol, the Member States would open the possibility of creating a genuine democratic policing system within the EU. In doing so, however, they would lose the absolute control that they currently hold over Europol. The European Parliament in its proposal purports perplexity as to why the Council has not selected the conversion of the Europol Convention into a Council Decision as a solution.⁷⁴ As this chapter has made abundantly clear, the Convention was

⁷³ Provisional Eurojust is the Third Pillar structure devised to facilitate judicial co-operation within the EU. Although it is administered through a Council Decision, it can be thought of as a sister-agency to Europol (see Chapter VIII for a detailed account of this structure).

⁷⁴ Treaty of Amsterdam Article 41.3, Op. Cit., p 17

designed as an intergovernmental barrier against supranational influences. It is most likely to remain in place until JHA co-operation has advanced further, along with EU integration as a whole, to a point where it will no longer be necessary to keep Europol separated in this fashion. Presently though, the emphasis placed on internal security in the post-11 September milieu and Europol's augmentation through its counter-terrorist role will most likely ensure that the Member States are in no hurry to share this instrument with the EU's supranational institutions. It cannot be overemphasised how important the issue of sovereignty becomes when terrorism is involved.

One final issue requiring address, and one that stems from these discussions, is the conceivability of a two-tier or multi-speed Europol. Currently the Convention prohibits such a move by preventing Member States from entering into reservations, and thereby enforcing a singular pace (Article 44). This pace might not be fast enough, or even heading in the preferred direction for some Member States, such as Germany. Would a solution then be to advance the co-operative pace between those Member States that desire it? Certainly, the EU is not short of precedents in terms of multi-speeding: the European currency and Schengen represent two particularly significant examples. Establishing such a system, however, would be problematic only in terms of the TECS being a particular source of headaches. Adapting the TECS to dual-speed conditions would introduce severe fragmentation into the Europol structure, possibly even reaching breaking point because of the problems that would be created by sharing certain types of information that have been inputted by differing levels of access. Consider the difficulties that the CCIC

would have faced if the UK had remained outside of the SIS. It would be far wiser to concentrate on the other areas of Europol's mandate. Contracting parties could for example expand the remit of Europol officers operating on their soil, in a manner paralleling Interpol's TE Group, but with additional powers could be granted to the seconded officer, as is occurring between PSNI and Garda officers following the implementation of the Independent Commission on Policing for Northern Ireland's Report. This in itself would not be too difficult, simply requiring an optional protocol between the contracting parties on what is permissible by Europol officers on their soil.⁷⁵ This would actually be very similar to the bilateral agreements regarding "hot pursuit" and observation under the Schengen Implementing Convention. Whether the consent would be required of all signatories for their officers to operate with enhanced conditions in a Member State that has contracted to a multi-speed approach or through a bilateral basis is a matter for the negotiating table. To cite a comparative precedent would be Germany's open declaration under Article 41 of the Schengen Implementing Convention, removing any time or distance factors that would prohibit the continuance of a "hot pursuit" across its territory. Under this declaration, no bilateral accord was required as a precondition.

The Federal Alternative

Many of the solutions for resolving the democratic deficit are synonymous with federalism. As Chapter IV illustrated, a federal Europe is capable of

⁷⁵ Certainly it would not be as contentious as granting Europol operational powers of investigation as an agency per se.

realising this, but what exactly would Europol's position be within a federal Europe: in other words, would it be a European FBI?

The answer to this question lies with the proviso attached to the concept of European federalism – *sui generis*. We must not fall into the trap of automatically associating a federal Europe with a federal police force. Under the concept of subsidiarity, an EU police force serves as an unnecessary intrusion of sovereignty (although this is relative to the taken definition of subsidiarity). To make this point, let us consider the US model for such a police force, as this is the one most touted as Europol's endpoint. The FBI's mandate centres mainly around cross-border and federal crimes – terrorism being a case of the latter, and for the most part this works fairly well in America. However, we should also bear in mind that the FBI was established in 1908, and has had many years' exclusive experience of tackling these types of crimes. The US was undergoing a political, social and economic transformation at the time the FBI was founded, with advances in communications and transport focusing attention on the need for a greater investigative input from the federal government. Professional policing could no longer be left to cities or large townships.⁷⁶ This shift by the public towards favouring a federal response was coupled with the idealistic reforming zeal of what has become known as the Progressive Era, circa 1900–1918, personified by President Roosevelt. These “progressives” believed government intervention at all levels was necessary for justice within an industrial society; specifically, “experts” were needed to achieve this goal.

⁷⁶ *History of the FBI, Origins* (www.fbi.gov)

The agents of the FBI represented one such group of experts.⁷⁷ Such experts were all the more necessary because subsidiarity, deeply embedded in the American constitutional system, established a fragmented policing system.⁷⁸

The US a century ago is radically different to the EU today. The justice gap has long since been filled in Europe, by national police forces, trained to tackle all types of crime, including those specific to the FBI. Moreover, lack of a fragmented policing structure means that there is little need for the establishment of a new investigative body such as a European FBI. Actually establishing such a body would require the fragmentation of national law enforcement to accommodate this new Euro-FBI's investigative mandate. However, as has already been made clear, establishing such an organisation would be the law-enforcement equivalent of robbing Peter to pay Paul. Subsidiarity, in relation to modern Europe, would prevent the establishment of a central authority to execute what the Member State is perfectly capable of performing.

Consequently, even within a federal Europe, the notion of a Euro-FBI is remote. Rather, Europol would be best suited to its present role of support structure. Federalisation of Europe would ensure some changes to Europe as it currently stands, but these would relate primarily to removing its accountability deficit as detailed above. In terms of Europol's operational capacity, a federal system could imbue it with additional powers to obtain information that was unforthcoming from national authorities, by making this

⁷⁷ Ibid.

⁷⁸ Today the distribution of officers in the US is 82% local, 10% state and 8% federal (Verbruggen, Op. Cit. p 153).

a federal offence for example, but otherwise it is difficult to see any significant change beyond this. There is, after all, only so much that can be done with a support structure.

Europol should not be perceived as an embryonic federal police force. Such a concept is entirely impractical. However, for those Member States who wish to advance further with Europol, the option of a dual-speed Europol is a possibility. Creating dual-speed conditions would lead to further fragmentation within the JHA process. While some Member States might not wish to see their flagship co-operative law-enforcement structure become fragmented, this option does offer a realistic alternative to addressing the desires of Member States who wish to push further ahead with co-operation in this area. The advances made in law-enforcement co-operation amongst the Schengen states, together with their Roman law heritage, may perhaps make them more willing to expand upon these with further integration via Europol. Europol, it should be remembered, was also as much a political as a practical construct.

Conclusions

Investigative law-enforcement co-operation against terrorism has been an area that some Member States have shown particular keenness in keeping on the periphery of the JHA field. Europol, although the first of these instruments to be placed inside the EU fold, and taking advantage of the close co-operative structures within it, has maintained elements of this traditional policy via its

“prophylactic” Convention, because of the concern of many of the Member States. Most Member States have yet to be convinced that the EU is a forum where a successful counter-terrorist policy can be established, although evidence suggests that this is changing, with the JHA Council’s emphasis now being placed on the counter-terrorist competences of Europol, following the 11 September attacks. These boosted competences, however, have also driven the Member States to shore up their influence over Europol, rather than devolve it further towards the EU.

From an operational perspective, intergovernmental policy is a perfectly capable choice for leading the mechanics of investigative counter-terrorist co-operation. It provides an authoritative edge to persuading law-enforcement authorities, often suspicious of sharing sensitive information of this kind, to engage actively in co-operation. Most law-enforcement officers still view the idea of a federal-style EU force with suspicion, although as we have demonstrated, these grounds are without merit. Indeed, the measures taken to bolster counter-terrorist co-operation since the 11 September attacks enhance the intergovernmental position of Europol, and are aimed at demolishing the prevarication with which many of the Member States’ counter-terrorist units have treated the organisation’s counter-terrorist auspices, resulting in the “malfunctioning” of Europol’s analysis files.⁷⁹ Issues of trust therefore remain a paramount concern for these agencies, clearly reflecting the correlative variant between the new “European” approach and the traditional “informal” style. Intergovernmentalism, however, does not necessarily equate to superior

⁷⁹ *Statewatch* Post 11.9.01 analyses: No. 1 *The “Conclusions” of the Special Justice and Home Affairs Council on 20 September 2001 and their implications for civil liberties* Section 9 i.e. The files were not receiving “premium” grade intelligence.

security and trust within a structure, but it does provide these agencies with the comforter they require in order to utilise this service beyond half-hearted measures. Unfortunately, as the example of the faults arising within the co-operation over the Strasbourg plot demonstrates, this approach can also lead to a blinkered national response, ignoring the transnational requirements of tackling what are transnational – not simply national – threats.

The problem with the current intergovernmental approach taken by the Member States is not that it is responsible for encouraging such attitudes, but rather its unenthusiastic response to addressing the democratic deficit within the structures that it has created. It is not necessary for Europol to be an EU institutional instrument with operational powers to execute its role effectively. What it does require, though, is greater democratic control. It is not an intelligence agency, it is a law-enforcement agency, primarily utilised by the police forces of the Member States. Greater democracy does not mean surrendering it to supranational control. Rather it means providing an accountable police agency – the requirement of any democratic state. 11 September provided an opportunity to re-examine the EU's response to terrorism. In re-examining Europol's counter-terrorist role, an opportunity to open up the structure has been squandered.

Regardless, though, of where we view Europol within the EU spectrum, it is steadily growing as a law-enforcement agency. It has obtained "operative" powers from Amsterdam and Tampere, as well as from the JHA Council's response to 11 September. Perhaps even more fundamental is the recognition

of Europol by third party agencies and their willingness to actively engage in co-operation with it as an agency in its own right. Europol has signed a number of agreements with countries, including the USA, the Czech Republic, and Norway, as well as Interpol, permitting the exchange of information. Through these agreements Europol secures for itself a greater legitimacy as a significant co-operative structure within the EU, moving it closer to centre-stage; its position is further strengthened by the possible acquisition of access to the SIS databanks; meanwhile the co-operative agreement with the USA against terrorism, signed in December 2001, underscores Europol's counter-terrorist credentials.

Europol's position within the EU has improved co-operation against terrorism. This we have seen with the extraordinary wave of arrests throughout the EU against suspected Islamic extremists – although it took a crisis to actually implement Europol's utility here for the first time. The support structure to enhance investigative co-operation offers a number of options, both informal and regulated; these options did not exist during the Lockerbie investigation. Investigative co-operation, as embodied through Europol, also differs, comparatively, from the standpoint of border security. Europol is not in a position to actively encourage further developments in co-operation beyond the services it offers, because it functions as an organisation in its own right rather than as a framework. Where the Schengen Implementing Convention enthusiastically encourages additional bilateral co-operation, Europol cannot, because any co-operation would be independent of it. This would detract from Europol's purpose. Only if individual Member States sought to extend it on a

bilateral basis, implementing a multi-speed Europol, could such co-operation be possible. From this perspective the flagship of European law-enforcement co-operation, like any organisation, cannot push collaboration beyond the rate at which the JHA Council provides it with new competences. Even the level at which police agencies employ Europol will not actively increase their own co-operation with other agencies, as they deal primarily with Europol. Only through its co-ordination capacity is Europol able to offer national police agencies face-to-face co-operation with other national agencies. This is an area, however, where we have yet to see any real evidence of firm co-operation in the counter-terrorist field. Consequently, the argument that the informal PWGOT structure is better suited to formulating co-operation *between* counter-terrorist agencies still stands. From this perspective, we can see that there is a notable difference in integrative terms between a regulated organisation and regulated framework.

Investigative co-operation has increased tremendously with the establishment of a permanent and regulated structure under the competences of the JHA security continuum. Europe appears to be reaping the rewards of this long building process, with the arrest of numerous suspects, and very importantly, no successful attack on European soil by terrorists. This last point is emphatic: Europe is far more vulnerable, both geographically and socially, to such attacks than the USA, whose much smaller Islamic community provides less water for the terrorist fish. The work in Europe, though, is unfinished. Law-enforcement co-operation continues to make advances, although the levels vary somewhat throughout the field. Integration has become a driving

force in law-enforcement co-operation, whatever the methodology. Currently Member States adopt the intergovernmental approach, albeit one flawed through its dismissal of democratic accountability; nevertheless it is driving co-operation forward. As this thesis has shown, the intergovernmental route is not absolutely necessary for furthering law-enforcement co-operation; even in a Europe of sovereign states, we have observed other methodologies more suited to certain conditions. Intergovernmental policy can be well suited to the likes of the PWGOT and the former Trevi, provided there is sufficient latitude on the part of the central authorities towards their inherent neo-functional tendencies to allow the co-operative organ to function, much like the examples of co-operative border control discussed earlier. Indeed, intergovernmentalism is a useful policy tool for forcing the co-operative pace where necessary, whilst respecting the scepticism national police authorities have for wholeheartedly embracing a pan-European approach to tackling transnational crime. However, as we have discovered, a federal approach need not mean the subservience of national police forces to a central authority, or an agency encroaching on their mandates. Business would continue much the same as usual, as we have observed regarding the issue of federalism and border security. The real difference would be seen in terms of improved accountability and a greater authority for Europol vis-à-vis obtaining data. Moreover, within a federal Europe, one could perceive a greater commitment by national police forces to utilising the services offered by Europol precisely because it would be a federal organisation, with greater access to intelligence,

and hence would be held in greater esteem.⁸⁰ Thus far, federalism offers a genuine alternative to the intergovernmental approach.

Neo-functionalist policy, by contrast, is more limited in what it can achieve, due to the lack of any true geo-spatial environment offering commonality upon which to build – counter-terrorism still maintains its national perspective. Rather, what we may witness insofar as Europol is concerned is that it may push for a greater role for itself, via the personality of the Director, if he is so inclined. In truth, however, such a move would differ little from any other organisation seeking to consolidate its position within its own business environment. Neo-functionalist oriented co-operation here is not strong enough to dominate intergovernmental control; instead, it is limited to pushing forward the edges of Europol's role.

The level of law-enforcement co-operation open to participating agencies is, of course, also determined by the degree of judicial co-operation between the Member States. Neither Schengen's Implementing Convention nor Europol, for example, could engage in active co-operation without the pre-existence of some judicial arrangements. It is to this area of co-operation that we now turn, in an attempt to fully understand the developments in law-enforcement co-operation, as well as making the case for a field of co-operation against terrorism in its own right.

⁸⁰ Subject to Europol successfully delivering the services it offered.

Chapter VIII

The Mechanics of Judicial Co-operation against Terrorism

If the criminal justice system of a state is the forge upon which its counter-terrorist policy is tempered, judicial co-operation between states is the anvil to the hammer of law-enforcement co-operation. Without effective judicial co-operation, the efforts of law-enforcement officers are severely diminished. This does not relate simply to the extradition process of a terrorist suspect after he has been located, but to almost every aspect of the co-operative effort. Co-operation relating to the transfer of evidence is equally as important, as are the testimonies of witnesses, and their cross-examination in court. Even the exchange of information requires judicial safeguards to ensure that an officer is not acting on information that could be classified as inadmissible in his own territory, but not in another, as demonstrated by inclusion of legal experts amongst the SIS's SIRENE staff to guard against this very issue.

Terrorists have recognised the power of the judicial system when it is set against them, and have sought to intimidate it, thereby demonstrating their fear of it. Their efforts ranged from the intimidation of jurors in Northern Ireland, leading to the establishment of the controversial juryless Diplock Courts in 1973 to try terrorist cases, to the assassination of judges. The IRA have murdered eight members of the judiciary, whom they regard as primary targets along with members of the RUC and British Army, especially after the introduction of the Diplock Courts denied the IRA jurors to threaten,

heightening the role of the judges themselves.¹ ETA has conducted a similar campaign, most recently assassinating a Supreme Court Judge in Madrid on 30 October 2000, and the Chief Prosecutor of Andalusia earlier the same month.² Similarly the Red Brigades kidnapped Judge Giovanni d'Urso, responsible for running the special prisons established to hold terrorists, in December 1980, in an attempt to force the government to close these prisons.³ Meanwhile the Italian Mafia, although not technically terrorists, have engaged in terrorist-type acts, and targeted members of the judiciary to deter investigations against them. Most notable were the assassinations of leading anti-Mafia prosecutors Giovanni Falcone and Paolo Borsellino and their bodyguards in May and July of 1992 respectively. Threats have also been carried out by terrorist groups against the judiciary. Abu Nidal threatened to kill any judge who signed the order to extradite Mohammed Rashid, a member of his organisation who had been apprehended in Greece and was subject to a US extradition request for planting a bomb aboard a Pan Am flight from Tokyo to Hawaii in 1982, which killed one passenger.⁴ Similarly, Francisco Mugica Garmendia, a former ETA leader arrested in France in 1992 before being extradited to Spain in 2000, threatened the High Court judges at his trial with assassination. The campaign

¹ Malcolm Sutton Bear in mind these dead...An Index of Deaths from the Conflict in Ireland 1969-1993 1994. Information updated by Sutton on the Cain Website (Conflict Archive on the Internet) www.cain.ulst.ac.uk, Appendix: Statistical Summary – updated October 2002 Lord Justice Gibson, for example, was murdered by the IRA, along with his wife, on 25 April 1987, in revenge for his acquittal of four RUC Special Branch officers who had shot dead three unarmed IRA men in their car, Kinnego, 27 October 1982. Gibson's ruling on 5 June 1984 that the men were "absolutely blameless", congratulating them on bringing the IRA men to "to the final court of justice" indicated to the republican and nationalist community that a "shoot-to-kill" policy did exist, "underwritten by highest levels of the judiciary" (Peter Taylor Brits: the War Against the IRA 2001 pp 249-50)

² Daily Telegraph *Rush-hour blast kills Spanish judge* 31 October 2000 (online edition); Daily Telegraph *News in Brief* 10 October 2000 (online edition).

³ Edward F. Mickolus, Todd Sandler, and Jean M. Murdock International Terrorism in the 1980's: A Chronology of Events Vol. I, 1980-1983 1989 p 108

⁴ Patrick Brogan World Conflicts pp 602-3

Although not extradited, Rashid was tried in Athens, in October 2001, for the bombing and convicted in January 1992 (see below).

against the judiciary began eleven days after he was sentenced to a thirty-year prison sentence for his involvement in the 1989 murder of a public prosecutor.⁵

The judiciary are just as much a threat to terrorist groups as the police. Accordingly, transnational co-operation in this area is equally as important as that of law-enforcement. In comparison, however, the advancement of judicial co-operation has, until very recently, been a much slower affair, almost snail-like in movement. Extradition treaties have traditionally been regarded as the key instrument in tackling terrorism in the area of judicial co-operation, but for the most part, they have been hopelessly outdated in relation to the issue. Neither, for that matter, are they directly associated with the EU, but rather with the pan-European Council of Europe. Only within the past few years of the EU integrative process has work seriously been undergone to address the deficit in judicial co-operation. The Amsterdam Treaty began this process of “catch-up”, recommending the establishment of a European Judicial Network (EJN) to facilitate judicial co-operation, following it through with the Tampere Conclusions, which placed significant emphasis on the improved judicial co-operation. It is the events of 11 September, however, that have catapulted judicial co-operation forward, with the establishment of the contentious European Arrest Warrant, which removes the need for the extradition process between Member States in relation to particular crimes.

⁵ *Daily Telegraph* *Rush-hour blast kills Spanish judge* 31 October 2000 (online edition).

In ascertaining the effectiveness of the judicial measures ranged against terrorism, this chapter addresses the concept of extradition as a measure against terrorism, as well as the various extradition treaties at both the Council of Europe and EU level. Understanding their effectiveness is critical in view of the dominating hold that they have had on this area of co-operation. Beyond this is the need to understand how the changes at EU level will affect the co-operation as a whole. Likewise, are they effective in addressing the emerging terrorist threat?

Extradition

Extradition is the process by which a state may request the return of a wanted fugitive who is currently residing in another country. It is an exact science, requiring precise wording and filing of what is known as a *commission rogatoires* or a rogatory letter, for it to be considered a proper request. The British authorities were much chagrined when their initial request to Belgium for the extradition of an IRA suspect, Patrick Ryan, was refused because it had been incorrectly drafted.⁶ It is also usually a very long process, because few fugitives do not contest their extradition. The process, from start to finish, can take as long as several years, as it is effectively fought as a court case.⁷ Those

⁶ Brogan, Op. Cit., p 427

See below for a fuller discussion of the Ryan case. Similar examples include the release of Evelyn Glenholmes (who was wanted by Britain in connection with the Brighton bombing 1984) from Irish custody in March 1986 following administrative errors on the extradition warrant. A similar case occurred that August, resulting in the release of Gerard O'Reilly. (Cain Website (Conflict Archive on the Internet) *A Chronology of the Conflict: 1986* www.cain.ulst.ac.uk)

⁷ Unless a special bilateral arrangement exists permitting a speedier extradition process, as exists between Spain and France, or the UK and Slovakia. Under this latter arrangement, three IRA suspects arrested in Slovakia, 5 July 2001, were rapidly extradited to the UK the following month. (BBC News *Terror charge three extradited* 30 August 2001)

cases involving terrorists typically result in generating significant publicity for the terrorist and their cause. The British government's nine-year battle to have the IRA terrorist, Joseph Doherty, extradited from the United States, became very much a *cause célèbre*, turning Doherty into a hero of the Republican movement. Extradition does not deny the terrorist "the oxygen of publicity", and a sophisticated group such as the IRA or ETA is capable of drawing as much advantage from the process as possible. Doherty, for example, used the media attention to convey the image of the IRA as a legitimate resistance group rather than a terrorist organisation, undoubtedly harnessing additional support for the republican cause from sympathisers in the US.⁸

Conversely, the opportunity also exists for the aggrieved government to explain its position to a wider audience, and if it wins the extradition case, it serves as a sanctioning of their counter-terrorist policy by another state. Unfortunately this rarely rectifies the massive publicity bestowed upon the terrorist, and the occasional extradition case that is lost can be most damaging to the legitimacy of a state's counter-terrorist policy. A UK court overturned the Home Secretary, David Blunkett's decision, in November 2001, to return to France Rashid Ramda, an Algerian suspect wanted by France in connection with the 1995 Paris Metro bombings; expressed doubts on the evidence against him; and ultimately expressed concern that Ramda might be subject to mistreatment in a French prison. This overruling indirectly infers a condemnation of French penal policy regarding terrorists.⁹ Similarly, the

⁸ See Martin Dillon's *Killer in Clowntown* 1992 for an excellent account of the extradition process against Doherty.

⁹ [BBC News UK to extradite Paris terror suspect](#) 9 October 2001; [BBC News Paris bomb suspect's extradition blocked](#) 27 June 2002.

refusal of the Irish Attorney-General to extradite Patrick Ryan to the UK on the grounds that the British government and newspapers had made so many prejudicial statements against him that he could never receive a fair trial, also stands as a criticism of Britain's counter-terrorist policy in this regard.¹⁰

Extradition, nevertheless, has been the only process available to governments seeking the return of wanted terrorist suspects.¹¹ It is often a convoluted process, but much of the complexity stems from the fact that the procedure is designed specifically to protect the wanted individual's rights, through a regulation of procedures, as much as it a respect of the sovereignty of other states.¹² A visitor to another country is, after all, entitled to the same protection as that of its citizens. To casually return a wanted individual to a requesting country would be to fly in the face of centuries of jurisprudence, as well as to display a blatant disregard for the concept of sovereignty. The above examples of Ramda and Ryan demonstrate how the procedures governing extradition can protect these rights.

Ramda was taken into custody in the UK in 1997. Britain refused to uphold France's extradition requests as evidence suggested that one of those convicted for the bombing, Boualen Bensaid, had been mistreated by the French authorities.

¹⁰ While the UK redrafted a corrected extradition request for the Belgian authorities, the Belgian government quickly expelled Ryan to Ireland rather than continue his detention. The fallout of this decision led to severe straining of relations between the UK and Ireland and Belgium. The incident occurred over a particularly short period of time, between November and December 1988.

¹¹ At least the only legal option available; the SAS snatch squads that operated along the Anglo-Irish border are a case in point. France, having secured a guarantee of non-interference from the Sudanese government, apprehended Carlos the Jackal in Khartoum, August 1993, by abducting him in a covert operation. The United States, meanwhile, through its rule of extraterritorial jurisdiction, ensures that a US court takes no account of how the suspect actually arrived there; that he is standing before them is all that is of concern. Through this policy, the US has been able to employ inventive methods of apprehending terrorist suspects. Fawaz Younnis, for example, was convicted for air piracy and hostage taking, and sentenced to thirty years imprisonment, after being lured into international waters between Cyprus and Lebanon. Mid-air refuelling ensured that he always remained in international airspace on his journey to the US. (Christopher Harmon *Terrorism Today* 2000 p 254)

¹² Geoff Gilbert *Transnational Fugitive Offenders in International Law: Extradition and other Mechanisms* 1998 p 6

Terrorists, extradition and the political exemption

One of the most problematic issues to affect the Western European states in the early 1970s was how to deal with international terrorists after they had been apprehended in a country. The political overtones claimed by the terrorists of their acts created much disarray within European judicial systems, especially as the pan-European Convention on Extradition 1957 clearly emphasised under Article 3.1 that:

Extradition shall not be guaranteed if the offence in respect of which it is required by the requested Party as a political offence or an offence connected with a political offence.

This Article and the resulting confusion, in conjunction with the initial belief that the international terrorism spilling over from the Middle East and affecting Europe would only be a temporary phenomenon, resulted in European states being prepared to throw their caught terrorist “fish” back into the water. The discovery of a massive shipment of Czech arms, bound for the IRA at Schiphol airport, Amsterdam in October 1971, for example, did not lead to any arrests on the Continent. Those involved in the operation (Maria Maguire and David O’Connell – one of the chief contenders for the command of the PIRA) fled the Continent to Ireland, but the Dutch did not request their extradition from Ireland.¹³ Only Switzerland enforced an exclusion order

¹³ The shipment contained a formidable amount of ordnance: 166 crates, including grenades, rocket launchers and bazookas. A detailed account of this operation is contained in the Maguire’s recantation of Republican violence: Maria Maguire To Take Arms: A Year in the Provisional IRA 1973, especially chapters 4, 5 and 6.

against the duo, when it discovered that they had used Zurich to transfer the funds necessary for payment of the shipment, converting the monies from Irish into Swiss currency.¹⁴ Clearly, the smuggling of an arms shipment was a criminal offence in breach of Dutch law. That the Dutch took no judicial action is illustrative of the ambiguous political overtones regarding terrorism, which pervaded European states during the early 1970s.¹⁵ This reluctance to take legal action against political offenders stemmed from the late eighteenth- and nineteenth century origins of the modern European state. Democracies were loath to persecute or extradite revolutionary radicals who were attempting to ferment change in their own authoritarian regimes, their own democratic existence having stemmed from past revolutions. Contemporary terrorism, however, is several steps removed from both the tactics and strategies of its revolutionary origins, and neither is it aimed exclusively against authoritarian or 'occupying' states. The realisation that international terrorism was not going to abate forced the European states to rectify the political exemption clause by imposing conditions upon it.¹⁶ In December 1975, and again in July 1976, the European Council called for co-operation in extraditing and prosecuting terrorists. The European Convention on the Suppression of Terrorism 1977 (ECST) was the means of addressing this problem.

¹⁴ Ibid., pp 45-6, 67-8

¹⁵ Neither were the Dutch prepared to allow French Special Forces to storm their Embassy in The Hague, following its seizure by three members of the United Red Army of Japan in Sept 1974.

¹⁶ The political offence itself remained a bar to an extradition request within the EU until 1995 when the newly implemented EU Convention on Extradition removed it (Article 5).

The ECST¹⁷

The ECST followed in the tradition of European efforts at regulating the Byzantine complexities of extradition law, and was essentially an extension of the European Convention on Extradition 1957.¹⁸ Its purpose was to consolidate the spirit of Article 3 of the 1957 Convention with the practicalities of dealing with modern-day terrorism. The Convention's main thrust was to list a series of specified offences, archetypical of a terrorist act, under which the political exemption clause offered no succour. These were as follows:

- an offence within the scope of the Convention on the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970;
- an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

¹⁷ The past tense is used to refer to the ECST insofar as this thesis is concerned with EU Member States, where this Convention is now effectively redundant.

¹⁸ Prior to the 1975 Convention, extradition relied upon the reciprocity of bilateral treaties (which were in no way standardised). In an effort to prevent lawbreakers from exploiting a chaotic "system" that no longer reflected post-war democratic Europe the 1957 Convention introduced regulation along with a set minimum standard for extradition among the signatories. A later supplementary protocol ETS 86 (1975) paved the way for the ECST by removing war crimes and crimes against humanity from the political exemption clause.

- an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

(Article 1)

Whilst a commendable start, the Convention's list of proscribed activities can be circumvented under certain conditions, depending on the weapon used. The RAF's murder, by a sniper, of Detlev Rohwedder, the director of the Treuhandanstalt, in Dusseldorf in April 1991, would in theory fall outside the remit of Article 1, because the weapon used was not an automatic one.¹⁹ The same principle could apply to any IRA sniper operating in South Armagh or November 17's murder of Pavlos Bakoyiannis, chief parliamentary spokesman of the conservative New Democracy party, in Athens September 1989, with the signature .45-calibre pistol.²⁰ Neither November 17's murder of Richard Welch, the CIA station chief at the US Embassy, in December 1975 nor that of the British defence attaché, Brigadier Stephen Saunders in March 2000, with the same signature weapon would, however, fall under Article 1's scope, as they were both diplomatically protected persons.

¹⁹ The Treuhandanstalt was responsible for the privatisation of the former state industries of East Germany. (Charles J M Drake *Terrorist's Target Selection* 1998 p 24)

²⁰ George Kassimeris *Europe's Last Red Terrorists* 2001 pp 88-9, 73-4, 104 (Although Saunders' murder occurred after the 1995 EU Convention on Extradition, the simplified extradition convention has yet to be universally ratified by the Member States).

Equally, had Joe Doherty fled to a European state rather than to the USA, he would have found it much more difficult to contest his extradition. Although it is not known who amongst Doherty's unit operated the heavy M60 machine gun that killed SAS captain Herbert Westmacott (it is IRA policy that a volunteer never takes responsibility for "a kill" or admits to who used the murder weapon), it is known that Doherty did fire his Heckler and Koch *automatic rifle* at the soldiers.²¹ Involvement in such a particular terrorist incident would fall under Article 1. This loophole was partially addressed by Article 2, which permitted the exclusion of additional offences from the political exemption clause, but this was not a universal condition. A contracting party could make a declaration, but unless the other state involved in the extradition process had made a similar declaration, then it could not count.

Another potential wrecking device is Article 5, which permitted a state to refuse extradition if it has cause to believe that the fugitive was being prosecuted/punished on account of his race, religion, nationality or political opinion. The premise of this article is to prevent a state being forced to extradite a persecuted individual, but it also allows a state to decide unilaterally what composes or defines a racial or political persecution. Most terrorists would claim that they were being persecuted by a state for at least one of these reasons.

²¹ Dillon, Op. Cit., Chapter 6, especially pp 98-99, 1992

The most astonishing loophole, however, was that contained under Article 13, permitting a signatory to reserve “the right to refuse extradition in respect of any offence mentioned in Article 1, which it considers to be a political offence or an offence inspired by political motives”. This clause effectively flies in the face of the ECST’s initial purpose. The only limitation that a signatory need undertake before making its unilateral interpretation of a political crime was “due consideration when evaluating the character of the offence, any particular serious aspects of the offence including:

- that it created a collective danger to the life, physical integrity or liberty of persons, or
- that it affected persons foreign to the motives behind it, or
- that cruel or viscous means have been used in the commission of the offence

The inclusion of Article 13 clearly established a potential derogatory effect against the spirit of the Convention, so much so that one might ask whether the intent was to create a paper tiger.

Paper Tiger or First Step?

There is much to criticise in the ECST concerning its failure as a resolute bulwark of judicial co-operation against terrorism. Beyond the two main flaws discussed above is the criticism that it invited a host of reservations, declarations and territorial declarations to be made at signature. France, for

example, placed reservations and declarations in respect of her constitutional and revolutionary context: “anyone persecuted on account of his action for the cause of liberty has the right to asylum”. Belgium reserved the right to decline to extradite offences it considered political with the exception of hostage-taking. Greece, meanwhile, reserved the right to refuse the extradition of any of the offences listed under Article 1 if she believed that “the offence is being prosecuted for his or her action in favour of freedom.”²² Reservations such as these stretched the purpose of Article 1 to breaking point, by appropriating the right to dictate what was and what was not a political offence rather than leaving it to the provisions of the Article.

Further evidence to support the paper tiger argument lies not so much with the Convention itself, but with the significant delay in many Member States putting it forward for ratification. Italy, France and Greece, for example, did not ratify the European Convention on Terrorism 1977 until 1986, 1987, and 1988 respectively.²³ Again, such measures seriously dilapidated the fibre of the Convention. The ECST’s purpose was supposedly to bring some unanimity to bear against the new phenomenon of modern terrorism. Such fragmentation made this exceedingly difficult, as we shall shortly see. Some of the delays were the result of constitutional issues; Ireland continued to refuse to sign, arguing that Article 29 of her constitution prevented the extradition of political offenders. Such an interpretation, however, generated considerable academic and political controversy: in practice, the refusal to

²² Alfred P. Rubin *Extradition and Terrorist Offences in Terrorism* Vol. 10, No. 2 1987 p 87; List of reservations made with respect to treaty no.090 European Convention on the Suppression of Terrorism, Complete chronology on: 16/02/01 Council of Europe

²³ See table vii for a full listing of the ECST’s signatories and their ratification dates.

extradite political offenders appears to be a matter of state discretion, and consequently, if it is a rule of international law, then it is permissive rather than obligatory.²⁴ A. E. Evans is extremely critical of this position, arguing that a rigid adherence to such a principle is “a narrow conception of the nature of international law and the process of its growth”.²⁵ Similar arguments go a long way towards dispelling the “sacred” defence of all political offenders. Indeed the recent advances within the EU demonstrate how quickly such beliefs have fallen by the wayside. This attitude displayed by some states towards the ECST is further borne out by the failure of the Dublin Agreement of 1979.

The Dublin Agreement 1979

The Council of Europe, not the EEC, had taken the lead in attempting to galvanise judicial co-operation against terrorism. Some within the Community felt that with their close links, they should also be able to contribute some sort of additional effort in this area. Belgium therefore proposed that the Member States should shore up the ECST by speedily ratifying it, without reservations; the proposal was opened for signature at the Dublin European Council in 1979.

²⁴ Juliet Lodge with David Freestone *The European Community and Terrorism: Political and Legal Aspects* in Yonah Alexander and Kenneth A. Myers (eds.) Terrorism in Europe 1984 p 83

²⁵ Ibid. The original source is A.E. Evans *The Apprehension and Prosecution of Offenders: Some Current Problems* in A.E. Evans and J.F. Murphy Legal Aspects of International Terrorism (Lexington Books, Lexington, Mass., 1978) p. 499

While work on the Belgian proposal was underway, the Legal Affairs Committee of the European Parliament “took a much bolder initiative, which for a time monopolised the attention of the Nine and delayed progress on the Belgian proposal”.²⁶ The Committee was considering a proposal made in December 1977 by the French President, Giscard d’Estaing, for the establishment of an *espace judiciaire européenne*. This was aimed at facilitating co-operation in criminal matters, particularly with a view to simplifying extradition procedures and the application of the principle “to extradite or prosecute” (see below), rather than an attempt at establishing a common jurisdiction, legal code, or legal process.²⁷ Although the Tyrell Report looked favourably on the French President’s proposal viewing it as perfectly feasible, France’s Community colleagues had a markedly cooler response. They were concerned about how this would affect the powers of the Community, while Britain feared that its common law tradition would become open to inroads from the Napoleonic system. The French proposal was submitted as a draft at a meeting of the Ministers of Justice in Rome, June 1980. The Dutch government, believing that it would not be successful in carrying the support of its parliament, was responsible for actually sinking the French proposal, by their refusal to support it; consequently, the draft was not opened for signature. In retaliation, France refused to ratify the Dublin Agreement, sinking it in turn. This was partly a retaliatory response, but also because France’s National Assembly, as well as French public opinion, was hostile to the weakening of the traditional right of political asylum.²⁸

²⁶ Antonio Vercher Terrorism in Europe: An International Comparative Legal Analysis 1992 p 356; Simon Nuttall European Political Co-operation 1992 p 295

²⁷ Vercher, *Op. Cit.*, pp 356-57

²⁸ Simon Nuttall European Political Co-operation 1992 pp 295-6

This particular case illustrates the failure of the Community members to achieve even a relatively simple attempt at solidarity against terrorism, symbolised by the Dublin Agreement. Indeed, its failure served only to diminish enthusiasm for judicial co-operation against terrorism among the Member States for some time to come. France made a renewed attempt with her Minister of Justice, Robert Badinter, proposing in September 1982 a European criminal court to handle terrorist cases. Her Community partners were less enthusiastic and pressed France to ratify the Dublin Agreement instead.²⁹ Only with the impetus generated by the TEU were there the beginnings of significant change.

Why was this co-operation so reticent? Could those Member States who supported the Dublin Agreement not go ahead with the measures that they had agreed to in signing the forlorn agreement bilaterally? Perversely, states have a tendency to shy away from multilateral commitments, unless they can be certain that others will also follow them. To commit unreservedly to the ECST would curtail the options open to a government in dealing with certain terrorist issues. Sometimes it is easier to be able to ignore or expel a wanted terrorist rather than risk reprisal attacks. This is despite the limitations of Article 1 and the customary derogation clause, Article 14, which permits immediate derogation from the ECST (Article 13 would be effectively nullified as all signatories would be confirming their commitment not to

The Dublin Agreement remained in perpetual limbo. The agreement required unanimity in ratification before it could come into effect; therefore although France was later to sign and ratify it, so too now was it required of the new Member States. Greece, although signing it, had yet to ratify it. This state of affairs continued until the agreement became surpassed by modern developments.

²⁹ Vercher, *Op. Cit.*, p 357

include reservations with regard to the political offence). Without a universal commitment, some states would be reluctant to sign an agreement that limited their options, and not those of their neighbours.

The ECST put into practice

Without doubt, the ECST was riddled with inconsistencies, but ultimately the proof of it being a paper tiger lies in how effectively it was enforced by its signatories. Certainly, the Convention was used to extradite terrorist suspects: two IRA escapees arrested in the Netherlands in January 1986, for example, were extradited to the UK the following December.³⁰ Han-Joachim Klein, a former compatriot of “Carlos the Jackal”, was extradited by France to Germany following his arrest in September 1998, and brought to trial in December 2000.³¹ Equally, the latter aspect of the Convention’s principle of *aut dedere aut judicare* (extradite or try) has at times been put into practice, rather than resorting to actually extraditing a suspect. The purpose of this principle, attributed to Grotius, is that contracting states on whose territory those reasonably suspected of terrorist acts happen to be, must either try them or hand them over to the requesting contracting state, according to the Convention. Simply letting them go in the face of reasonable evidence is not permissible.³² This principle might be invoked if the state in question does not believe that the suspect would receive a fair trial if extradited, or might

³⁰ Cain Website (Conflict Archive on the Internet) *A Chronology of the Conflict: 1986* www.cain.ulst.ac.uk

³¹ *BBC News Jackal ally tried for OPEC kidnap* 17 October 2000; *BBC News Christmas killings that shocked the world* 15 February 2001

³² Vercher, *Op. Cit.*, p 350

face mistreatment or capital punishment.³³ Greece tried Mohammed Rashid for the 1982 Pan Am bombing in October 1982, rather than extraditing him to the USA, and sentenced him to fifteen years in prison.³⁴ Greece did this, partly because it feared terrorist reprisals, but also because the Greek government has had a policy of maintaining good relations with the Palestinians.

The negative cases, however, undoubtedly overshadow the history of ECST. Terrorist intimidation and/or political motivations typically lie behind any failure to follow through on the commitments made under the ECST. Perhaps the most notorious example of this is France's decision to hurriedly expel two Iranians rather than extradite them to Switzerland to face charges of assassinating two Iranian political exiles late in 1993. France feared Iranian terrorist retaliation as well as the possibility of jeopardising her growing export market with Iran.³⁵ Similarly, Greece expelled to Libya in 1988, Abdel Osama Al Zomar, a Palestinian, who was wanted by the Italian authorities for his alleged involvement in the bombing of a Rome synagogue.³⁶ Equally, the *aut dedere aut judicare* principle has been grossly abused, with prosecutions

³³ Co-operation between Europe with the United States over extradition, in the wake of 11 September, has become somewhat problematic because of the death penalty, as we shall discuss later on.

³⁴ Yoram Schweitzer *The Arrest of Mohammed Rashid – Another point for the Americans* The International Policy Institute for Counter-Terrorism : articles www.ict.org.il

Rashid was released for good behaviour in 1996 after serving eight years. He was subsequently apprehended by US officials in 1998 and brought to trial.

³⁵ Peter Rudolf *Critical Engagement: the European Union and Iran* in Richard N. Haass (ed.) Trans-Atlantic Tensions: The United States, Europe and Problem Countries 1999 p 75

Pierre Marion, a former DGSE Director, lamented that little could be done to respond to the terrorist threat against France, because there was no consistent counter-terrorist policy: "The influence of the pro-Iraqi, pro-Libyan, pro-Palestinian lobbies dictates the orientation of external action and blends its efforts with the military-industrial complex to increase arms sales". (Douglas Porch The French Secret Services 1995 p 433)

³⁶ Malcolm Anderson *Counterterrorism as an Objective of European Police Cooperation* in Fernando Reinares (ed) European Democracies Against Terrorism 2000 p 239

having been conducted half-heartedly. No watchdog mechanism existed to ensure wholehearted commitment to the Council of Europe's ECST; thus there was nothing to deter states from acting in the interests of short-term realpolitik. As one MEP put it:

We have a convention that is valueless...because of the contradictions it contains and the opinion it offers of paying no attention to the very rules it lays down³⁷

The comment is harsh, but justifiable. There is much to criticise in the ECST, not least the reluctance of the Member States to commit themselves fully to its principle. It is much easier to commit oneself to a police-co-operation agreement where, should realpolitik dictate, one can simply withhold information without others knowing; extradition, on the other hand, is an entirely public matter. Consequently the ECST was intentionally riddled with escape clauses.

Do such infractions and contradictions make for a paper tiger? The ECST is a weak piece of legislation, certainly, making as much sense as a doorway in the middle of a field. If you so choose, you could pass through the door, but equally you could ignore it. The ECST did however have a positive affect on European attitudes towards terrorism. It established the concept that a terrorist crime need not necessarily be – indeed was most likely not – politically motivated. This immediately became a focal point in dealing with

³⁷ Noemi Gal-Or International Cooperation to Suppress Terrorism 1985 p 294

terrorism, sweeping away the aimless confusion of the past and dramatically curbing the number of terrorists who were simply being expelled because governments did not know what else to do with them. Beyond this, the ECST also illustrated the beginnings of the Community Member States focusing on the possibilities of developing an EEC response to terrorism. The Dublin Convention marked the basis for the first exclusive agreement among Community states to combat terrorism.³⁸

It is perhaps unfair then to criticise the ECST too harshly; whilst it practically invited its signatories to run a coach-and-horses through it, it was also a revolutionary piece of legislation, re-evaluating the whole ethos of the political offence as an exemption from extradition. It tore down a fundamental and historical leitmotif, which had stood unassailable for more than two centuries within extradition law. The failure of the ECST lies in the fact that it was not followed by a more committed Convention to 'plug' the exposed holes. Instead, judicial co-operation against terrorism was left withering on the vine over a long period, during which time terrorism continued to develop.

Readdressing extradition: the EU initiatives

The advancement in co-operative law enforcement throughout the EU against terrorism, as well as traditional criminal activities, ensured that extradition

³⁸ Vercher, *Op. Cit.*, p 352

The Dublin Agreement was not the initial judicial effort by the Community against terrorism; efforts were being made to establish an extradition treaty to combat terrorism, but the Council of Europe pipped the Community to the post with the ECST. Consequently the Community dropped its own plans as there was little point in establishing a parallel system.

procedures would invariably have to be reassessed. The Schengen Implementing Convention, for example, included a necessary supplementary section (Title III, Chapter 3) to the 1957 Convention and Benelux Treaty of 1962 in recognition of the fact that if its provisions increased the movement of police officers across internal borders, then so too would the standard extradition practices also require supplementing. However, it is the EU Convention on Extradition 1996 (signed 27 September 1996) which simplifies the extradition process between the Member States; it was also the first piece of legislation to accurately recognise the advances made in law-enforcement co-operation. Aside from the literal simplification of the correct procedures surrounding an extradition application (the bane of many a refused request), the Convention also removes the category of a political offence (Article 5.1) and refuses, unconditionally, the inclusion of any reservations regarding terrorist offences (5.2). This does not render the ECST obsolete, as Article 5 (of the ECST) is retained. It does, however, effectively address the majority of the flaws endemic to the ECST. Additionally, Article 7 puts forward the principle of extraditing nationals. It recognises that many Member States do not follow this practice, and that some have constitutional barriers prohibiting it, but asserts the argument that inroads should be made because of the “shared values, common legal traditions and the mutual confidence in the proper functioning of the criminal justice systems of the Member States of the European Union” (Article 7). The Italian authorities faced this problem when their request for the extradition of Tarek Maaroufi, an Islamic preacher of Tunisian origin, whom they believed to be a key figure in a thwarted bombing

campaign in Strasbourg, December 2000, was refused because Maaroufi also possessed Belgian citizenship.³⁹

What is most controversial about this Convention is that it extends extradition into the area of acts of “conspiracy” or participation in a criminal organisation, even if these are not offences within the requested Member State (Article 3.1).⁴⁰ The Explanatory report from the Council argues that this is necessary to adequately prevent extradition failing against “organised crime in all its forms”.⁴¹ In doing so however it removes another tradition of extradition law, that of “dual criminality”: that the crime must be an offence in both countries for an extradition request to be received. While certainly boosting the scope of extradition against terrorists, this does generate some worrying concerns as well. In February 1996, relations between Belgium and Spain were strained by the former’s refusal to extradite two Spanish Basques who had applied for political asylum, having been accused by Spain of providing “logistical assistance” to ETA terrorists. A straightforward and reasonable charge, one would assume, but it failed because the Belgian courts argued that the ECST did not maintain provisions for charges of supporting a terrorist group – an offence for which Belgium has no criminal statute in any

³⁹ Wall Street Journal *Foiled Strasbourg plot underscores obstacles to fighting terrorism* 24 October 2001

⁴⁰ However, this is conditional on the offence being punishable by at least one year’s imprisonment, and that the conspiracy must have as its objective an either an act of terrorism or “drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons”.

⁴¹ Convention relating to extradition between the Member States of the European Union – Explanatory Report (Text approved by the Council on 26 May 1997) 41997Y0623(01) *Official Journal C 191*, 23/06/1997 p. 0013-0026 Article 3

case.⁴² The egregious part of this particular incident, however, was that the offence charged by Spain had actually occurred in Belgium, when the Basque couple allowed some ETA members to stay in their home. The new EU Convention on Extradition prevents any similar case failing on this particular ground.⁴³ Indeed, it was Spanish lobbying, concerned with bringing greater pressure to bear against ETA, that pushed for this provision to be included in the Convention.⁴⁴ It is understandable that the requirement of dual criminality may at times legitimately be seen as a perversion preventing extradition; however, if the offence occurred in the requesting state, this legislation ensures that an individual's actions abroad, rightly or wrongly, become a matter of prosecution within the state.

Overall, this Convention builds significant inroads towards addressing the weaknesses within the ECST, making terrorism a compulsory extraditable offence. However, its erosion of the dual criminality principle does raise important concerns, particularly in the case of defining "logistical assistance", and while ignorance of the law is no defence, the example of EU nationals arrested in Greece 2001 on espionage charges while plane-spotting (see

⁴² FECL 48, November 1996 *Agreement on Extradition puts an end to Spanish-Belgian Dispute*; Monica den Boer *The Fight Against Terrorism in Maastricht* in Reinales, Op. Cit., p 216

⁴³ A bilateral agreement was signed between the two countries in November 1996 addressing these Spanish concerns, as it would take some years, even with the "rolling ratification", before the EU Extradition Convention became active. (FECL 48, November 1996 *Agreement on Extradition puts an end to Spanish-Belgian Dispute*) Indeed, following this new agreement, the two Basques in question, Raquel Garcia and Luis Moreno, were extradited to Spain the following year subsequent to a similar Spanish request. ([Statewatch](#) artdoc (online) *Spain: Torture and Extradition* February 1997)

A similar case occurred in Germany, leading to the extradition of Benjamin Ramos, a Basque, in September 1997, on charges of assisting ETA. ([Arm the Spirit Basque Solidarity Action in Berlin](#) email communiqué 9 January 1998 (www.burn.ucsd.edu/archives/ats-1/1998.01/msg00026.html))

⁴⁴ den Boer, Op. Cit., p 213

below) illustrates the merits of dual criminality requirements while Europe continues to maintain differing judicial systems.

The transfer of evidence

Just as individuals are transferred to a requesting state through the procedures of an extradition hearing, so too does the request for evidence and witnesses progress through a formal procedure. The EU Convention on Mutual Assistance in Criminal Matters 2000 complements the simplified EU Extradition Conventions and is the enhanced successor to the Council of Europe's European Convention on Mutual Assistance in Criminal Matters 1959. The 1959 Convention applied to all offences, with the exception of fiscal, military or political crimes.⁴⁵ Working on the principle of *Commissions Rogatoires*, the request is usually made through the interior ministries, and then forwarded to the relevant judge or magistrate. Additionally, information from judicial records can also be requested (Article 13). That Britain did not sign up to this Convention until 1991 (or ratify the 1957 Extradition Convention until 1990)⁴⁶ proffers some explanation towards certain of the problems faced by the Lockerbie investigation, despite the Lord

⁴⁵ A 1978 Protocol *inter alia* removed the exemption for fiscal offences, although a state could still retain the exemption in part.

⁴⁶ The UK was late in entering into these Conventions because her criminal law tradition did not comfortably correspond to the changes that they would bring, without inducing alterations to the UK legal system. At the same time the UK's geographical position served as an effective barrier against transnational crime, which was then in its infancy, therefore change was considered unnecessary. The growth in transnational crime, especially drug trafficking, along with increased travel and globalisation resulted in the UK bowing to the inevitable and signing the Convention, after having introduced the necessary changes to her extradition law via the Extradition Act 1989.

Advocate's own *Commission Rogatoire* to the Frankfurt state prosecutor's office asking for all possible assistance in the inquiry.⁴⁷

The 2000 Convention is essentially an update of the 1959 Convention, especially acknowledging technological advances. Telecommunications intercepts, for example, have become much more common in court, but they remain a highly contentious source of evidence, due to their "big brother" overtones; hence the need to ensure adequate provisions sympathetic to data protection legislation, whilst also providing for the facilitation of their transfer. The Convention also represents a political expression in the battle against organised crime throughout the EU, with JHA Ministers recognising the Convention's "capital importance" in this fight.⁴⁸ In this respect, the Convention is also particularly useful against terrorism, because it can facilitate the transfer of evidence towards an investigation, as well as a prosecution.

Perhaps most interesting in the 2000 Convention is its interpretation of the advances made in European co-operation through provisions which impart greater powers in the gathering of evidence and obtaining of witnesses, without their consent if necessary (although witness statements may be made via video conference, rather than compelling individuals to appear in the court of another Member State). This is a significant step on the 1959 Convention: although it permitted a judge to request the attendance of witnesses who

⁴⁷ David Leppard *On the Trail of Terror* 1991 pp 85-6 (Although Scottish law has greater commonality with Continental Roman law than English Common law.)

⁴⁸ House of Lords Select Report on the European Union 12th Report 18 July 2000, Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union – The Final Stages, Introduction and Background, paragraph 1

resided in another state, the summons only became binding if the witness actually entered the requesting state and had ignored the said summons. The new provisions offer a definite advantage in tackling international terrorism, where witnesses are likely to reside outside of the prosecuting state. During the Lockerbie trial, the Crown was unable to compel any witnesses other than British nationals to testify, and found this a hindrance when airport staff workers at Luqa airport in Malta, where the IED was placed aboard PAN AM 103, refused to provide evidence.⁴⁹ Once the Convention comes into effect, such occurrences should no longer be an issue.⁵⁰ In view of the current transnational terrorist threat facing Europe and the world, the removal of impediments to trials is an important step.

The European Judicial Network (EJN)

The progress made in law-enforcement co-operation throughout the Member States has ensured that judicial co-operation in criminal matters cannot be exclusive to extradition. As part of the EU's strategy against serious crime, the Council established the EJN through a declaration in June 1998.⁵¹ By creating a series of contact points between the judicial authorities of the Member States, the Council aimed to improve the speed and methods of communication in this area, paralleling, to a certain extent, the role of liaison officers in facilitating police co-operation.

⁴⁹ *BBC News Witnesses pull out of Lockerbie trial* 13 July 2000

⁵⁰ Malta is also on course for EU membership at the next accession.

⁵¹ The EJN was officially inaugurated on 25 September 1998.

The EJM works on three levels: firstly, the Member States each propose one or more contact points, "taking care to ensure effective coverage of the whole of its territory and all forms of serious crimes" (Article 2.1).⁵² These contact points then liaise between their own judicial and national authorities, and with the sister facilities in the other Member States, and are able to provide legal and practical information to facilitate judicial co-operation and requests. The second level involves periodic meetings of the EJM to serve as "a forum for the discussion of practical and legal problems encountered by the Member States in the context of judicial co-operation" (Article 5.1(b)). The third level concerns the dissemination of information within the EJM (Title IV), where the contact points must have permanent access to the following four types of information:

1. full details of the contact points in each Member State with, where necessary, an explanation of their responsibilities at national level;
2. a simplified list of the judicial authorities and a directory of the local authorities in each Member State;
3. concise legal and practical information concerning the judicial and procedural systems in the 15 Member States;
4. the texts of the relevant legal instruments and, for the conventions currently in force, the texts of declarations and reservations.

(Article 8)

⁵² Council Joint Action establishing the EJM, 98/428/JHA of 29 June 1998.

One can immediately see the resemblance to areas of law-enforcement co-operation such as the Terrorism Directory, as well as the liaison officers, in these provisions. Essentially though, the EJM is designed for speediness; consequently the Joint Action necessitates that the Member States keep the information required by Article 8. Speed is vitally important as in many cases, once a criminal activity is uncovered, a rapid response is required before the transgressors have time to react. Richard Gerding, a deputy chief prosecutor in Rotterdam, and in charge of the Secretariat of the EJM, gives the hypothetical example of the discovery of a child pornography site in The Netherlands, where the information for the site came from an Austrian service provider.⁵³ Traditionally a rogatory letter would be sent by a Dutch prosecutor to the competent Austrian authority, requesting the seizure of the site's material. This would take time to process, allowing a significant possibility that the material might disappear by the time the police arrived. Direct communication between the contact points dramatically reduces this risk, particularly due to the secure telecommunications system linkage (Intranet) established in June 1999 (Article 10). With the EJM, the Dutch police can call upon their contact point who can then consult the Austrian Legislation on Child Pornography and the coercive measures permitted under Austrian law. Computerised telecommunications make the transfer of information almost immediate. Provided Austrian law permits the judicial authorities to conduct a computerised search, the contact point can obtain the evidence and hand it over to the Dutch magistrate, all without the need to draft and send a *commission rogatoire*.

⁵³ Conference Paper, Child Welfare Initiative, ASEM Resource Centre, Vienna 29 September-1 October 1999, Richard Gerding *Combating Child Pornography on the Internet – The Role of the European Judicial Network* paragraph 16

These sorts of procedures work equally well against terrorism, enhancing the authorities' ability to rapidly seize documents and information, especially when it is considered how important the Internet has become as a means of communication between terrorist cells. The EJM is therefore an acknowledgment of increased integration and the advances in technology that allow a nineteenth-century procedure to be updated to apply to the realities of the twenty-first.⁵⁴ However it is the embryonic European judicial co-operation unit, commonly known as Eurojust, that represents one of the two co-operative judicial measures with the teeth to fight terrorism.⁵⁵

Eurojust

As the name suggests, Eurojust is the judicial equivalent of Europol, and likewise, is based at The Hague. The decision to establish such a unit was made at the Tampere summit in October 1999 in order:

to reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system⁵⁶

⁵⁴ A former US Attorney-General described extradition laws as belonging to "the world of the horse and buggy and the steamship, not in the world of commercial jet air transportation and high speed communications". (Gilbert, Op. Cit., p 1)

⁵⁵ The Council Decision of 28 February 2002 that implements Eurojust proper, has yet to come into effect. (32002D0187 2002/187/JHA: Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime Official Journal L 063, 06/03/2002 P. 0001-0013)

⁵⁶ Tampere Conclusion No. 46

Like Europol, Eurojust began its role in a provisional capacity (Pro-Eurojust), on the grounds that the experience gained would serve as the basis for its establishment as a permanent body. It began operating in January 2001, having received the necessary political endorsement by the JHA Council the previous July; it became fully operational in December 2001.⁵⁷ Moreover, like Europol, it too is controlled by a Convention, immediately suggesting strong intergovernmental control. Similarly, its competencies cover the same criminal activities as Europol, with a particular emphasis on financial crimes (Article 5).

Eurojust's objectives (Article 3) are aimed at improving both the co-ordination and co-operation of investigations and prosecutions between the Member States, along with improving the areas of mutual assistance and extradition requests.⁵⁸ To this end, it includes a database support arm, capable of imparting legal and practical information to the Member States' judicial authorities, as well as establishing an index of data relating to investigations, along with temporary work files also containing personal data (Article 14.4). Again, like the databases of the SIS and Europol, these are accessible only by liaison officers, termed "national correspondents" (Article 9). Moreover, Eurojust has the capacity to establish joint investigative teams to facilitate the work of the Member States (Article 6 a(iv)), greatly adding to its co-ordination abilities.

⁵⁷ House of Commons Home Affairs Select Committee 31st Report A Provisional Judicial Co-operation Unit issued 15/10/2000 paragraph 14.2; Statewatch post 11.09.01 analyses: No. 1 The "Conclusions" of the special Justice and Home Affairs Council on 20 September 2001 and their implications for civil liberties

⁵⁸ Article 3.2 does permit Eurojust to assist a Member State with a non-Member State.

Eurojust's capacity for facilitating co-operation was demonstrated with the arrest of an ETA suspect, Ramon Rodriguez, in Amsterdam, January 2002. This was the first time the Dutch and Spanish had worked together to make a terrorist-related arrest. Certainly a significant factor in the Dutch co-operation towards the Spanish request rested on post-11 September attitudes towards terrorism; however it was the facilitatory input from Eurojust, encouraging the sharing of information, which actually created the conditions permitting the arrest.⁵⁹

Eurojust represents a new approach towards judicial co-operation, moving away from a reactive stance, most typically represented by extradition, to a more proactive one. By serving as a facilitator of judicial co-operation, Eurojust effectively acts as a pilot for the Member States' authorities in this complex milieu, thereby encouraging this co-operative approach. It is able to fuse law-enforcement and judicial co-operation concurrently into an investigation rather than the traditional approach of judicial co-operation following the police investigation. The result is a more effective investigation due to judicial support throughout.⁶⁰

This new-style approach is especially important in tackling the emerging threat of transnational terrorism. Here, the transnational and international interlinkages involved require proficient judicial support for investigative co-operation to make any headway. The case of Tarek Maaroufi above is an

⁵⁹ *BBC News Dutch police arrest ETA suspect 17 January 2002*

⁶⁰ In any event, such progress is a necessary package of the JHA programme. For judicial co-operation to remain focused around extradition would have been to stymie the advances made at the law-enforcement level. Police co-operation can only progress so far without similar advances made at the judicial level.

example characteristic of the legal complexities involved here. The JHA Council, clearly aware of these attributes, has put significant emphasis on Eurojust's role in countering terrorism in the post-11 September environment. Its role in joint investigations has been boosted with representatives from Eurojust participating in the special counter-terrorist teams set up to "co-ordinate current investigations into terrorism which are in any way linked".⁶¹ Additionally, co-operation between anti-terrorism magistrates is being strengthened by Eurojust bringing such magistrates together to focus on this issue.⁶² One of the more significant expansions of Eurojust's powers is through a protocol adopted by the Member States to the 2000 EU Mutual Legal Assistance Convention.⁶³ The protocol extends the MLA Convention to place obligations on member states to provide information on bank accounts, banking transactions and surveillance of banking transactions, and removes some of the existing grounds on which Member States can refuse to co-operate with requests. Another of Eurojust's roles is to find "practical solutions" should a Member State refuse to co-operate with a request made under these provisions.⁶⁴ What exactly these "practical solutions" may be is unspecified, although the implications are that Eurojust might take a mediatory role. In any event, this addendum to Eurojust's role is illustrative of the growing significance attached by the Member States to its position in facilitating counter-terrorism.

⁶¹ Statewatch Post 11.9.01 analyses: No 7 EU anti-terrorism plan: "operational measures" Point No. 2

⁶² Statewatch Post 11.9.01 analyses: No 1 The "conclusions" of the special Justice and Home Affairs Council on 20 September 2001 and their implications for civil liberties Point No. 6

⁶³ The protocol has yet to be ratified by all the Member States, although the target date set for this was for the end of 2002.

⁶⁴ Statewatch Post, Op. Cit., analyses: No 1, Point No. 20

As the above example of Ramon Rodriguez demonstrates, the sea change towards terrorism has promoted a hardening of attitudes amongst even the more liberal-minded of EU Member States. Undoubtedly this has had its part to play in the increased co-operation occurring in Europe since the al-Qaeda attacks in America. However, the co-operative structure that has been put in place by the Member States is primarily responsible for achieving this co-operation. By enhancing co-operation at the judicial level, the Member States' law-enforcement agencies have been able to progress further in their operations than ever before. Eurojust is grease to the judicial wheel: its purpose is not to alter the system, but to make it run more smoothly. The UK Home Secretary's failure to extradite a GIA suspect to France by overruling the courts demonstrates that neither Eurojust, nor the EJM for that matter, are capable of interference in a Member State's judicial matters. The planned introduction of a European Arrest Warrant, however, will result in a radical and controversial overhaul of the extradition process as we currently know it.

The European Arrest Warrant

The second measure devised by the EU Member States (adopted 13 June 2002) with teeth to fight terrorism is the European Arrest Warrant. Its purpose is to replace the extradition procedure on a range of crimes with a fast-track arrest warrant, which can be executed at greater speed, as it will involve an emphasis on administrative rather than judicial procedure. This is achieved through the principle of mutual recognition of criminal judgements within the Member States – that court orders and decisions taken in one country are

recognised and enforced by all the others.⁶⁵ Consequently certain extradition measures would be dissolved, such as some rights of appeal, with the warrants being executed by designated judicial authorities, rather than the continuous need for a higher national authority to be involved – as the Home Secretary is in the UK, for example.⁶⁶ Moreover, the warrant allows the authorities to request an individual be detained, searched or surrendered by police in another Member State.⁶⁷ Again, such measures represent a move away from the reactive nature of judicial co-operation, towards a more proactive response.

The warrant, however, is much more than a fast-tracking of the extradition process. Its ability to request another Member State's police force to detain suspects, coupled with the much faster transfer process, effectively introduces a structure into the EU whereby suspects can be detained at the transnational level almost as comprehensively as at the national. Additionally, the warrant dissolves the concepts of both dual criminality and nationality, completing the initial inroads made in the 1996 Convention against these traditional pillars of extradition law (Articles 2.2 and 5.3 respectively⁶⁸). Under these provisions, cases such as that of Tarek Maaroufi could be resolved, as the warrant

⁶⁵ Ibid. Point 1

⁶⁶ *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* 2002/584/JHA, Articles 6 and 7; [BBC News Suspects face quicker extradition](#) 27 June 2002

⁶⁷ [Statewatch Post](#), Op. Cit., analyses: No 1, Point 1

⁶⁸ Only if the warrant is for the purposes of enforcing a custodial sentence or detention order may the right to surrender a national be refused, if the state consents to execute the said sentence or order under national law (Article 4.6). See also Article 5.3 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision 32002FO584 Official Journal L 190, 18/07/2002 P. 0001-0020

removes nationality as a prophylactic to transfer.⁶⁹ Quite how the constitutional arrangements of some Member States are going to be reconciled with these provisions is another matter.

The warrant also adds a new dimension to counter-terrorism strategy through a much-reduced timescale leading to surrender. This provides a motivation to request the detention and surrender of a suspect, principally for the purposes of interrogation, rather than for trial. Such surrender would of course involve a trial, but because the scope of the warrant covers crimes punishable by a minimum of four months imprisonment or more – rather than the traditional one year for extraditable offences – the opportunity exists to develop a new mindset of casting nets to catch minnows *as part of an investigation* to lead them to a pike.⁷⁰ This concept provides for the continuation of a proactive rather than a reactive counter-terrorist policy.

The warrant is a potent weapon against terrorism, but it contains the same weaknesses as any other extradition mechanism: to function, it requires the Member State to surrender the terrorist suspect, even in the face of terrorist intimidation or realpolitik. To expect the warrant not to be tested in this way would be naïve. Terrorism's *raison d'être* is to use intimidation to force a given change. The UK government, for example, had little choice other than

⁶⁹ The matter of recognising terrorism as a criminal offence in national legislation was finally resolved by the establishment of a common definition on terrorism throughout the EU, at a Council meeting on 6 December 2001. The definition covers terrorist offences, as well as those linked to them, including incitement and abetting (Articles 1, 2 and 3). Prior to this definition, only Germany, Italy, the UK, Spain and Portugal incorporated any such definition into their national legislation. The EU had begun work on this issue in 2000, but the al-Qaeda attacks in September 2001 accelerated the process.

(Council of the European Union, Outcome of Proceedings; 7 December 2001, Proposal for a Council Framework Decision on combating terrorism. 14845/1/01 Rev 1 Limite)

⁷⁰ Article 2.1

to release the PFLP hijacker, Leila Khaled, in September 1970, despite an Israeli extradition request, after the group hijacked a BOAC jetliner on 1 September 1970. The PFLP threatened to kill the passengers and crew, along with those of two other hijacked European liners at Dawson's Field in Jordan, if a number of their colleagues were not released from Switzerland and Germany, along with Khaled.

More recent was the case of Abu Ocalan, the leader of the PKK, who became something of a 'hot potato' for several EU governments when he arrived in Italy on 12 November 1998 seeking asylum. On his arrival in Rome, Ocalan, who was regarded by most Western governments as a terrorist, had two outstanding arrest warrants against him issued by Germany and Turkey. Italy refused Turkey's extradition request because her constitution prevents her extraditing prisoners to countries with capital punishment. The ECST's dictate of *aut dedere aut judicare* did not apply, because Ocalan was wanted on charges of treason, not terrorism. Germany's warrant was also declared invalid by the Italian court because Germany had replaced the original international warrant with one that could only detain Ocalan if he actually went to Germany. Ocalan, however, was very much an unwanted guest, just as he had previously been in both Syria and Russia. That no government would want to take him in is understandable, but Germany did not press its case to have the PKK leader before its courts. Bonn's silence stemmed from its wish to avoid inflaming Germany's large Kurdish migrant *gastarbeiter* community. Greece's eventual sanctuary of Ocalan in its Nairobi embassy could be construed as sympathy for the PKK, especially considering the

antipathetic relationship between Athens and Ankara; but equally, suspicions were also raised that the Greek government betrayed Ocalan, allowing Turkish special forces to capture him in Nairobi on 16 February 1999.⁷¹

The Ocalan case demonstrates the nervousness that can develop towards having an infamous terrorist on one's soil, let alone in the dock. Even the notorious East-German Stasi grew concerned with their patronage of "Carlos the Jackal", fearing that he would turn on them if they put too much pressure on his group.⁷² One could argue, though, that 11 September truly was a watershed in the way that we view terrorism, and that consequently resolve has been significantly stiffened to stand firm in the face of terrorist intimidation. This, however, would blinker the fact the realpolitik is rarely comfortable with the concept of *fiat iustitia ruat caelum*. British policy towards alleged Muslim terrorists within the UK illustrates a potential sticking point with the Arrest Warrant. On many occasions, the UK's European partners have accused British concern with Irish terrorism as having a detrimental effect on awareness of other terrorist threats. With twenty-eight per cent of the UK's Security Service budget allocated to international counter-terrorism and thirty-two per cent to Irish terrorism during the period April – December 2001, this is, however, a questionable charge.⁷³ What can be said, although it has never been made explicit, is that British policy adopted a low-key approach to Islamic militants prior to 11 September, reflecting

⁷¹ The Guardian *Turks angry as Italian court frees Kurdish leader* 17 December 1998 p 15; The Observer *Can't stay, won't go: Italy's difficult guest* 3 January 1999, p 17; The Times *The Ocalan Test* 17 February 1999, Editorial

⁷² John Follain *Jackal* 1999 p 228

⁷³ MI5: The Security Service, Fourth Edition 2002 p 11

asylum law, but also the realpolitik of deterring militants from engaging in acts of terrorism within the UK. Rather, British intelligence monitored the extremists, utilising gained intelligence to thwart attacks being planned elsewhere.⁷⁴ Abu Qatada, for example, the controversial Jordanian-born cleric, who entered the UK in 1994 seeking asylum, and who is wanted in eight countries on terrorist-related charges including the USA, Belgium, France and Spain, and has been described as “Osama Bin Laden’s ambassador in Europe”, has not been extradited to any of Britain’s EU partners.⁷⁵ His disappearance in December 2001 sparked rumours that he had turned “supergrass” and was being protected by the Security Services.⁷⁶ More to the point, however, is the fact that the investigation by the British into Qatada and a number of other clerics has found little evidence to support the claims made by their European colleagues.⁷⁷ This difference of opinion stems from the differing legal systems in operation between the UK and her continental partners. Once the Arrest Warrant comes into force (scheduled on 1 January 2004 throughout the EU⁷⁸), one can expect that a number of warrants will be issued against many Muslim radicals living in Britain. Should, or rather, when this occurs, the British government will be placed in the dilemma of whether or not to enforce them. If it does so, it goes against traditional British policy in these areas, as well as possibly risking al-Qaeda reprisals for this u-turn, but

⁷⁴ Jane Corbin *The Base* 2002 pp 202-3

⁷⁵ Although no EU Member State has yet made a formal request for Qatada’s extradition. *BBC News* *Cleric held as terror suspect* 25 October 2002; *India Times* Online Edition *Fugitive Cleric Linked to Al Qaeda Arrested in Britain* 8 November 2002

⁷⁶ *BBC News Britain* “sheltering al-Qaeda leader” 8 July 2002

⁷⁷ *The Guardian* *Allies point the finger at Britain as al-Qaeda’s “Revolving Door”* 14 February 2002, (On Line edition).

⁷⁸ Council Framework Decision, Op. Cit., Article 31

to refuse them would be to contradict government policy on its support for the “war on terrorism”.

There are also a number of other concerns regarding the Arrest Warrant, not least that it covers a range of crimes far exceeding the more serious offences such as terrorism and murder. Rather, its sweeping list of thirty-two offences includes illicit trafficking in cultural goods, antiques and works of art, swindling, arson, and racism and xenophobia (Article 2.2).⁷⁹ Such a broad scope, together with the removal of dual criminality and nationality, seriously erodes the sovereignty of national criminal law and the safeguards it offers. Its acceptance of the premise of mutual recognition of criminal judgements amongst the Member States in a Union whose degree of judicial integration remains in its infancy is erroneous at best. The argument that all the Member States are signatories to the European Convention on Human Rights, which consequently serves as a bolster or safety-net to the premise, similarly falls flat. The farcical arrest and trial of fourteen British and Dutch plane-spotters in Greece, accused of espionage by the Greek authorities, clearly illustrates the lack of minimum judicial standards across the EU. The inability to comprehend the concept of “plane-spotting” led the Greek authorities to pursue the charge after arresting the plane-spotters in November 2001, and after trial, find them guilty in April 2002 (although this was later quashed upon appeal).⁸⁰ Aside from the incredulous charges (the plane-spotters had received permission from the airbase authorities to be there), the case

⁷⁹ Unpleasant as these latter two offences might be, classifying them as crimes is highly contentious; the State should have no right to legislate as to how people think. These are individual beliefs and opinions, not criminal acts in themselves.

⁸⁰ *BBC News Greek tragedy for jailed plane-spotters* 27 April 2002

highlights further dangers regarding the use of the Warrant. The plane-spotters' rights were abused, through the fact that they were not charged within seven days of arrest, and although the magistrate accepted that there was no evidence against them (fresh charges were made), they were remanded in custody, with the hearings heard in private.⁸¹ Notably, one of the plane-spotters, Michael Keane, was unable to return to Greece for the appeal on health grounds, and consequently was not acquitted. Although espionage does fall under Article 2 of the Warrant's scope, the example stands that similar circumstances covered by the Warrant could theoretically lead to the surrender of Keane to Greece to serve out his sentence, unless he appealed.

The Warrant is a useful mechanism against the type of terrorism currently threatening the EU Member States, but its scope is too wide, too early. Two of the plane-spotters arrested in Greece have begun lobbying the European Parliament for a common judicial standard throughout the EU.⁸² Only when the Member States begin to rectify this problem will the Arrest Warrant as it stands be a welcome addition to European judicial co-operation.

Conclusions

Judicial co-operation against terrorism has progressed significantly since the drafting of the ECST. Only recently, though, have these developments actually taken off, catalysed by the advent of the al-Qaeda threat; without the progress in European integration these developments were simply not in a

⁸¹ BBC News *Plane spotters "could be at risk even at home"* 30 November 2001; BBC News *Greek tragedy for jailed plane-spotters* 27 April 2002

⁸² BBC News *Plane-spotters seek EU law change* 19 November 2002

position to occur. The 11 September attacks accelerated much that was already in the pipeline. Many of the flaws inherent within the ECST have been rectified by the EU 1996 Extradition Act, which is in turn about to be superseded by the introduction of the European Arrest Warrant. The Warrant has the benefit of rapidly speeding up the transfer of wanted fugitives, and this reduces the "oxygen of publicity" capable of being generated by a terrorist fighting the request for his/her surrender; nevertheless, at heart, it remains a form of extradition, with similar weaknesses.

It is interesting that extradition's inherent weakness when faced with terrorism has not deterred the Member States from focusing co-operation, for the most part, on this concept. The predominant demand of a Member State would still seem to be that a terrorist should not escape the long arm of the law, principally its own arm. How this weakness is resolved ultimately depends upon the nerves of the individual Member State(s) concerned. Extradition agreements have failed to effectively stiffen this resolve against terrorism due to their numerous "escape" clauses related to the issue. Extradition works well against "common" criminals, but in targeting terrorists, it also reflects on politics. This is problematic because extradition legislation is extremely sensitive of the requested state's sovereignty, as it must be, since it is dealing with the criminal law of another sovereign power. When politics enters the equation, however, as can happen in terrorist extradition cases, national sovereignty has a greater tendency to reassert itself, even if it is only in the interests of "self preservation". Observing the loopholes in the ECST, we can see that this is no exception, even in relation to terrorism. Extradition accepts

the realpolitik of Hedley Bull's Anarchical Society; the agreements and regulations only denote an understanding between two states that wanted fugitives may be returned to the requesting state *if* certain conditions are met, but the prerogative remains with the requested state as to whether this should take place – the commitment is not binding.⁸³ Within the EU, the recent integrative advancements within law-enforcement and judicial co-operation, especially Eurojust, are more likely to hold a Member State to its commitments than they were ten years ago. Bull's anarchical society holds less sway over the integrating European Union, which is held together by processes far beyond mere international treaties and agreements. This is not to say that extradition of terrorists and others will not always be refused, as there are sometimes good reasons to do so when it is felt that justice would be ill-served. The Irish government clearly felt that this would be the case with Patrick Ryan, as do the UK courts with Rashid Ramda. With the arrival of the "New Terrorism" however, and the nightmare scenarios which it is capable of producing, even this model of integration may be sorely tested by terrorist intimidation.

The recent advances in judicial co-operation have, however, changed the nature of counter-terrorism, allowing the development of a much more proactive stance. No longer is it simply a case of waiting for an extradition request to be acted upon. The Warrant and Eurojust offer new strategic

⁸³ Hedley Bull The Anarchical Society: a Study in the Order of World Politics 1995
Bull's classic realist study of international relations argues that that rules which govern relationships and behaviour between states are almost ethereal in nature unlike those at the national level, because international society has no centre of authority. The United State's decision to invade Iraq in 2003 is a classic example of realist argument, where the might and primacy of American power is sufficient to allow it to act unilaterally if necessary.

opportunities. Combined with the developments in law-enforcement, this significantly extends the Member States' reach against terrorism.

Judicial co-operation has yet to reach the stage whereby Europe is capable of developing an *espace judiciaire européenne*, although certainly current developments have surpassed Giscard d'Estaing's original vision here. Some progress has been made at the bilateral level towards the literal meaning of this concept. The development of a "common area of freedom, security and justice" between Spain and Italy has led to the replacement of extradition by administrative transfers for all offences carrying a minimum prison sentence of four years. Unlike the Arrest Warrant, the crimes are all encompassing, and surrender is automatic unless there is either inadequate documentation relating to the request or the case concerned is granted immunity by legislation in the "requested state".⁸⁴ Achieving such integration on an EU-wide basis is another matter entirely. Although one should be wary of pushing judicial co-operation too fast, the Warrant's large scope is too overloaded for the current level of judicial integration within Europe.

This integration is a little difficult to place within the traditional context because of the conservative nature of judicial co-operation. Traditional co-operation was limited to closing loopholes in extradition legislation via the Council of Europe, but attempts to move beyond this via the European Community failed abysmally. The JHA process has provided a new canvas, and the co-operation which has occurred in improving the extradition arrangements, establishing the EJM, Eurojust and the fast-track arrest warrant,

⁸⁴ Statewatch *Protocol on extradition* Vol. 10 No. 5 September-October 2000 p 4

has done so because European integration, as well as law-enforcement co-operation, has reached a state of affairs far more sophisticated than that of the late 1970s. We can see that judicial co-operation is moving towards parity with the transnational work of their police colleagues, and as such, perhaps we can expect co-operation here to be open to the same type of influences as those that have affected law-enforcement. The emphasis on developing structures puts individuals at the forefront of some of the co-operative facilitation here, principally within the EJM and Eurojust, perhaps leading to the budding of neo-functional collaboration at a later stage. Intergovernmentalism certainly defines co-operative policy at the moment, but again the concept of federalism within judicial co-operation is a tantalising one, and a necessary building block of a federal Europe. On matters of counter-terrorism, could a common policy against this threat be achieved at the judicial level without resorting to the federal route; more to the point, is the intergovernmental course capable of this?

As judicial co-operation develops from the new facilitatory structures, we will see further developments within law-enforcement co-operation. Tampere's recommendations for establishing an EJM and Eurojust ensured that new opportunities would open to the existing JHA structures, once these came into effect. Unlike the developments at the traditional extradition level, these enhancements allow co-operation to develop, since they are not limited to executing extradition requests, focusing instead on actually developing judicial co-operation between the Member States. By developing judicial co-operation, the ground is prepared for further developments within law-

enforcement, which are able to progress with new initiatives that would previously have been unworkable, similar in some respects to the concept of spillover. As developments occur in one area, so they have a positive knock-on effect on another. Hence, as the EJN and Eurojust develop facilitatory co-operation with national judiciaries within the Schengen Area, this will improve rate and performance of border co-operation. The process for obtaining warrants permitting cross-border observation will, for example, become easier as links between the national judiciaries improve.

The advances in judicial co-operation therefore have important implications beyond their own immediate connotations. The Member States are now in a much better position to tackle terrorism than they have ever been, especially with the introduction of the Arrest Warrant. However, as mentioned above, the integrative process has an important part in steeling the mettle of the Member States to their signatures on these agreements, and it is to the advances in European integration which we now turn, in order to observe how judicial co-operation fits into the process of the European Project.

Chapter IX

The Position of Judicial Co-operation against Terrorism within the European Integration Process

The progress of judicial co-operation within the EU over the past five years has been remarkable, both in terms of pace and through the development of a proactive approach. Admittedly, however, these developments have remained centred around the concept of extradition, either through its simplification or its alteration into a transfer process, with Eurojust and the European Judicial Network serving primarily as facilitators for this co-operation. This focus illustrates the narrow margin of co-operative scope available to the Member States within this particular area. Expanding co-operation beyond this area is perceived as too sensitive an issue, encroaching as it would, in the most direct terms, on the last bastions of national state power: criminal jurisdiction, criminal trial and criminal sentencing.¹ Consequently, judicial co-operation remains concentrated primarily on facilitation rather than harmonisation.² However, the arrival at a common definition of terrorism by the EU Member States at the end of 2001, together with a listing of terrorist groups and individuals both inside and outside the EU, does represent a harmonisation of

¹ Wolfgang Schomburg *Are we on the Road to a European Law-Enforcement Area? International Cooperation in Criminal Matters. What Place for Justice?* European Journal of Crime, Criminal Law and Criminal Justice Vol. 8 Issue 1, 2000 p 51

² Fleur Keyser-Ringnalda in her study of a common EU policy towards the confiscation of criminal gains, points out that the advantages made available from the wholesale harmonisation of penal law do not easily outweigh the sacrifices required to reach such a goal. (Fleur Keyser-Ringnalda *European Integration with regard to the Confiscation of the Proceeds of Crime* in European Law Review Vol. 15 1992 p 484)

definitions, if not actual counter-terrorist policy.³ Even the advances made in the extradition process are effectively a streamlining process, although clumsily executed in the case of the Arrest Warrant; one could argue however, that the removal of the nationality exemption clause does surrender a sliver of sovereignty.

The limited parameters of judicial co-operation against terrorist related matters, together with the employed methodology, suggest very little scope for supranational influences. Equally though, the concerns of the last chapter with certain issues of co-operation, particularly the Arrest Warrant, question whether the current intergovernmental approach is the most suitable for stewarding judicial co-operation. The sway of intergovernmental decision-making dominating the current advances in co-operation has been demonstrated many times. Should we therefore discount supranationalism as superfluous to the equation? Far from it: while it is undeniable that intergovernmentalism currently shapes co-operative policy in this area, the co-operative constructs that are emerging do have the potential to be more open to supranationalism further down the road. This would also theoretically support the neo-functionalist philosophy that the intergovernmental bargain is necessary to make the initial inroads, but having done so, the way is open for spillover. This chapter explores these possible supranational undertones, while also addressing the dominance of the intergovernmental approach. The

³ Council Common Position (2002/976/CFSP) of 12 December 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/847/CFSP; Council Common Position (2002/947/EC) implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/848/EC.

author however does not agree that judicial co-operation against terrorism need be as limited in scope as traditional thinking dictates. Consequently, two alternative models have been included: an advanced intergovernmental approach, and a supranational one, both of which expand the remit of counter-terrorist judicial co-operation beyond current conceptions. Following on from this is the need to analyse the causes responsible for the explosive pace of advancement over the past five years. Crucially, what role has terrorism had to play within this? Equally why has recent emphasis centred on a proactive stance; is terrorism again responsible, or does the answer lie deeper within the integrative process? Addressing these issues allows us to develop a more comprehensive understanding of the strategy being developed against terrorism through judicial co-operation.

Intergovernmental dominance

Intergovernmental policy dominates the current law-enforcement co-operation within the JHA continuum, so it is of little surprise that it also controls the integrative energy behind the equivalent judicial co-operation. Judicial co-operation, however, has lacked any tangible efforts outside the competency of the Council of Europe until the Treaty of Amsterdam, which provided an objective to maintain and develop the EU “as an area of freedom, justice and security”. Article 31 required Common action in a number of areas including co-operation between ministries and judicial authorities, facilitating extradition, preventing conflicts of jurisdiction and the progressive establishment of minimum rules relating to the constitutive elements of

criminal acts.⁴ Maastricht did not sufficiently address the issue of judicial co-operation in criminal matters (JHA Provisions, Article K.1.7) beyond highlighting it, along with the other JHA provisions, as a “matter of common interest”, whereas law-enforcement at the very least was promised Europol (Article K.1.9). Progress in extradition of course preceded Amsterdam, with the Schengen Implementing Convention and the simplified EU extradition treaties, but it was the second TEU, together with Tampere, which initiated the building of the co-operative facilitating mechanisms.⁵ With such a short pedigree (outside extradition agreements), judicial co-operation has not been in the European arena long enough to develop roots, let alone develop any supranational outlook or influences.

The Member State governments’ anxiety to maintain control of their criminal law-making powers is without doubt, however, the cardinal explanation for the dominance of intergovernmental policy. Keeping the co-operation tightly focused within set parameters such as through the Eurojust Convention also facilitates intergovernmental control. One should also consider the argument that judicial co-operation is not particularly open to developments without the encouragement and sanction of the executive and legislature in any case. Cadoppi makes the point that lawyers tend to be conservative regarding their own criminal justice system, even “in the face of superior needs of the

⁴ Jörg Monar *An “area of freedom, justice and security”?* *Progress and deficits in justice and home affairs* in P. Lynch, N. Neuwahl and W. Rees (eds.) Reforming the European Union: from Maastricht to Amsterdam 2000 pp 143-5

⁵ The Benelux Union also included some necessary enhancements in judicial co-operation to equate to its co-operative law-enforcement, especially in the area of extradition. Only Amsterdam however, offered the first all-encompassing approach.

society”.⁶ Such an explanation may partly account for the failure of the UK government’s policy to target “job culture”, through the introduction of twenty-four hour magistrate courts.⁷ Cadoppi uses the example of the failed UK Criminal Code drafted by James F. Stephen in the late nineteenth century, scuttled through “laziness and conservatism by legal practitioners and judges”.⁸ Cadoppi acknowledges that such a mindset is less of an issue today, and one most likely incapable of hindering any possible unification of criminal laws were a united Europe ever to occur. What this principle does imply, however, is that the natural conservativeness of the national judicial establishment is unlikely to develop co-operative measures without governmental sanction, and moreover, initiation. This is further supported by the lack, until recently, of co-operative structures capable of inducing contact between members of the Member States’ judiciaries. Extradition requests, excluding those of the new Arrest Warrant, are administered exclusively via diplomatic channels or the relevant national ministry, thereby further denying the development of a network of contacts, as was possible through localised police co-operation.⁹ National criminal-justice policy was therefore effectively isolated from the European Project until the arrival of the Amsterdam Treaty.

⁶ A. Cadoppi *Towards a European Criminal Code* in European Journal of Crime, Criminal Law and Criminal Justice Vol. 4 Issue 1, 1996 pp 7-8

⁷ BBC News *Night courts “to be dropped”* 30 December 2002

However, as the Lord Chancellor’s Department summarised, the high costs of the project, together with its lack of real results are primarily to blame.

⁸ Cadoppi, *Op. Cit.*, p 7

⁹ G. Vermeulen and T. Vander Bekon *Extradition in the European Union: State of the Art Perspectives* in European Journal of Crime, Criminal Law and Criminal Justice Vol. 4 Issue 3, 1996 p 214

Supranational potential?

The move away from solely extradition orientated co-operation begun at Amsterdam has continued into the post-11 September environment, establishing forums through which individuals from the Member State judiciaries may meet on a regular basis. Eurojust functions through Member State magistrates, national prosecutors and equivalent law-enforcement officers working together under a single roof to achieve its aims, in the same manner as Europol. National correspondents/liaison officers administer its database, thereby establishing a network of contacts, while Eurojust's Convention permits the establishment of joint investigative teams (Article 6a (iv)) further enhancing this network, as Eurojust officials will work with national judiciaries and law-enforcement officers in the "field". The reaction to 11 September has enhanced the role of these networks, with Eurojust participating in special counter-terrorist teams. Meanwhile, the new informal forum bringing anti-terrorism magistrates together to discuss ways of combating the renewed threat of terrorism, mirrors the original Trevi working-group, suggesting a strong emphasis on utilising this traditional approach to develop initial co-operation here.

Where there was little contact before between the Member States' judicial authorities, there is now a great deal more. Even the new Arrest Warrant contributes to this though increased judicial communication between designated national judicial authorities that administer the surrender requests. The establishment of these networks, both formal and informal, goes some

way to deconstruct the isolationist state of the Member States' national judiciaries. In itself, this does not detract from the current intergovernmental captaincy of judicial co-operation; rather it implies the germination of supranational potential within this previously exclusive area. Increased transnational communication and co-operation between judicial officials initiates the concept of elite-actors into the equation; but given the limited access points for communication, via named "competent judicial authorities", this is not a major revolution in judicial co-operation.¹⁰ Moreover, whereas police co-operation, especially in border regions, has been able to take some initiatives in developing co-operation (Nebedeag-Pol), the judiciary is limited to enhancing co-operation through existing regulations. New laws cannot be introduced without the approval of legislative and executive, especially in those countries that operate under Roman Law, with a criminal codex, and consequently cannot utilise the concept of precedent and interpretation to the same degree as permitted by Common Law. However, this increased co-operation will give judiciaries a stronger voice in requesting or demanding new transnational legislation to facilitate co-operation against terrorism and crime in general, because they will be in a position to discuss such problems amongst themselves. Now inside the EU arena, these groupings will be able to engage in the politics of integration as actors in their own right. If the JHA Council is unsympathetic to a particular concept suggested by one of the co-operative structures, then the judiciary are in a better position to attempt to galvanise support for this from other EU institutions or even Europol. Equally, Eurojust is in the position to become an important actor in its own

¹⁰ *Council of Europe Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, Articles 6 and 7.

right. Controlled by a Director in a similar fashion to Europol, such an individual is not a voice in the wilderness. If, for example, the Director believed that greater integration was required to tackle the threat of terrorism, perhaps moving in the direction of a common criminal policy, then such a concept would gain an element of credence, if nothing else. By drawing the elite-actors into the equation, the current intergovernmental approach is diluted. Consider the broad scope of the Common Arrest Warrant and how this takes the matter of extradition for a great many offences out of the hands of government, and directly into those of the judiciary.

Essentially the establishment of networks puts judicial co-operation on the same track as its law-enforcement counterpart, opening it up to similar integrative influences. Police co-operation has had a head start of some twenty-years, but the acceleration witnessed within judicial co-operation, with the establishment of a formalised structure, Eurojust, and its incorporation into the JHA machinery without any prior informal structure building, along with further enhancements in the wake of the 11 September attacks, demonstrates that it will quickly catch up. Law-enforcement co-operation will retain its intergovernmental drive, although its supranational elements will be capable of directing some influence, however minor.

Throughout this thesis we have questioned the merits of the intergovernmental approach vis-à-vis some of the supranational alternatives; in some areas it serves as a positive effect, in others, less so. In the case of judicial co-operation, this comparison is less clear-cut, not only because it is essentially

virgin territory in terms of EU co-operation, but because the current co-operative structure, it is safe to say, would not exist without the initiatives put in place through intergovernmental integration. The practitioners were in no position to initiate such moves; neither were the Commission or the European Parliament, without the active support of the Council. The reality of the situation is that intergovernmentalism has been a necessary motor in this area of co-operation. However, we also have the somewhat brusque position taken by the current intergovernmental approach towards the issue of democratic accountability, and as the policy of rushing the controversial Common Arrest Warrant through national parliaments demonstrates, the Member State governments are content to continue this policy in the matter of judicial co-operation. This therefore raises concern over a continued intergovernmental dominance in judicial co-operation. By contrast, a federal approach would do much to alleviate accountability concerns. In doing so, however, it would change the direction and pace of judicial co-operation, focusing it towards a common criminal policy. A controversial issue, certainly, but would it not also be a practical one?

Two integrationist models supporting a unified European criminal policy on terrorism

Does the EU need a common criminal policy to tackle terrorism effectively? Without doubt, a common system would make co-operation throughout the EU a much easier process. Information could be more readily shared because it could be accepted as evidence in any Member State court, while many

bureaucratic procedures could be swept away, simplifying and speeding up investigations. A year after the 11 September attacks, over eight hundred suspects were identified in Europe as having ties to al-Qaeda, but with the number of trials occurring being marginal, none have yet been convicted.¹¹ Beyond these practicalities, a common judicial policy would also serve as final recognition by the Member States that terrorism will not be brooked anywhere within the EU. The common EU definition on terrorism moves in this direction, but agreement on a definition does not provide the emphasis of determination that the establishment of a common judicial policy would bring.

The dissolution of Europe's internal borders has, to an extent, increased the EU's vulnerability. The terrorist's life has been made easier, allowing him to disperse his planning elements throughout the Union, making it more difficult for operations to be detected by national law-enforcement agencies, only bringing everything back together for the actual attack.¹² The realisation of the extent of interlinkage between North African terrorist cells and groups within the EU, in the wake of the Strasbourg plots and 11 September attacks, does provide grounds for serious consideration regarding a common criminal policy towards terrorism.

The threat posed by these groups, hidden within the ethnic minority populations of the Member States, is serious, from the point of view of both their numbers

¹¹ *BBC News Europe's hunt for al-Qaeda* 6 September 2002.

Indeed to date, only one individual has been sentenced in connection with the 11 September attacks: a German court convicted Mounir al-Motassadek, a Moroccan, to fifteen years imprisonment for his part in the logistical work of the Hamburg cell. (*BBC News First 11 September suspect jailed* 19 February 2003)

¹² *BBC News Europe's hunt for al-Qaeda* 6 September 2002

(Germany's BKA put the figure at several thousand) and their willingness to use mass-casualty weapons.¹³ This is the reason why the co-operative pace must be increased.

To the Member States' credit, retrenchment of European integration has not occurred; on the contrary, co-operation, as we have seen, has only been enhanced. For the most part however, this enhancement has continued along the track of facilitating co-operation, with only the Common Arrest Warrant bucking the trend. Facilitation is producing results, but as the IRA warned after the Brighton bombing, "Today we were unlucky. But remember we only have to be lucky once. You have to be lucky everyday"¹⁴. A common criminal policy would increase the co-operative pace.

Prior to the 11 September attacks, there was little practical reason for initiating a common judicial policy against terrorism. As we have noted, the concept did not fit the integrative trend adopted by the Member States. Public opinion would most likely be hostile to an integration of judicial systems. As Wilkinson has clearly emphasised:

national publics may often criticise aspects of their own systems and demand reforms in the law, but they are not sympathetic to the idea that their own system should change in order to

¹³ BBC News *Germany predicts al-Qaeda strikes* 28 May 2002

¹⁴ BBC News *The IRA campaign in England* 4 March 2001

accommodate to some supranational or intergovernmental design¹⁵

The apprehension generated by the “new terrorism” is not in itself sufficient to cause or indeed justify such change to the national judicial systems. Europe’s citizens are split deeply, for example, over the current “war on terrorism”, especially with regard to engaging in war against Iraq. It is extremely doubtful therefore that opinion would warm to such a move on the grounds of countering terrorism alone. However, a harmonisation of European judicial systems, specifically directed against terrorism, is now a legitimate possibility, thanks to the progress made within European JHA integration.

The progress made within the European Project, particularly monetary union, has demonstrated to the European public that even sacred cows may willingly be sacrificed before the altar of integration; usually by their elected governments, rather than the citizens themselves. Wilkinson’s assertion, it should be noted, was made in a time when integration in counter-terrorism was rudimentary by comparison to today. As this thesis has continually shown, the Member State governments have quite happily initiated reform throughout the JHA continuum without seeking public support, let alone, in some cases, that of both national and supranational legislatures. In simple terms, if the change is regarded as a practical necessity, then generally, opinion grudgingly supports the change, or remains mutely apathetic. In such a climate, an effective argument supporting increased integration via the

¹⁵ Paul Wilkinson *Terrorism and the Liberal State* 2nd edition 1986 p 291

judicial system against terrorism is quite possible. The greater challenge against deeper JHA integration comes from within the system, rather than from the public; but that too no longer has the same support it once had.

The "natural" isolation of national judiciaries to the European Project has been eroded, to some extent, by the progress made within judicial co-operation.

The EJM and Eurojust illustrate that co-operation is no longer exclusively an extradition issue. The Arrest Warrant further substantiates this, representing mutual recognition and confidence in the criminal judgements of each Member State, regarding a great number of offences. To take another step and integrate a common judicial policy against terrorism would not be a particularly arduous task. We are not, after all talking about initiating an all-encompassing common criminal policy. The ground is prepared, and the climate requires it.

The intergovernmental model

The manifestation of a common judicial policy against terrorism would require the surrendering of further sovereignty, although the extent would depend on the type of approach taken. Would a centralised court be required to try terrorist cases, as proposed by the French Interior Minister, Robert Badinter in 1982, and since carried on by many academics such as Wilkinson and Paul O'Higgins, or would national courts conducting terrorist trials operate under a common set of rules? How would the special requirements of the anti-terrorism legislation of the Member States, such as the UK's Diplock Courts

in Northern Ireland or France's juryless assize courts, which try terrorist cases that try all terrorist cases that are not regional in character, contend with this?¹⁶ Indeed should a common policy apply only to acts of international terrorism, and if so, how exactly do we define that in the current climate? Suppose a Groupe Salafiste pour Prédication et Combat cell (GSPC), having lived in London for several years (and based there), were to carry out a bomb attack in the UK. Would this be an example of international terrorism, or only if the group crossed the English Channel, and attacked Paris? The situation is complicated further by the many false identities, together with matching documents, under which these terrorists operate. Indeed, it is not uncommon to find a suspect with up to forty different identities. Consequently, can one even be sure of their nationality?

Resolving these questions, and many others, would not be an easy process, but neither would it be an impossible one. One possible approach would be to initiate a common legislation against terrorism by taking advantage of the fact that most Member States have only recently decreed terrorism as a specific crime onto their statute books. In so doing, they are recognising that terrorism requires specific legislation to curtail it, beyond the normal requirements of criminal law, as the UK found when it was compelled to initiate emergency legislation to deal with the situation in Northern Ireland. Under this premise, it should be possible to draft a EU-wide generic counter-terrorist legislation capable of replacing national legislation. Taken from this perspective, a common legislation is not as imposing or intrusive as the concept initially

¹⁶ Antonio Vercher Terrorism in Europe 1992 pp 320-1

implies. Particular problem areas such as Portugal's national criminal law system's refusal to recognise life sentences have to an extent already been resolved through Portugal's declaration of the 1996 EU Extradition Convention (Annex) and the Common Arrest Warrant (Article 37), whereby the assurance is made that if a life sentence is decreed, it will not be carried out. Portugal would therefore be exempt from enforcing any sentence beyond the maximum twenty-five years permissible by its national law. More problematic areas such as the terrorist situations in the Basque Country and Northern Ireland, which have required specialised legislation in the past, could be covered by temporary national legislation, specific to these areas, superseding the EU common policy.

Establishing the enforcement body of this policy is more likely to prove contentious than the actual common approach. The current JHA provisions, after all, remain subservient to the Member State's right to determine their own internal security and law and order measures (Article 33, Nice), thereby allowing a Member State to rescind from the actions relating to any agreement, if it deems it necessary. Creating an actual European terrorist court would be problematic in its logistics, but precedent has been set through the establishment of the International Criminal Court. Additionally one might be able to seek inspiration from the Lockerbie Trial, conducted under Scottish law and sovereignty, whilst in another country – The Netherlands. A more practical solution though is to allow the national courts to enforce a unified policy rather than act through a centralised agency. Eurojust is in the ideal position to act as co-ordinating agency; its position reinforced by the JHA

Council's emphasis on Eurojust's counter-terrorist role.¹⁷ The concept of such a court stems from a period when judicial and JHA co-operation in general, were insufficiently developed to induce significant confidence between the Member States regarding this co-operative policy. Its conceptualised purpose was to try terrorists and international criminals that a given European country had refused to extradite or try on its own territory. Hence, Badinter saw such a court as "removing emotional aspects of political trials which France fears could affect judgements on alleged terrorists who have taken refuge in other European countries".¹⁸ Current levels of judicial co-operation, however, as we have seen, have alleviated most concerns of fellow Member States evading their obligations through acquiescing to terrorist intimidation.

Execution of a common approach by national courts would still require some form of enforcement mechanism. Under the present intergovernmental approach, adopting a common judicial policy against terrorism, the most practical solution would be to draw up an implementing convention in the same manner as that which enforces Schengen's flanking measures. This stance permits a flexible approach to allow for specific geo-political conditions. Stylised on such a convention, there is no actual agency involved, as is the case with Europol. Rather it is "simply" the case of executing a common approach throughout the Union. The involvement of the European Court of Justice as an interpretative body in the event of disputes arising is strongly advised. This, though, would actually be a less contentious issue than the division that occurred over the Court's role within Europol. The Court

¹⁷ Statewatch Post 11.9.01 analyses: No 7 EU anti-terrorism plan: "operational measures" Point No. 2

¹⁸ Vercher, *Op. Cit.*, p 357

would be strictly limited to the parameters of the common legislation, which itself would be the result of an agreement superimposing this over national legislation; the ECJ would therefore not be in a position to override specific national provisions. The Court's role is important as the ultimate arbitrator in what would be a piece of judicial, rather than political legislation. The final word is thus removed from the politics of the JHA Council. Legislation dealing directly with the law requires a judicial authority. Additionally the Court's incorporation deepens the position of the common legislation within the context of the EU Project, without any actual detriment to the intergovernmental approach.

The federal model

Developing a deeper approach towards a common judicial policy against terrorism would require adopting a supranational methodology. Only the federal approach, however, would be conducive to such deepening, as the needs of the current climate are far too pressing to justify the time required to develop the integrative developments obtained from the slower-paced functionalism or neo-functionalism. A federal alternative, however, would require the active participation of the Member States' governments in order to bear fruit. The fundamental difference to the intergovernmental approach would not be the actual legislation, but that an independent enforcement/interpretative body would be necessary, together with a greater emphasis on EU involvement as a whole. Establishing the type of court advocated from a number of quarters above to try terrorist cases, would

certainly be less complicated in a federal environment. However, it would not be quintessential to the process. Unquestionably, a legislative authority would be required, but it need not be a centralised working court trying terrorist cases as a matter of course. The enforcement body's principal role would be interpretation of the legislation, but unlike the intergovernmental case, its authority would supplant the Member States' in this area. Amendments by the Member States to their counter-terrorist legislation would, one presupposes, require the approval of this body. This implies that this federalised body would also have authority or influence over the counter-terrorist initiatives conducted within Europol and Eurojust. National courts could continue to try terrorist cases under the common approach, with the enforcement body dealing with cases where a Member State refused to try a case and/or as a final court of appeal. Indeed, to categorise terrorism specifically as a federal offence would create many enforcement problems. As the principle of subsidiarity has illustrated, the enforcement of counter-terrorist policy is best left at the national level, which can draw upon the assistance of centralised support bodies as required. Attempting to square the national counter-terrorist legislation with federal law, together with actually trying a terrorist suspect before a federal court and perhaps sentencing him to a federal prison, would cause significant judicial and logistical problems. Indeed, it is doubtful that many Member States would be predisposed towards having to build new prisons specifically to host these special category inmates.¹⁹ The input of

¹⁹ The UK maintained two prisons in Northern Ireland for incarcerating convicted terrorists: Crumlin Road gaol and Long Kesh/Maze Prison. The latter of these has been earmarked either for demolition or to be turned into a museum, in light of the ongoing "peace process". This example demonstrates that States have no particular interest in maintaining specific prisons for terrorists other than out of necessity. Furthermore, Long Kesh was necessary specifically to deal with the significant number of terrorists indigenous to the situation in

federal law would, at this stage be an unwarranted intrusion upon the counter-terrorist policy of the Member States. In short, if terrorism were to be categorised as a federal crime, then the federal authorities would be required to undertake counter-terrorist policy. Yet, we know that this is not conducive to effective counter-terrorist policy and co-operation within the EU. Instead, the adoption of a common approach to counter-terrorist legislation would be far more conducive to the situation, as well as satisfying the requirements of subsidiarity. We should remember, after all, that under the new EU common definition of terrorism, every Member State is obligated to deal with this threat, with no real recourse to refuse the extradition or transfer of a terrorist suspect wanted by another Member State. That it is dealt with on a national basis rather than from a federal position does not detract, qualitatively, from actually administering justice.

Adopting a common approach is similar to the stance taken under the proposed intergovernmental model, except that under a federal system an enforcement mechanism would be essential to ensure that Member States abided by a common approach. If, for example, a Member State failed to adopt a forceful or just approach in the execution of its counter-terrorist policy, then it could be held to account by this body, with disciplinary measures taken against it in the form of fines. In this way, the federal

Northern Ireland. To disperse such a large number of prisoners throughout the mainland prisons was seen both as impractical and a possible contravention of human rights, due to the travel difficulties that this would impose on visiting relatives. By contrast, though, recent Spanish penal policy has removed its ETA prisoners from Basque gaols, and dispersed them throughout Spain, in an effort to dispel both their influence on ETA members at large and to counter intimidation against prison officers living in the Basque Region (as happened in Northern Ireland) where ETA's influence is strongest. Dispersal would be the most efficient way of dealing with such "European terrorists".

approach is able to enhance co-operation against terrorism, without eroding the principle of subsidiarity and the benefits that are provided by national counter-terrorist legislation any more than is necessary.

Such an enforcement body requires real teeth, but it must also be subject to checks and balances. Without such safeguards, a central court or body, as described above, would be too powerful, making it difficult, for example, for Member States to challenge the court's ruling. Without checks and balances, the court's existence would be a powerful blow against democratic values. A federal approach would therefore also have to widen the roles played by the European institutions in counter-terrorism, laying the foundations for this by redressing the democratic deficit, enhancing the role of the other institutions, but especially that of the European Parliament – the only true democratic element within the EU. Additionally, however, one should also bear in mind the role played by the European Court of Human Rights. "Federalising" even a small area of criminal policy within the EU requires a greater emphasis on enforcing human rights legislation to safeguard against any abuse of these rights. The ECHR has found elements of national counter-terrorist legislation wanting on a number of occasions (notably some of the interrogation methods practised by the security forces in Northern Ireland during the early 1970s), leading to their correction. This role remains just as important, indeed more so, because of the encompassing effect of a single policy (in this respect, the ECHR's role is equally necessary under an intergovernmental approach).

The level of democratic accountability would be elevated – an increasingly important quality as our counter-terrorist measures are enhanced.

Additionally, it would reduce the potential for fragmentation within the common policy, because of the more rigorous enforcement mechanisms, which are naturally slacker under the type of intergovernmental convention discussed above. National courts would still carry out trials, and national police officers would still conduct investigations, but the federal approach truly gels a co-operative counter-terrorist policy together in a way that the current intergovernmental approach does not.

Towards an *espace judiciaire européenne*?

Returning to the realities of current integration within the judicial sphere, the previous chapter concluded that the EU had yet to reach the level of integration whereby it could implement a common judicial space. As the models discussed above illustrate, however, this concept could be equally at home with either one of them. The *espace judiciaire européenne*, as Freestone correctly surmises, is “an indeterminate flexible concept”.²⁰ It would exist as a matter of course under a federalised approach, but from an intergovernmental perspective, the concept is an acceptable mechanism to adopt – the intergovernmental model of the common judicial policy against terrorism demonstrates this. A common judicial space, for example, could function under the parameters of Giscard d’Estaing’s original concept. The advanced intergovernmental model meets not just Giscard d’Estaing’s desire

²⁰ David Freestone *The EEC Treaty and Common Action on Terrorism* Yearbook of European Law, 4 (1984), p 209 cited in Vercher, *Op. Cit.*, p 359

to simplify extradition procedures and the application of the principle “to extradite or prosecute” (already met under current co-operative conditions), but could also be extended in its definition to have a common jurisdiction and legal code or process met. Freestone does consider that an *espace judiciaire européenne* would require some form of European Criminal Court to co-ordinate efforts; but at a purely intergovernmental approach to co-operative policy Eurojust, as has been indicated, is in a position to administer the necessary co-ordination.

The proactive stance currently developing within judicial co-operation is illustrative of changes ongoing within this sector of collaboration. Terrorism, embodied through the attacks against the United States, has played a role in this transformation, although one essentially limited to facilitating the passing of these measures at a quicker pace. As explained in the previous chapter, these co-operative advancements facilitating proactivity were already in development several years before September 2001, as part of the spearhead towards establishing an area of “freedom, security and justice”. The importance of the terrorist attacks cannot be underestimated, however. Article 31 of Amsterdam, which deals with judicial co-operation in criminal matters, provides for “common action” in these matters, but no deadline is given by which this “action” must be taken. Only at Tampere were any firm deadlines set, with judicial co-operation in criminal matters allocated a five-year deadline from enforcement of the treaty (Conclusions 49-51). Although work has begun on some aspects of Tampere, the treaty has yet to officially come into force, requiring as it does a minimum of thirty ratifications by 21 June

2003. Effectively the Member States are therefore not obligated to engage in work on the judicial measures required by Tampere until 2008. That they have been engaged in working on these measures almost immediately after Tampere was opened for signature is indicative of their willingness to commit to constructing these measures, displaying no evidence of heel-dragging. The rise in co-operative judicial measures following 11 September demonstrates that with the official deadline for initiation of work far ahead in the distance, the terrorist attacks have significantly increased the pace of co-operative output.

The proactive approach is indicative of a more cohesive effort at co-operation, but also one that is moving away from intergovernmental micromanagement to a more devolved approach, at least in the area of extradition and transfer. Without this requisite, the proactive approach would be impossible to realise, and instead would be bogged down in time-consuming micromanagement. Indeed the emphasis on speed in judicial co-operation, promoted by the JHA Council, would also be hampered by too much control stemming from the "centre". Consequently, a more "aggressive" style of judicial co-operation is redirecting the traditional approach of intergovernmental management in this field, inducing an element of autonomy for the actors and structures concerned, all the while maintaining the intergovernmental strategy. As was pointed out earlier, this strategy will ultimately weaken intergovernmental policy through the introduction of autonomy, increasing the influence of the non-governmental players involved, and sowing the seeds of supranational influences such as neo-functionalism within the system.

Conclusions

The EU has been something of a late starter in terms of judicial co-operation on criminal matters, leaving it primarily in the hands of the Council of Europe and its extradition conventions. That it has taken off has been due to the integrative foundations developed by the treaties on European Union, allowing follow-up work such as Tampere to complement the ongoing progress in law-enforcement co-operation with supportive judicial measures. The shock to the system caused by the terrorist attacks on America has acted as a catalyst within all areas of JHA co-operation; but it is in the judicial spectrum that it has produced the most controversial of all measures, namely the Common Arrest Warrant – demonstrating that judicial co-operation is not exempt from the intergovernmental accountability deficit.

Unlike other areas of JHA co-operation, judicial co-operation has been immune to supranational influences, isolated within national boundaries and executing co-operation through sterile extradition channels. Entry into the JHA gamut has removed this isolation, and like every other area, it is susceptible to non-intergovernmental integrationist influences. These influences will not occur overnight, but the neo-functionalist seed is there. As the pace of co-operation deepens, supported by the new proactive direction, the cohesion of these actors will in turn intensify, as they develop their working relationship. From the perspective of influence, this group will have greater authority over any challenge or request made to the Member State governments than their police colleagues could have, due to their judicial

background. In other words, their opinion would automatically take legal considerations, as well as practical ones, into account.

Taking all of this into account, we can expect the days of judicial co-operation trailing behind that of law-enforcement to be well and truly over. Where its future lies is, like everything else within the European Project, uncertain.

What is certain is that a number of pressing problems concerning the issue of counter-terrorism remain unresolved. Existing judicial co-operation has yet to gravitate towards increasing the number of trials, let alone convictions of terrorist suspects within Europe, in the wake of 11 September. Greater law-enforcement co-operation, certainly, is improving the arrest rate; but this is of little use without convictions before a court of law. That Member States have continued to rely upon their judiciaries and rule of law, rather than quick-fix politically imposed solutions, such as internment, to resolve this problem is to be congratulated. The British courts' overturning of the Home Secretary's decision to extradite Rashid Ramda to France is illustrative of this position. Nevertheless the threat posed by terrorism does present judicial co-operation with new and urgent challenges, namely how to draw the most efficiency out of a co-operative counter-terrorist policy that is operating under fifteen (currently) different systems. The solution must ultimately be the harmonisation and subsequent integration of counter-terrorist co-operation at the judicial level, achieving a single EU counter-terrorist legislation. This would dramatically increase the pace of judicial co-operation, improving both trial and conviction rates. This is not an unrealistic proposal; it is perfectly feasible under the current conditions of integration, and enforceable through

an intergovernmental mandate with minimum loss to sovereignty. Indeed if one were to stick fully to the practical argument, the policy could be executed as a temporary one, with the option for renewal, mirroring the erstwhile administration of the UK counter-terrorism legislation. If problems arose that could not be resolved, or when the “war on terror” reaches a conclusion, the common policy could be rescinded. Equally, a Member State could pull out of the agreement if they so desired. A common policy need not mean federalisation of that policy. However, under a federal approach, derogation would be impermissible, and enforcement mechanisms would attempt to ensure that Member States abided by such common policy.

If the EU wishes to develop an efficient approach to combat terrorism, the rate of judicial co-operation must be increased. As the situation currently stands, terrorists have, and are able to exploit weaknesses in co-ordination between national policies. With the threat remaining high, especially after the discovery of the biological toxin, ricin, during a police raid on a flat in London in January 2003, these weaknesses require resolution without delay.²¹ A common judicial policy against terrorism goes a long way to achieving this. Moreover, a comprehensive single judicial policy against terrorism will also produce beneficial spillover effects within law-enforcement co-operation, allowing further developments to match the new progress taken at the judicial level. Co-operation against terrorism would then be in a position to develop around this new common approach, producing a much more systematic methodology, replacing the patchwork affair that has traditionally been indicative of JHA co-operation.

²¹ *BBC News Terror police find deadly poison* 7 January 2003

Chapter X

Conclusion: Patchwork Policy or Comprehensive Security?

This research has aimed soberly to identify the explanations as to why co-operative counter-terrorist policy between EU Member States has remained very much a marginalised affair in comparison to “First Pillar” activities. Other writers have given attention to specific aspects of counter-terrorist policy within the EU, but no research has undertaken a systematic and holistic approach to this area until now.¹ Only by doing so can we appreciate the complications and subtle nuances involved in ascertaining a pertinent answer to the deceptively “simple” question above. It is too easy to focus entirely upon the intergovernmental approach to co-operation, without giving due attention to other background influences (neo-functionalism and federalism, for example). Typically, these are neglected by the literature. Nevertheless, significant attention must be given to the development of the JHA architecture; this is, and will remain for some time to come, the blueprint for co-operation in counter-terrorist matters.

Monica den Boer, writing before 11 September 2001, argued that the third pillar of the EU is an inappropriate locus for dealing with matters of terrorism.² She points out that the architecture of the Economic Union treaties is both “sloppy” and “hierarchical”, resulting in an inadequate response to fast-moving security situations such as terrorism, and is critical of “lowest

¹ Chalk, den Boer, Reinares, and Anderson amongst others.

² Monica den Boer *The Fight against Terrorism in Maastricht* in Fernando Reinares European Democracies Against Terrorism 2000

common denominator” agreements and the rule of unanimity. Crucially, den Boer questions the appropriateness of a communitarian response against terrorism, arguing that the principle of subsidiarity should be weighed together with the principle of proportionality appropriate: a regional or bilateral response may be better suited to dealing with particular issues, leaving the weight of all the Member States to deal with those issues that cannot be resolved.³ These are salient points; the internal security structure built within the EU is by no means a honed piece of machinery. Indeed, it might be more accurately described as a patchwork of agreements, mechanisms, and conventions cobbled together to form a security continuum, with new pieces continually being added. This statement is an accurate reflection of the origins of police and judicial co-operation in Europe; however the component parts, while certainly diverse, are being fused together under the direction of the JHA Council and policy, and this is ironing out any incongruities. Den Boer’s criticism that the JHA machinery is ill suited to responding to terrorism is, however, more difficult to judge. The one available opportunity for effectively testing the structure within the framework of a significant transnational investigation (the Strasbourg plots of 2000) was effectively squandered by the investigating national forces’ neglect to fully utilise the services of Europol, which could have injected the greater degree of co-ordination and co-operation so lacking towards the end. As more recent events have shown however, the EU’s machinery has proven adept at turning to face the terrorist threat posed by al-Qaeda and its associates. Moreover, the JHA Council has attempted to resolve the issue of national agencies bypassing

³ Ibid., p 218; p 220; p 222

Europol, by ending the ambiguity that previously surrounded Europol's counter-terrorist competences: an ambiguity which originates in part from the initial political reluctance to provide Europol with such a mandate, preferring instead to keep this area exclusively in the hands of the PWGOT.

Even if we discount the renaissance in internal security co-operation in the post-11 September environment, den Boer's criticism is still somewhat unfair. Much of the problem has resided not so much with the structure, but with the willingness – or lack thereof – of the police forces to utilise it correctly.

Certainly, the practice of building these structures through reaching the “lowest common denominator” via intergovernmental agreements cannot have installed the greatest confidence in their co-operative abilities. Weaning counter-terrorism officers – and their governments – away from the traditional style of co-operation, especially when this style remains in place, embodied through the PWGOT, has proved a difficult task. Den Boer's opinion regarding the importance of subsidiarity is, as this thesis has demonstrated, unassailable. However, her argument implies that even under the current intergovernmental JHA policy architecture, greater use could be made of the principle of subsidiarity. To do so, however, would risk undermining the common approach emphasised at Gomera in 1995: that combating terrorism should be treated both as a priority and as a matter of common interest.⁴

Subsidiarity is a fundamental condition of EU internal security co-operation. This would be particularly true under a federal Europe, where it would allow counter-terrorist policy to operate with the minimum of interference from a

⁴ La Gomera Declaration, Annex 3: Terrorism, Madrid European Council 15 and 16 December 1995 Presidency Conclusions

cumbersome centre – which would otherwise risk damage to the execution of counter-terrorist policy.⁵ We see the merits of bilateral co-operation against regional terrorism, such as Franco-Spanish efforts against ETA, can be eviscerating in its effect. Furthermore, the Greek authorities managed to bring down November 17 with the technical advice and experience of a New Scotland Yard team, although good fortune ultimately provided the crucial dividend.⁶

Equally, terrorism, in its Islamic extremist guise, is a threat pervasive to the entire EU, and it is correct that it is dealt with by employing the full weight of the EU's JHA machinery. However, returning to the failures of the Strasbourg investigation, we can see that these failures occurred precisely because the investigation was limited to a regional context against a genuine transnational threat. Indeed, the danger of placing too much emphasis on subsidiarity is that it risks emasculating the genuine solidarity that has developed against terrorism. This new unity, coupled with the much belated arrival of a common European definition of terrorism, and with the emergence of a common list of proscribed groups and individuals, finally establishes the concept of the terrorist as *hostis Europa civis*.⁷ Solidarity against terrorism is the most effective way of bringing it to heel, and it is unwise to advocate an alternative route in this case. Terrorism can rarely be limited to a specific state or region; its acts invariably cause undulations beyond the scene of conflict. The Middle

⁵ The preconditions of accountability and security of the federal union as a whole would obviously apply.

⁶ On 29 June 2002, Savvas Xiros was apprehended after being injured by the premature explosion of a bomb that he was planting in Athens. His subsequent interrogation created a cyclical effect of further arrests, interrogations, and more arrests. (BBC News *How November 17 was cracked* 19 July 2002)

⁷ A definition, one might add, achieved through the machinery of the JHA co-operation.

East represents a case in point; equally, organised crime and smuggling, in which many groups are involved, will have repercussions for other states. Italia's mafia may be rife in its southern regions, but its criminal interests and activities are not limited to that area. Neither could we dispute the fact that the IRA's activities have caused concern for other European states, contributing in a large part to the establishment of the PWGOT. Equally, November 17 became a concern for the UK when it murdered one of its diplomatic staff. Certainly, these terrorist groups remain the primary concern of the country plagued by them, and one might expect another interested party to offer bilateral support, as the UK did, following the murder of Brigadier Saunders in Athens in June 2000.⁸ Having begun this co-operation, the Greek authorities moved towards closer relations with other European counter-terrorist authorities, including Europol, which held a briefing for a number of Greek police officers, many of which were anti-terrorist officers, on the subjects of organised crime and terrorism, in June 2001⁹.

These threats illustrate the growing need for a transnational approach. The offices of the EU accept this as a fact, and voice a *one for all, and all for one* philosophy:

⁸ BBC News *Brigadier's body flown home* 13 June 2000

The insular philosophy of November 17 meant that multinational co-operation was never required in tackling them. Indeed the UK co-operation was aimed specifically at assisting the less experienced Greek police in tracking down the killers within their own borders. While the overriding determinant of this bilateral co-operation was a marriage between Britain's desire to see Saunders's murderers brought to justice and Athens's anxieties about keeping the 2004 Olympics.

⁹ Embassy of Greece Press Office Bulletin *Tougher Anti-terrorism Law* Vol.7, No. 6 June 2001

“When ETA increased its attacks in Spain, Justice and Home Affairs ministers decided that terrorism was no longer a national matter,” the EC source told Reuters.

“An attack against one Member State is an attack against the Union.”¹⁰

Subsidiarity has an important role in the internal security of today’s EU, and a possible future federal one. Achieving the right balance between the security of the EU as a whole, and that of individual Member States will be no easy task.

Developing Counter-terrorist Integration

In almost every way, the level of co-operation in counter-terrorist policy today in Europe is staggering in comparison to its inception in the mid-1970s.

Police and judicial co-operation have made massive strides in the past few years: the exchange of liaison officers occurs as a matter of course; massive computer databases permit intelligence to be exchanged instantaneously; while extradition procedures have been significantly streamlined, finally and irreversibly removing the contentious political offence from terrorist acts.

Today we are enjoying the dividends of developing an internal security continuum as an integral part of the Treaties of Economic Union, with a wave of arrests occurring throughout Europe against Islamic extremists, and the successful thwarting of terrorist plots. That Europe has not yet suffered any similar attacks in the aftermath of al-Qaeda’s devastating assault on America

¹⁰ CNN.Com/World *EU plans terror threat crackdown* 22 August 2001

is a testament to the co-operation that has gradually but continually been built upon. Europe, following 11 September, is not a soft target.¹¹ Moreover, the renewed Franco-Spanish co-operation against ETA, following the collapse of the terror group's ceasefire at the close of 1999, is a further illustration of the advances made in Europe.

Advances in technology have played no small part in developing this level of co-operation and co-ordination. The technology revolution has enabled law-enforcement to harness these advances to the application of co-operation, improving the overall benefits. The SIS II, for example, with its vast databanks of information and ability to transfer data on fingerprints, ballistics or DNA, is the central point of the Schengen Implementing Convention and addresses the security deficit in the policy on open borders. Without doubt, however, the leading factor responsible for the advancements made in counter-terrorist co-operation is the inclusion of a Justice and Home Affairs policy within the European integrative process. By incorporating this area of policy into the fold, the Member State governments dramatically forced the pace of law-enforcement co-operation, transforming it from an informal system to a regulated structure, thereby allowing new types of co-operation to emerge, such as Europol and Eurojust. Equally important, as this thesis has consistently argued, is the fact that the placement of co-operation against serious crimes such as terrorism within this rubric, will encourage co-

¹¹ Instead al-Qaeda related attacks have targeted Westerners (amongst others) abroad. A suicide bomber in Kabul, June 2003, killed four German peacekeeping soldiers; while co-ordinated suicide bomb attacks in Morocco included the targeting of Western and Jewish targets, killing 41 and wounding over 100 in May 2003. Most notoriously of all was the Bali bombing the previous October. *BBC News Peacekeepers killed in Kabul blast 7 June 2003*; *BBC News Terror blast rocks Casablanca 17 May 2003*

operation to develop in a manner not always consistent with intergovernmental policy.

The major criticism of the co-operative advances made against terrorism, aside from the noticeable democratic deficit, is that they have taken almost thirty years to reach the current stage of development, especially in the judicial field, where only very recently has a common European definition of terrorism emerged, and the glaring inconsistencies in extradition conventions finally been rectified. Developments in European integration have certainly not been a requirement in addressing these latter issues, although the integrationist trough that ended with the Single European Act of 1986 has had its part to play in holding back progress. Nevertheless, if the European Member State governments had been consistent in developing a unified strategy against terrorism, Europe would have arrived at the current stage of development that much sooner. Unfortunately, national prerogatives, together with a dogged stance towards sovereignty, dominated during a period when governments quaked before the terrorist theatre of Carlos, now revealed as a shabby dog-and-pony show in comparison to the ambitions and capabilities demonstrated by al-Qaeda. Instead, it has been the events of 11 September that have propelled forward the EU's embryonic counter-terrorist policy.

As we conclude this thesis, it now becomes necessary to address the overall degree of efficiency developed over the past thirty years in counter-terrorist co-operation under the stewardship of intergovernmentalism, and to determine the appropriateness of continuing to maintain this policy through

intergovernmental control, or at the very least, this version of it. After this, we can ascertain what lessons the development of European co-operation in this area holds for other countries and the “war on terrorism” in general.

Intergovernmental bonsai?

Intergovernmental direction has been the guiding force in shaping the co-operative internal security policy currently in place within Europe. Without its leadership and drive, the structure in place would be nowhere near as developed as it is today, remaining instead wedded to the traditional informal approach. The initial hostility of many of Europe’s police forces to the idea of Europol is illustrative of their unwillingness to shift direction. They saw it principally as a needless political construct foisted upon them.¹² By introducing JHA policy, the Member State governments were taking direct control of this area, allowing them to build the regulatory co-operative structures necessary to compensate for the security deficit created by the four freedoms. Counter-terrorism, however, was an area of policy that some Member State governments did not want included in this new co-operative structure. That counter-terrorism has become a primary concern of JHA co-operation can in no small way be attributed to the events of 11 September. We have acknowledged that intergovernmentalism is not the sole defining foundation of police co-operation; neo-functionalism has also played a defining role in fleshing out much of the bilateral co-operative border agreements. This supranational influence, however, has rarely been in a

¹² Malcolm Anderson et al Policing the European Union 1995 p 53, 79

position to enjoy exclusive rights in police co-operation. Even the CCIC and regional Benelux border co-operation has been limited by issues of sovereignty, with the former risking dissolution because of a divergence of policy between the UK government over Schengen and her continental partners. Federalism, by comparison, has never made its presence felt in internal security co-operation, due to the powerful antipathy from many Member States to a federal Europe, which they view as an anathema. Rather, the federal model serves instead to provide a feasible alternative to the current development intergovernmental JHA policy.

Despite the initial attempts to stifle a counter-terrorist policy under JHA, co-operation has developed steadily, paving the way for a "joined-up" approach with developments in the judicial arena finally meeting up with those in law-enforcement. Having ascertained the progress of police and judicial co-operation throughout Europe since 1972, it would be profoundly wrong to place the burden of culpability on intergovernmentalism per se for the lack of progress in developing a cohesive counter-terrorist policy. No other integrationist theory was in a position to develop co-operation as far as intergovernmentalism has. Federalism, as we have seen, has been a non-starter in this capacity, while neo-functionalism, although useful in administering co-operation at a local or regional level, has been unsuccessful in crossing the divide into the broader context of co-operation. Moreover, counter-terrorist co-operation, as we have seen, contains an inherent self-regulating quality based on a dominant national perspective, which has prevented neo-functionalist characteristics, or any other supranational

tendencies, from supplanting intergovernmentalism, despite the loose rein allowed by Member State governments in some instances (PWGOT). Rather, intergovernmentalism is to be congratulated in taking forward internal security co-operation (albeit a little half-heartedly initially where counter-terrorism was concerned) into a regulated and progressive policy arena – JHA. The fault line in reaching a cohesive counter-terrorism policy has instead rested almost exclusively on the failure of the European Member States to develop the political will necessary to engage terrorism on a strategic basis. Progress in counter-terrorism was moving in the right direction towards the end of the 1970s with the development of co-operative law-enforcement structures and the beginnings of a judicial policy – the ECST – aimed at ending the confusion over how to deal with apprehended transnational terrorists. The level of terrorist threat, coupled with the geo-political environment, ensured that nothing more sophisticated than this was required at the European level until the integrative developments of the SEA and TEU. The exception to this urgent need was closing the loopholes within the ECST to ensure a uniform judicial codex for dealing with terrorist extradition amongst the Member States. The dismal failure of the Dublin Convention and lack of any further serious attempts in this area condemned co-operative European counter-terrorist policy to the self-centred national prerogatives of the individual Member States, effectively making a mockery of co-operation when wanted terrorists were quickly expelled from their territory rather than extradited to face justice.

One could look at this failure in policy and argue that a communitarian approach, with all the regulatory systems and locking-in mechanisms of the EC, would have forced the Member States to acquiesce to the demands of such a Convention, and in this way intergovernmentalism is responsible for the failure here. This, however, would be to ignore the reality of the political situation at the time: the Member States would never have surrendered sovereignty over matters of counter-terrorism. The EC, regardless of the views of its supranational institutions, had no authority outside the scope of economic affairs. That, even today, relatively few prerogatives in counter-terrorism have been surrendered outside the implications of the Common Arrest Warrant, remains telling. A Community approach, however, with all its supranational connotations, was not the only remedy to this problem. All that was required was the political will to shore up the ECST and stand by it. The Member States were incapable of this.

The emphasis on the need for political will or backbone to maintain a credible counter-terrorist policy is, to some extent, lessened within the JHA era. While by no means a communitarian approach, the ongoing co-operation within the intergovernmental Third Pillar has reached a level of sophistication whereby it would be very difficult for a Member State to refuse to extradite or surrender a terrorist on national or political grounds. It is more than simply conventions and agreements without loopholes however; the machinery in place is too advanced, and the needs too great to allow any one Member State to attempt to "buck" the system. *Engrenage*, although a neo-functionalist term, can be as justifiably applied to the Third Pillar of the EU as to the First; the Member

States are enmeshed. Even the UK had no option but to partly enter the Schengen acquis after its own police chiefs pressed the benefits that the SIS would bring, together with the consequences for intelligence co-operation if they did not. The regulated structure building holds the Member States together in a way that the traditional informal style could not.

The style of co-operation within the JHA field is certainly different to its earlier predecessors, and to those remaining outside its authority. Regulation, where it is strict, undoubtedly limits co-operation to within these parameters. Europol, the flagship of European police co-operation, is the perfect example of this regulatory approach. Its Convention defines Europol's scope, duties and mission statement, and only JHA Council approval can make amendments to this. Europol cannot act outside these parameters. There are two important reasons for adopting the regulated approach as a matter of course throughout JHA policy. The first is that the traditional relaxed approach has little place in the current geo-political environment of Europe. Advances in integration and technology have drawn the Member States much closer together, making it unacceptable to rely upon a co-operative policing system that is little more than an old-boys network. This would not work in any Member State, and neither can it be expected to work within the European Union. The EU is a far more complex structure than the old EEC. As has already been stated, the relationship between the Member States of the EU cannot be equated to Bull's "Anarchical Society"; regulations and procedures *are* a fundamental part of this working relationship.¹³ Moreover, the widespread utilisation of

¹³ Hedley Bull The Anarchical Society: a Study in the Order of World Politics 1995

technology in police co-operation demands a regulated approach both to safeguard abuses and also to encourage deposition of intelligence into a pooled reservoir in the first instance, acknowledging that fixed controls exist regarding the use of this information.

The second point to make is that the threat from transnational crime has increased, both in the customary sense of the meaning, and in its transnational capacity, exploiting the four freedoms for its own illegal benefit. One of the effects of the collapse of the USSR was the emergence of a new entrepreneurial criminal class, greedy to exploit the wealth and openness of the EU; more damaging though was the rise of the Russian Mafia, soon to spread its organised crime tentacles throughout Europe and beyond.

Meanwhile, the implosion of the former Yugoslavia destabilised law enforcement in the region, leading to the development of a stronger and more pervasive organised criminal class on Europe's own doorstep. The influx of highly aggressive Albanian criminal gangs to Europe in recent years has led to their domination of the illegal sex trade in London, currently controlling three-quarters of the industry, according to NCIS.¹⁴ Even terrorism requires a regulated approach; it is no longer an isolated phenomenon, conducive to being dealt with on an informal footing. The threat level posed by the "global reach" of al-Qaeda and its associate cadres is huge, illustrated in Europe through the revelation of a diverse network of North African terrorist cells following the thwarting of the Strasbourg plot, and subsequent investigations after 11 September. Neither Interpol nor the PWGOT are capable of dealing

¹⁴ BBC News *Sex workers say "let us stay"* 18 February 2003

with this complex level of threat alone. By comparison, the negative associations of too strict a regulatory approach make it difficult to adapt to a new or changing threat. Consider Europol's counter-terrorist mandate, overly delayed due to political intransigence from the UK and Denmark, who preferred the traditional PWGOT approach, which would have kept counter-terrorism out of the regulatory requirements of the Third Pillar. Had these governments been able to continue their procrastination, Europol might not have been in the position today to support the Member States' law-enforcement agencies against the al-Qaeda related threat. This factor only relates to contentious issues, however, as an expansion of Europol mandate requires only a two-third majority from the JHA Council, and this can quickly be enforced, as was the case with the addition to its mandate of the sex trade in women and children in 1996, following the infamous Dutroux case in Belgium.¹⁵

One could argue that a loosening of the "apron strings", similar to the policy adopted by central government and the Benelux border-regions, and the regional border-agreements between the Benelux and Germany, such as the Nebedeag-Pol agreement, might encourage further co-operative growth. These agreements exploit the best of both worlds, through government or local authorities demarcating set parameters beyond which co-operation may not expand, but otherwise leaving the detailed implications in the hands of the police authorities. In most cases, where political obstruction is minimal, this has led to a flourishing of cross-border co-operation. We have already seen

¹⁵ Europol annex.

the adoption of this approach through the Schengen framework, establishing set minimum levels of mandatory co-operation, but leaving anything beyond this to the bilateral level, acknowledging the previous existing agreements. Consolidating this approach with other areas of JHA policy is less clear-cut.

In most cases, the process of co-operation, whilst becoming more advanced, is still limited in the actual process of bringing national authorities together. Co-operation is focused instead through the medium of facilitatory agents such as Europol, Eurojust and the EJM, who respond to requests from national authorities. JHA policy does not place much emphasis on encouraging non-regulated approaches towards co-operation. Rather this approach reinforces the intergovernmental stance, preventing law-enforcement co-operation from becoming too informal, which under the highly integrated EU environment would lead to a hotchpotch of agreements; these would ultimately prove an administrative and legal nightmare under the integrative relationship between the European Member States, where national sovereignty remains essentially *sine qua non*. Moreover, this continues the traditional theme of law enforcement collaboration, whereby the geographic realities of border co-operation demand active responses between the neighbouring police forces, something that is not required between non-neighbouring forces. For the most part this is sound enough policy under the current integrative environment; however, one area that does require more manoeuvrability, especially in terms of counter-terrorism, is judicial co-operation, specifically the European Common Arrest Warrant. The Council Framework Decision on the Warrant places emphasis on specifically declared judicial authorities within a Member

State as being competent authorities for the handling of all matters concerning the Warrant, with recourse to a central authority if so required.¹⁶ A more genuine transnational alternative would be to refocus the emphasis on *any competent* judicial authority, effectively paving the way for the development of a whole network of judicial co-operation. Political hesitancy over requesting or surrendering a terrorist suspect would be mitigated significantly, through further devolution of the decision making-process into one more likely to correspond to judicial rather than political interests. This would not produce the same chaotic circumstances envisaged by relaxing similar restrictions related to police co-operation, because judicial procedures would still be required. Operationally, it is feasible – utilising the European Judicial Network and Eurojust, and indeed, Interpol, as co-ordinating bodies, to help determine the location of wanted individuals.

From an integrative perspective, this would have profound consequences, ending the transnational isolation of national judiciaries and initiating the development of a co-operative network of national judiciaries throughout the EU, dealing directly with each other, rather than through intermediates. Over time, this would produce an environment conducive towards producing greater co-operation, due largely to the network of contacts created amongst the European judiciary through such direct communication. In some respects, this would bear pertinent echoes of neo-functionalism. Working together in this everyday manner would encourage the development of relationships between members of the European judiciary, leading to a possibility of positive

¹⁶ *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA, Articles 6 and 7*

spillover at a later stage. The degree to which the natural conservatism of national judiciaries would prevent this is uncertain, when we consider that these groups have previously been isolated from transnational co-operation.¹⁷ Although it might be going too far to say that such a network could be the germination of a genuine common European judicial code, it would be correct to say that their input into the JHA process would be increased, as they discuss matters and policy with their colleagues, reaching and recommending conclusions to the JHA Council. This supposition is supportable by the positions of Eurojust and the EJN, which serve as a forum for advancing co-operation in the first instance, particularly with the counter-terrorist magistrates brought together under Eurojust to discuss policy matters in this area.

In the area of investigative policing, however, intergovernmental co-operation is close to having run its course. Establishing a support structure (Europol) to provide assistance to counter-terrorist investigations is as far as we may reasonably assume co-operation to progress in this area. Certainly there are areas still requiring address, such as closer co-operation between the PWGOT, intelligence agencies, national police forces, and Europol, including secondment of Europol officers and improving Europol's ability to collect data. Equally, the multitude of data held under JHA auspices also needs to be addressed in accountability terms. Essentially, though, there is not much more work to be done in this sphere. Attempting to establish an operational Europol through a European FBI would be a legislative minefield, and one detrimental

¹⁷ A. Cadoppi *Towards a European Criminal Code* in European Journal of Crime, Criminal Law and Criminal Justice Vol. 4 Issue 1, 1996 p 7

to counter-terrorism as a whole – even in a federal Europe, this direction is one to avoid. Consequently, Europol must remain a support structure. Because of the folly of attempting this route, Member State governments have little to fear from neo-functionalism influences within Europol. The Director and his staff may push for greater powers for Europol, but there is a definite cut-off point. Rather, neo-functionalism should be encouraged within investigative co-operation, as its human element possesses distinct advantages in encouraging officers to co-operate and trust each other in the first instance. The impersonal developments established by intergovernmental and federal co-operation are capable of producing the necessary machinery, but neo-functionalism provides the best impetus in getting police officers to utilise them. The initial scepticism of national police forces to Europol, together with the less than committed approach by counter-terrorist officers to its services, illustrates the extent to which neo-functionalism is missing from the equation. We should remember, however, that neo-functionalist co-operation is most conducive to the border areas of the Member States, where geo-social commonalities are facilitative to co-operation. Co-operative investigation against terrorism by contrast, has greater difficulty in generating these transnational connections, all the more so because of the greater awareness of national politics characteristic to C-T officers. Developing policy to bridge this gap is a necessity if counter-terrorist co-operation is to be advanced. An intergovernmental solution will prove more difficult to engineer than a federal one due to the former's robust association with national sovereignty. A federal approach to counter-terrorism, however, while remaining true to the concept of subsidiary, does soften this association. Indeed, co-operative

investigation would obtain many benefits operating within a federal Europe, the principal one being the redress of the accountability deficit. However, it would also stand to gain greater access to intelligence from Member States, who are loath to share such information under the current approach to co-operation, even with the JHA Council demanding that they do. After all, the Council has not provided Europol with any additional means of accomplishing this, other than that the Director may make a formal complaint if he finds that he is being obstructed.¹⁸

From a holistic perspective, however, the intergovernmental approach serves the interests of the EU best at this current stage of development, and is at present the most realistic. Intergovernmentalism gives governments controlling sanction over JHA policy, preventing it from 'running away' from them. The emphasis on controlling mechanisms within JHA policy, such as the Europol Convention, is indicative of strong intergovernmentalism, as well as an awareness that incorporating such a policy within the architecture of the European Project runs the risk of supranational influences taking hold on susceptible areas. As this thesis has shown, areas of police co-operation are hospitable to neo-functionalism drives. Neo-functionalism, by contrast, is unsuitable for the regulated approach required by the EU in JHA policy, because its style is undisciplined and not amenable to accountability. While this could be considered tolerable, perhaps even inconsequential, in the early days of European co-operation, the systematic approach to law-enforcement co-operation and the threat it must now counter demands a regulated approach

¹⁸ *Statewatch* Post 11.9.01 analyses: No. 1 *The "Conclusions" of the Special Justice and Home Affairs Council on 20 September 2001 and their implications for civil liberties.*

– something that neo-functionalism cannot offer. Equally, its role in counter-terrorism would be problematic in certain areas, hence its lack of relevance along the Anglo-Irish border. What neo-functionalism does offer to the overall equation is an impetus to push for co-operation, which Member State governments must take seriously. The UK's partial entry into the Schengen Information System in 2000, along with certain areas of the Implementing Convention, were direct results of pressure by her police chiefs.¹⁹ Neo-functional co-operation serves with great efficacy as a pressure group, checking potential atrophy within JHA policy.

The application of a federalist approach as an alternative contender for advancing JHA policy is a problematic one, principally because Europe is not politically ready for such a move. The *sui generis* relationship developed between the European Member States, for all the EU's espousal of freedom, could scarcely be described as a democracy itself. The European Union may hold many democratic values, but it is no state; rather it is a club. The checks and balances system that exist within the EU are skewed towards the Member States' own controlling interests via the European Council, rather than the supranational interests represented through the remaining institutions. JHA policy, entirely under the rubric of intergovernmentalism, is effectively isolated from the remaining checks and balances, operating as it does outside the formal structures of the Community legal framework. The European Union treaties limit the European Parliament to receiving and debating one *annual* report from the Member State governments on their JHA activities,

¹⁹ House of Lords European Communities-Seventh Report, Session 1998-99, Schengen and the United Kingdom's Border Controls, paragraph 62

effectively limiting regular debate.²⁰ The European Court of Justice, meanwhile, has no jurisdiction to rule on issues of law and order or internal security, other than an interpretative ruling requested by the Council, Commission or a Member State.²¹ The Commission, as we have seen from numerous examples, is often *invited* to attend meetings, such as Europol's Management Board, but is permitted no executive role concerning the matter under deliberation.²²

Were this shortfall effectively addressed by national parliaments, much of the problem might be mitigated; unfortunately, the executive dominates JHA policy, having developed a tendency to marginalise legislatures in policy-making matters, with much of the work being carried out by ministerial Council meetings. Indeed the argument can be made, as it has been by Lode Van Outrive, that the JHA Council has executive, legislative and judicial power:

- legislative in that it has the capacity to adopt rules, measures and provisions together with the power to amend and/or supplement such measures;
- executive in that it has the capacity to decide on the suspension or otherwise of initiatives made before it;

²⁰ Peter Chalk *The Maastricht Third Pillar* Reinales, Op. Cit., pp 197-8

²¹ Treaty of Nice Article 35.5

²² Europol Convention, Article 28.4

- judicial in that it has the capacity to monitor, interpret and settle disputes.²³

Seen from this perspective the JHA Council is something of an anomaly in relation to normal democratic political structures. By contrast, parliaments are turned to only as a rubber stamp for ratification or rejection.²⁴ Even this area is under threat. Amendments to Europol's Convention currently need ratifying by all Member States (Article 43, Convention); proposed changes by the European Council would however ensure, in the name of progress, that amendments could in future be made by a Council decision alone, just as the Council does with additions to Europol's criminal annex.²⁵ In view of the important re-emphasis of Europol's role following 11 September, along with that of Eurojust, the proposal to dilute still further the influence played by national parliaments seems particularly egregious.

It is, to an extent, understandable as to why the Member State governments are reluctant to provide a greater voice for their national parliaments: doing so would inevitably slow down the whole process, with ratification from all Member States taking time. The ratification of the Treaty of Nice, paving the way for the accession of an additional ten candidate countries, only complicates the issue further, and has profound consequences as a whole for how the EU will operate in the future. Moreover, there is an evident secrecy hangover implicit within the third pillar, derived from the application of

²³ Chalk, Op. Cit. Van Ouirive was discussing the JHA Council's predecessor, the K4 Committee, but the comparison still holds.

²⁴ Ibid., p197

²⁵ Council of the European Union *Amendments to the Europol Convention* 8579/1/02, 25 February 2002, specifically Article 9.

protecting internal security against threats from terrorists. It is understandable that secrecy is a necessary prerequisite at the operational level in countering terrorism, but it is surely an unnecessary condition to carry over into the policy-making process under the aegis of EU co-operation. Unfortunately, it would seem that this has occurred nonetheless.

Even if the Member State governments finally rid themselves of this detrimental mindset and increase the role of their national parliaments in JHA policy, we cannot ignore the fact that a greater role is also demanded of the EU institutions. JHA is a European affair, yet national parliaments can only bring to account their own government, and no other. Consequently, a supranational watchdog is required. Another reason for increasing the supranational input, and fundamental to securing accountability within the JHA field, is the need to address the inadequate data protection legislation currently in place, at both the national and supranational level. This has become imperative of late, because of the growing employment of JHA computerised databases, such as the SIS II and the TECS, to facilitate the transnational transfer of information between police forces. These are particularly useful in helping to identify an individual, especially when SIS II's transfer of fingerprint and DNA intelligence becomes operational. The positive counter-terrorist connotations provided by this service are evident. Technology has greatly enhanced the importance of information held by states, improving access and exchange with ease and speed. It should also be noted that this is not an area limited to states; it is just as beneficial to commercial interests. As this technology evolves, so too do the implications

for the right to privacy, but also more fundamental liberties such as the right to a proper trial, and the rights of defendants in the judicial process. The UK has seen this issue flare up recently, over the controversial decision by the Home Secretary to increase police powers, allowing them to take fingerprints and DNA samples from everyone arrested, whether they are charged or not, and place them in a computerised database.²⁶ Data protection will inevitably be one of the ongoing fundamental issues sometime yet to come. As the situation currently stands, the only Common European data protection legislation in existence is in the form of the Council of Europe Acts of 1981 and 1987, but no enforcement arm exists here; meanwhile, the national legislation of the Member States varies widely. With the growing daily exchange of information within the European field, and agreements signed between Europol and third parties such as the USA and Interpol, it is essential that a specific EU response and safeguards compatible with the ECHR be implemented, establishing a regulatory mechanism. Such a body would require the teeth to ensure enforcement of the legislation, and this would obviously weaken the primacy of the current intergovernmental approach.

That the EU develops a strong data protection body is important, because this would pave the way for a German proposal, made in March 2002, for the introduction of computerised data profiling on an EU-wide level, to become at least theoretically possible.²⁷ The BKA has reinitiated its old and successful, but controversial, *Beobachtende Fahndung* (BEFA) system of computerised terrorist profiling, which was used to great effect against the Red Army

²⁶ BBC News *Police DNA powers to be extended* 27 March 2003

²⁷ Council of the European Union, ENFOPOL German delegation proposal: Europe-wide computerised profile searches 8 March 2002

Faction, but mothballed in 1981, following a tide of negative public opinion against the system, as people felt that it had become too intrusive. BEFA was a revolution in intelligence gathering: utilising computers for the first time, it permitted German police forces access to information that had previously been difficult to obtain, since it existed only in individual card files at separate police stations. BEFA revealed links between apparently unconnected information, such as a specific car type having been used in several terrorist operations, which would show an investigator if a similar car had been used in the case on which he was currently working. Upon the discovery of the Mohammad Atta's Hamburg Cell, and the significance it played in the 11 September attacks, BEFA was reintroduced to help hunt terrorist "sleeper" cells.²⁸ The German proposal argues that computerised profiling would be much more effective if it were applied on a European-wide scale. If such an application were as successful as it was against the RAF, then perhaps it could be equally as successful against transnational terrorism, turning the anonymity of the terrorist against themselves: BEFA, for example, pinpoints bills and transactions paid for in cash, and begins to narrow down factors from there.²⁹ Given the general practice of utilising computerised databases at the EU policing level, the German proposal has some foundational support. However little support has been forthcoming from the other Member States for such a

²⁸ Wall Street Journal (on line edition) *Pioneered by a German cop, computerised profiling makes a comeback* 10 December 2001, suspected of planning a bomb attack on a US military facility in Heidelberg,

²⁹ The system, however, is by no means infallible. Questions were asked in September 2002 as to how Osman Petmezci, an ethnic Turk and his US-German partner, Astrid Eyzaguirre, 23, suspected of planning a bomb attack on a US military facility in Heidelberg, managed to avoid detection in a computerised profile search of the entire community. Petmezci made no secret of his anti-Semitism, and had six convictions for theft, embezzlement and drug dealing, while his partner has been granted a pass by the US authorities, giving her access to high security areas. (Guardian Online *German right tries to capitalise on arrest of German bomb suspects* 9 September 2002)

proposal. To implement this system correctly *would* require new European data protection legislation to make it palatable to the European public. This author could not support such a system otherwise. However, this prerequisite would be detrimental to the present intergovernmental approach, as the JHA Council would no longer be the controlling voice over the application of personal information held in databases throughout the Union. Because of the significant effort devoted to computer databases in EU police co-operation, this might not be seen as a price worth paying for an EU-wide BEFA. This is very much a sticking point with the present intergovernmentalist style of co-operation.

The EU has been experiencing something of a renaissance in the field of counter-terrorist co-operation over the past few years, assisted in many respects by the need to improve the co-operative response in the wake of the al-Qaeda attacks. However, much of the fundamental work, such as establishing a common definition of terrorism, and even the Common Arrest Warrant, was ongoing prior to 11 September; the attacks served principally to accelerate the process and focus terrorism in the minds of European leaders, as events did in the 1970s. Maintaining this momentum is crucial if Europe is to achieve the sophisticated counter-terrorist structure that will forever deny to the terrorist the opportunity to exploit the concept of sovereignty between neighbouring states. Such a renaissance, however, can only be welcomed if it is duly accompanied by reformation. The lack of adequate accountability safeguards currently in evidence, carried over in scale to a completed internal security structure, would portend Orwellian overtones of a Big Brother within

its makeup. This is why the EU must pause for moment in its ongoing construction of an internal security edifice to reflect upon the implications of its work.

How long before a common counter-terrorist policy?

The EU appears to be moving ever closer towards a unified approach on terrorism, especially after the alarm call of 11 September. The JHA machinery is of a sophisticated level to enmesh the Member States within the structure; nevertheless, counter-terrorist policy remains primarily nationally-orientated. The JHA law-enforcement machinery is limited to facilitation alone; hence, the national units of the Member States execute the lion's share of counter-terrorism. Such a policy is indicative of intergovernmentalism: no sovereign unit exists outside the Member States with an executive mandate for dealing with terrorism. If the Member States are to tackle transnational terrorism as fluidly as indigenous national terrorism, there needs to be greater unity in their approach. The investigation into the Strasbourg plot demonstrates that, despite the structure being in place, long-term co-operation and co-ordination is a problematic for national police forces. The sense of urgency created after 11 September and new developments made to European counter-terrorism co-operation have improved the situation, as we can see by the unparalleled collaboration that has occurred; ultimately, though, this is unsustainable. Despite the impressive number of arrests, many were shown to have been made on the flimsiest of evidence; indeed, many of the suspects

were subsequently released.³⁰ Such careless work has significant ramifications for both the efficiency of counter-terrorism and human rights legislation. For this reason it is crucial that the Member States take the next step in the development of counter-terrorist structure-building, and establish a common criminal policy on terrorism to consolidate the work already achieved here. A common policy would place transnational terrorism on a par with national terrorism by removing the differences between Member State legislation, at all levels, in the manner in which it is tackled. This would result in a much improved and cohesive effort against transnational terrorism; moreover, it would pave the way for the development of an external authority with an executive mandate to conduct operations at the transnational level in conjunction with local authorities. The evidence suggests that the Member States require an agency with authority to co-ordinate and enforce such investigations, capable of avoiding the sometimes self-absorbed mindset associated with national perspective, and the problems that has brought to counter-terrorist co-operation in the past. Europol presents itself as a suitable candidate: however, improved judicial co-operation is just as important. Sharing the role with Eurojust would therefore provide a more encompassing approach, while also preventing any one agency from dominating this area. As Chapter IX has argued, such a common policy should be exclusively limited to terrorism, for practicality, if for no other reason. Limited to one criminal area, it can be managed effectively within a non-federal Europe. Equally, an executive mandate given to Europol is not going to create a

³⁰ Many of the arrests made in Spain for example have been overturned due to lack of evidence, while the much lauded arrest of twenty-eight Pakistani immigrants outside Naples, in January 2003, accused of planning to attack NATO bases in Italy, have also been released on similar grounds (BBC News "Major al-Qaeda attack foiled" 24 January 2003; BBC News *Italy frees Pakistani terror suspects* 2 February 2003).

European FBI, because the scope is so limited, but it will provide much needed guidance in an area where Europe's police forces and judiciary are still finding their footing.

From the intergovernmental perspective, the establishment of a common criminal policy against terrorism, together with a limited executive mandate for Europol is a feasible one. It would mean however that for the first time, some degree of sovereignty connected with counter-terrorism would have to be surrendered to a "supranational" authority.³¹ This contradicts all previous intergovernmental policy; nevertheless, this break is necessary if Europe is to move towards a complete and cohesive common criminal policy against terrorism. However, having observed the common denominator politics of intergovernmental bargaining throughout the years, it is doubtful as to whether the Member States, as a whole, are ready to make this step yet. This inbuilt need to defend subsidiarity in matters of internal security is an effective prophylactic for preventing substantive change, and one of the weaknesses of intergovernmentalism.

Implications of the European approach beyond its borders

The experiences of the European Member States in establishing an internal security space are something that has not been lost on other attentive countries. Europe is one of the few democratic regions in the world to have been troubled consistently by terrorism since the late 1960s. Many lessons

³¹ Moreover, taking such a step would mean establishing some form of regulatory body, be it intergovernmental or a greater role for the EU's supranational institutions.

have been learnt from how Europe has chosen to approach the threat, both nationally and transnationally. Right from the very beginning, when the EEC Member States established the Trevi Group to help counter terrorism, other countries expressed an interest in its work, leading them to become associate members as "friends of Trevi".³² The JHA process, despite its *sui generis* qualities, holds a similar interest, not least for the EU candidate members, whose successful membership requires their meeting the JHA Acquis Communautaire.³³ Non-candidate countries, for whom interest in JHA affairs does not hold such direct implications, are also attentive over events. Europol's information-sharing agreement with the FBI, for example, is one of mutual benefit. Meanwhile, the application of the Schengen acquis, especially the SIS flanking measure, has for some time piqued interest within the Canadian government as a means of policing the border with the US. The significant number of terrorists believed to be operating in Canada, taking advantage of her more liberal asylum rules, has generated concern over the threat they pose to the USA, due to the ease with which it is possible to cross the almost 4,000 mile long border.³⁴ After 11 September, a survey revealed that eighty-five per cent of Canadians favoured a Schengen style agreement

³² Austria, Morocco, Norway, Sweden, Switzerland, the USA and Canada.

³³ These new Member States will however remain outside the Schengen Area, until such time as the Schengen Members view them able to enter. (Personal meeting with Geoffrey Sonnenberg, Head of International Section, Police and Organised Crime Unit, Home Office, 2 April 2001).

³⁴ A 1999 report by the Canadian Security and Intelligence Service revealed that fifty foreign terrorist groups are operating in Canada, with 400 individuals suspected of terrorist involvement. Additionally a series of reports in Autumn 2000 concluded that international terrorists and organised crime groups were using Canada as a significant base of operations, endangering both Canada and the USA. Immediately after the 11 September attacks, the FBI requested that the RCMP and the Canadian Security and Intelligence Service check on 100 associates of Osama bin Laden, thought to be in Canada. Christopher Sands *Canada and the War on Terrorism: the U.S. Challenge on the North American Front* Centre for Strategic and International Studies (online edition) Vol. 2 Issue 3 October 2001; *Public Policy Forum Disappearing borders and economic integration: learning from the European Union* Report PPF Executive Study Tour, 2-9 November 2001 (online edition www.pppforum.com)

with the USA, demonstrating Canada's willingness to enhance security, without detriment to the benefits of the North American Free Trade Agreement (NAFTA).³⁵ Reaching such an agreement need not be an impenetrable issue, despite the comparative lack of integration between the US and Canada in contrast with Europe. Removing the fixed border controls from the highly porous frontier – when we consider the usual terrorist capacity to bypass such measures – would not be an illogical move, considering their replacement by more effective flanking measures, coupled with the benefits generated by increased freedom of movement and trade. How a “wounded” American public would view the removal of their northern border, with the physical, but false sense of security which it provides, in the post-11 September zeitgeist is much more questionable. The Schengen acquis, however, scarcely infringes on sovereignty, as it is only a framework for facilitating and regulating co-operation, and therefore a palatable option.

Modelling a police organisation on Europol is more problematic, because no other region has developed the level of integration necessary to achieve it; political reasons, as much as pragmatic ones, are responsible for Europol's creation. Europol requires the pooling of a significant amount of sovereignty for it to function, especially in relation to the TECS. The EU is the only group of sovereign states in the world familiar with pooling such sovereignty, almost as a matter of course. Considering that no other co-operative policing model of non-federal origin, such as Interpol or Aseanapol, is able to match the depth of services offered by Europol, and that no attempts have been made to

³⁵ Sands, *Op. Cit.*

establish something similar, it is very unlikely that a regional equivalent of Europol could emerge elsewhere without this deep integrationist background.

The EU's experiences are also making themselves heard within the broad-based Organisation on Security and Co-operation in Europe (OSCE), of which all European states are members, together with Canada and the USA.

Counter-terrorism is a new activity for the OSCE, and one initiated following the attacks of 11 September. The organisation's initial response following al-Qaeda's attacks was to launch an action plan at a summit in Bucharest which included stepping up both border security and information exchange, as well as making efforts to accede to all of the UN's conventions and protocols on terrorism by the end of 2002.³⁶ Such measures cannot match the sophisticated response of the EU to internal security co-operation, especially with the lack of integrative enforcement tools; however, under the leadership of the Portuguese Presidency (2002-3) there has been a significant shift of emphasis towards terrorist-related issues. An anti-terrorist conference in June 2002 focused on co-ordinating counter-terrorist initiatives, along with highlighting the need for greater co-operation between the world's various security agencies.³⁷ Most important was the decision, following the June conference, to adopt a Charter on Preventing Terrorism in December 2002. Such a charter will provide the political and legal basis necessary for developing OSCE co-operation against terrorism, especially in the complicated development of extradition arrangements between member countries.

³⁶ [BBC News](#) *OSCE moves against terror* 4 December 2001

³⁷ [BBC News](#) *OSCE discusses terror charter* 12 June 2002

The EU's influence within the OSCE is significant, both in economic terms and in size – representing over a quarter of its membership at present, which will soon increase to almost fifty per cent. The counter-terrorist arrangements being developed by the OSCE draw some parallels with the EU's developments, especially in terms of providing a political and legal basis for co-operation. For the EU, this was the TEU and its Third Pillar. Although the OSCE developments cannot match those of the EU's JHA, the Charter on Preventing Terrorism does provide the opportunity to develop co-operation further, now that the foundations have been laid. Co-operation at the OSCE level also serves the EU's interests, allowing it to exert influence beyond its borders in tackling terrorism, particularly in relation to the former Soviet states in the Caucasus and Central Asia, such as Uzbekistan and Kyrgyzstan, where Islamic extremism is a problem. Aside from holding conferences on these problems, tangible programmes include improving policing in Azerbaijan through training seminars.³⁸ Moreover, the adaptation of the charter will require institutional reforms to effect co-operation, and here the EU and its experiences stand as a useful model for these future developments.

Not all the commitments made by the OSCE in targeting terrorism are likely to be immediate. Despite the commitment to sign all the UN's conventions and protocols against terrorism, one particularly embarrassing issue remains for the EU. The UN's International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, if conscientiously enforced, would significantly hamper terrorist funding. The proviso to effective employment of this convention, however, is that financial transparency

³⁸ Annual Report on OSCE Activities 2002: Activities in the Field p 34

requires improvement within national legislation to increase the likelihood of detecting such monies and transfers in the first instance. Luxembourg and Austria have nonetheless refused to lift the veil of financial secrecy surrounding their banking laws unless Switzerland follows suit.³⁹ The EU has considered economic and political reprisals against Switzerland, a country which some Member States accuse of allowing EU citizens to evade tax, but because its own membership is divided over this issue, a solution is some distance away. Furthermore, the commitment to upholding human rights, for instance, has been routinely flouted by Russia in its action against Chechen separatists both in Chechnya and more recently during an armed siege in Moscow in October 2002, where security forces controversially employed a chemical agent to break the siege. Despite worldwide condemnation of Russia's actions, the EU itself has done little in attempt to effect change here.

Europe's approach to tackling terrorism is carefully regulated by the Member State's adherence to the European Court of Human Rights. Its ruling against UK interrogation methods at detention centres in Northern Ireland in the early 1970s ended this policy. Similar methods are now being inflicted by the USA on prisoners from Afghanistan, held under very dubious and messy judicial procedure at Guantanamo Bay Naval Base, Cuba. This is not to say that there have not been further European deviations from the principles of human rights; collusion between RUC officers and loyalist terrorists in Northern Ireland, or the GAL death squads, are two particularly disturbing examples. Nevertheless, there is constant pressure to expose any wrongdoings by the

³⁹ [BBC News](#) *EU to warn Swiss on bank secrecy* 8 October 2002

security forces: for example, the Stevens Inquiry showed great determination in the face of security force obstruction, in investigating allegations of RUC involvement in the murder by loyalists of Pat Finucane in February 1989 and Adam Lambert in November 1987.⁴⁰ The Bloody Sunday Enquiry also continues to attempt to determine the truth behind the deaths of thirteen Catholics, shot dead by the British Army during a Civil Rights march in Derry, on 30 January 1972. In Spain the GAL investigations have led to a number of jail sentences for Civil Guard officers and government officers, including a seventy-one year sentence each for Spain's most decorated police officer, General Enrique Rodríguez Galindo, and the Civil Governor of Guipúzcoa, Julen Elgorriaga in April 2000.⁴¹

The application of human rights legislation, however, faces two particular problems. The first is the current climate of fear and urgency following 11 September; the second is the extension of policing and judicial co-operation into the transnational sphere. Insofar as the first problem is concerned, Europe's desire to smash al-Qaeda related cells has led to a significant number of unsubstantiated arrests, and subsequent releases.⁴² The impression given is that national police forces are, in many cases, simply "fishing" for whoever fits the profile of a "terrorist". In the example of the twenty-eight Pakistani

⁴⁰ Mr Finucane was a well-known lawyer with a number of Republican clients, while Lambert was a Protestant student mistaken for a Catholic.

⁴¹ *The Times General Jailed for murder of Basque rebels* 27 April 2000 p 16
These investigations even threatened, for a time, the former Socialist Prime Minister, Felipe González with investigation and prosecution.

⁴² On a side note, the recent inclusion of the ECHR into UK legislation in 2000 after a two-year waiting period means (although Scotland incorporated the ECHR legislation in 1999) is still experiencing teething problems. The UK Courts' overturning the Home Secretary's attempts to introduce new asylum measures curtailing benefit payments of those who delayed application for asylum, ruling that they would infringe the human rights of asylum seekers, being a case in point. (*BBC News Blunkett's asylum appeal rejected* 18 March 2003)

immigrants arrested in Italy, the evidence for their arrests points to the fact that they were Muslim, and a large group living together in an isolated and dilapidated farm house. Based on a lack of any substantial evidence before such an arrest, this type of profiling borders on racial discrimination. The al-Qaeda related threat *is* an Islamic extremist one, and its perpetrators *are* mainly Muslim immigrants, but greater protection must be afforded to the overwhelming innocent and law-abiding majority of this community; therefore, human rights legislation, which has always played a positive role in the counter-terrorist policy of the Member States, should not be neglected because of the current climate. Indeed, to neglect this would be dangerous, as emphatically argued by Wilkinson, and more recently, Peter Chalk, because it could ultimately serve to alienate this persecuted community, thus improving the currents in the water of the terrorist “fish”.⁴³

The second concern relates to the extension of internal security into the transnational arena. Although human rights legislation has a more secure position here than do issues of democratic accountability and data protection, because of its transnational capacity via the ECHR, it is nevertheless in need of further bolstering. Some of the changes made by the JHA Council to extradition legislation and procedure have profound consequences for human rights. The removal of the dual criminality clause from the simplified EU Convention on Extradition 1996 becomes an issue when another Member State’s anti-terrorism legislation is sufficiently encompassing to merit the arrest of a EU citizen for assisting, even in the loosest sense of the word, a

⁴³ Paul Wilkinson Terrorism and the Liberal State (2nd Edition) 1986; Terrorism versus Democracy 2001 chapter 5; Chalk, Op. Cit., pp 183 –203

terrorist or terror group beyond its borders. The Spanish offence of providing “logistical assistance” to a terrorist group may well have serious implications once the European Arrest Warrant becomes active. This can only emphasise the need to increase the role of the ECHR in these procedures, now that the traditional extradition legislation devices that protected individuals’ rights have been removed.

Co-operation and co-ordination

The explanation accounting for these difficulties lies in the fact that information exchange has dominated counter-terrorist co-operation to the point that it has become synonymous with it. Without a doubt, information exchange is instrumental in defeating terrorism; it is the fulcrum of effective co-operation. However, its predominance within counter-terrorist co-operation also stems from a means of co-operation which impinges least on sovereignty. Information exchange can be strictly controlled by the national authorities of a Member State, whereas co-ordination of efforts does remove some degree of control over a terrorist matter, as action cannot be taken until all national authorities are ready. Under such conditions, Belgium and The Netherlands in the example above would be constrained against action by France. Permitting the presence of an active terrorist cell on one’s soil for the benefit of another state’s intelligence gathering would be an action that few governments would be inclined to take, and certainly not for any significant period. It carries the same risks as “controlled delivery” in counter-terrorist matters. In any event, such a commitment would, unless voluntary, be contrary to Article 33 of the

Treaty of Nice.⁴⁴ This provides sufficient explanation of the inherent problems associated with the lack of effective co-ordination within European counter-terrorist co-operative co-ordination. Consequently, it is no great surprise that there has been a dearth of counter-terrorist agencies clamouring to take advantage of Europol's co-ordinating facilities since its arrival on the scene. This is an unfortunate case of affairs as the terrorist threat has changed from one that was predominantly national, where information exchange was sufficient to tackle terrorism, to a situation in which transnational terrorism is now the key threat, and one which requires transnational counter-activity to effectively target it.

There has been some effort at co-ordination of efforts since 11 September, such as the seven month-long investigation by Germany, Spain, America and France, and subsequent arrest of Ahmed Brahim, a key al-Qaeda figure, in April 2002. However, as the sweeping arrests of the "usual suspects" indicates, such co-ordination has not dominated European counter-terrorism. Europol's co-ordinating abilities are not being utilised as they might. The explanation behind this does not rest so much with the actual counter-terrorist agencies, who are chiefly concerned with the guarding of their intelligence, as with those higher up the chain of command. The intergovernmental ethos of co-operation, is intrinsically hostile to losing any degree of control over counter-terrorist operations, which is ironic, considering that we have established that a federal Europe would impinge as little as possible in the running of C-T policy. Instead, change is necessary; relaxing the grip of

⁴⁴ The safeguarding of internal security and policing of a Member State cannot be overridden by any article of the TEU.

intergovernmental control, either through the establishment of a common criminal policy against terrorism, or, less likely, passing the baton to a federal Europe, would serve to encourage co-ordination.

The failure in co-ordination, despite the ever-increasing co-operation against terrorism, represents a serious threat to the efforts of co-operative counter-terrorism as a whole. The terrorist threat has rapidly evolved, and is itself much more co-ordinated in its efforts, requiring a similar response at the transnational level. Counter-terrorist co-operation urgently needs to put behind it the legacy of the days in which sharing intelligence was sufficient – this is simply no longer the case. Intergovernmentalism, as it presently stands, is non-conducive to the necessary requirements, hindering progress through its reluctance to relinquish subsidiarity. The intergovernmental approach must be dramatically rethought if European counter-terrorist co-operation is to have any real teeth against current and future terrorist threats. We should not be afraid of federalism; it offers greater internal security than the present intergovernmental approach to co-operation.

For most Member State governments, such a conclusion is a radical one. Rejecting this conclusion out of hand, however, would be premature. The author set out, and maintained throughout, no predetermined conclusion; principally, this research has arrived at its conclusion by analysing not just the specific co-operative counter-terrorist structures, but also police and judicial co-operation in general. Internal security matters are thereby ascertained in a more holistic manner. Fundamental to the author's approach, is the direct

linkage of internal security co-operation to the European Project and its ongoing integrationist development. The importance of this serves not only to sharpen the critical analysis of intergovernmental policy by offering an alternative perspective via neo-functionalism or federalism, but also to determine the extent to which this is justified. This latter point is determined by establishing the degree to which these integrationist theories are present or applicable to individual areas of co-operative policing and counter-terrorist policy. Appreciating the existence of such integrationist background influences is crucial to any serious study of internal security co-operation between the Member States. Accepting the primacy of intergovernmental co-operation in directing counter-terrorist policy simply because JHA policy is classified as intergovernmental is ill advised. Academic research should challenge established presuppositions wherever possible; in so doing we contribute to critical debate. Reintroducing these previously neglected heavy-hitters of European integration studies has been a key feature of this research, and one intended not only to challenge the complacency of JHA studies in their approach to intergovernmentalism, but also to bring about their rehabilitation. Utilising and debating these theoretical approaches as a means of taking integration forward is as valid within twenty-first century Europe as it was in the 1960s and '70s.

Research into counter-terrorist co-operation within JHA policy is thin on the ground, with Peter Chalk offering the most comprehensive analysis.⁴⁵

However, Chalk's emphasis relates specifically to empirical analysis, and his

⁴⁵ Peter Chalk West European Terrorism and Counter-Terrorism: The Evolving Dynamic Peter Chalk The Maastricht Third Pillar 1996; Fernando Reinares (Ed.) European Democracies Against Terrorism 2000

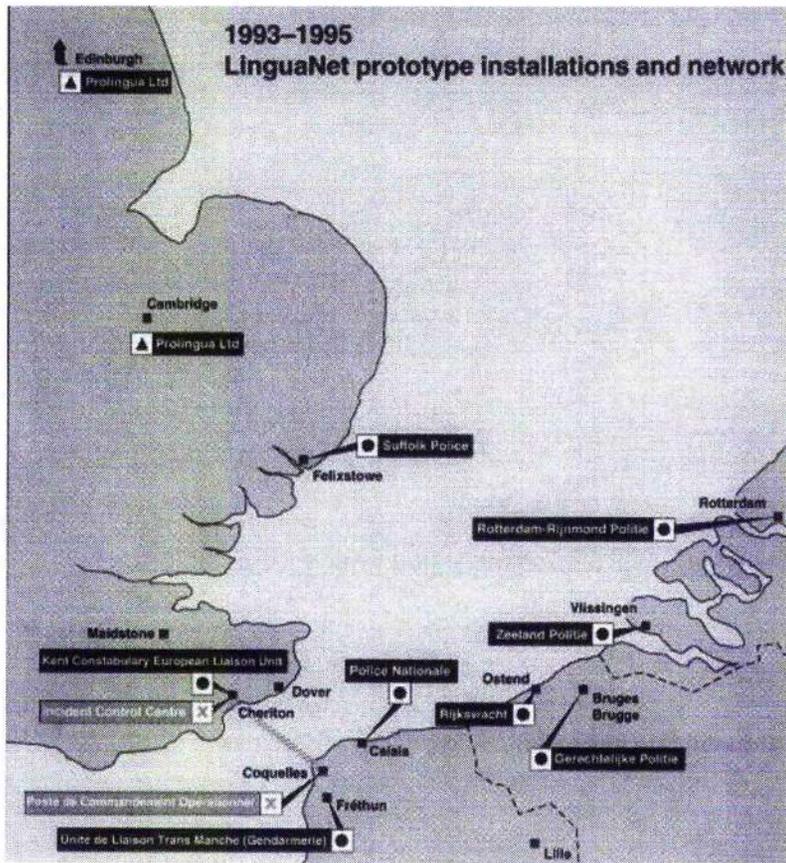
1996 work has rapidly become dated due to advances in JHA affairs. Equally, Chalk offers no real alternative to the problems associated with intergovernmental policy. Neither for that matter does Chalk address the evolution of counter-terrorist co-operation, so crucial to understanding C-T policy today, to the same depth as this research. This effectively makes this research a one-stop shop for anyone wishing to understand counter-terrorist policy within Europe. Moreover, as has been indicated in the introductory chapter, where the literature does address JHA affairs, it is in relation to general police co-operation; and again we see little analysis beyond an empirical approach.⁴⁶ Key structures of European police co-operation – Europol and Schengen – have previously been given short shrift in analysing their counter-terrorist value. This research addresses this shocking shortfall. If we are truly to comprehend the value of counter-terrorist co-operation within Europe, we must understand the role played by these structures in facilitating this. The ongoing debate regarding a possible executive mandate for Europol has significant connotations for counter-terrorism throughout Europe. The author's opposition to the conferment of such powers, while advocating a federal approach for investigative co-operation, also clearly illustrates the utility of approaching these issues from an integrationist perspective.

The existing literature is also limited in relation to the events of 11 September 2001, specifically in the consequences that this had for European internal security. Al-Qaeda's attacks forced terrorism to the forefront of international

⁴⁶ Anderson et al Policing the European Union 1995 is one of the few areas in the literature to address the political theory of police co-operation.

and domestic policy, thereby making it imperative that the literature in both the field of counter-terrorist and European studies address these consequences. This is additionally important because of their acceleratory effect on JHA affairs and the subsequent downgrading of accountability concerns. Again, this research not only addresses these issues, but arguably, it is also the first to do so within academic literature. For students of EU politics, this research offers an invaluable account of progress within the JHA sphere and its interlinkage with counter-terrorism, during a period of EU enlargement and structural change under the discussions of an EU constitution, and set against the backdrop of the international “war on terror”.

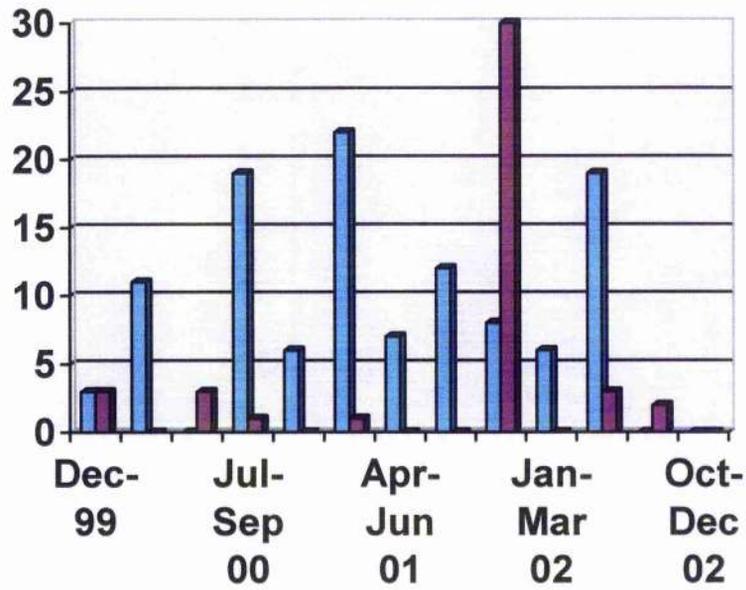
Diagram I¹



¹ The LinguaNet Project brochure (website): www.prolingua.co.uk/brochure/index.html

Table II

Number of ETA suspects arrested in Spain (light) and France (dark) between the period 1 December 1999 to 31 December 2002. Figures have been broken down to a quarterly basis after December 1999.³



³ Data derived from BBC News online archives between the period 1 December 1999 – 31 December 2002 to determine the total number arrests.

TABLE III

Official "Alert"* Figures entered into the SIS since its launch in March 1995

1995	3,868,529
1996	4,592,949
1997	5,582,240
1998 (5 March 1998)	8,826,856

*Figures based on the total number of alerts held in the SIS on a *single* day. They do not reflect the numbers deleted or added during the course of a year.⁴

TABLE IV

Total number of "positive responses" or "hits" recorded by the SIRENE BUREAUX

1995	31,585
1996	33,179
1997	36,949

(One of the largest categories of "hits" covers "aliens" to be refused entry under Article 96)⁵

TABLE V

Official "Hit" Figures recorded by the SIRENE Bureaux, 1997

	<u>Internal</u>	<u>External</u>
France	9,029	3,143
Germany	2,612	6,625
Belgium	3,397	2,425
Spain	2,106	468
Netherlands	2,214	1,609
Luxembourg	909	303
Portugal	404	113
Italy	136	895

⁴ *Statewatch, Schengen: Joint Supervisory Authority denied resources* Vol. 9, No. 3 & 4 May – August 1999, p22

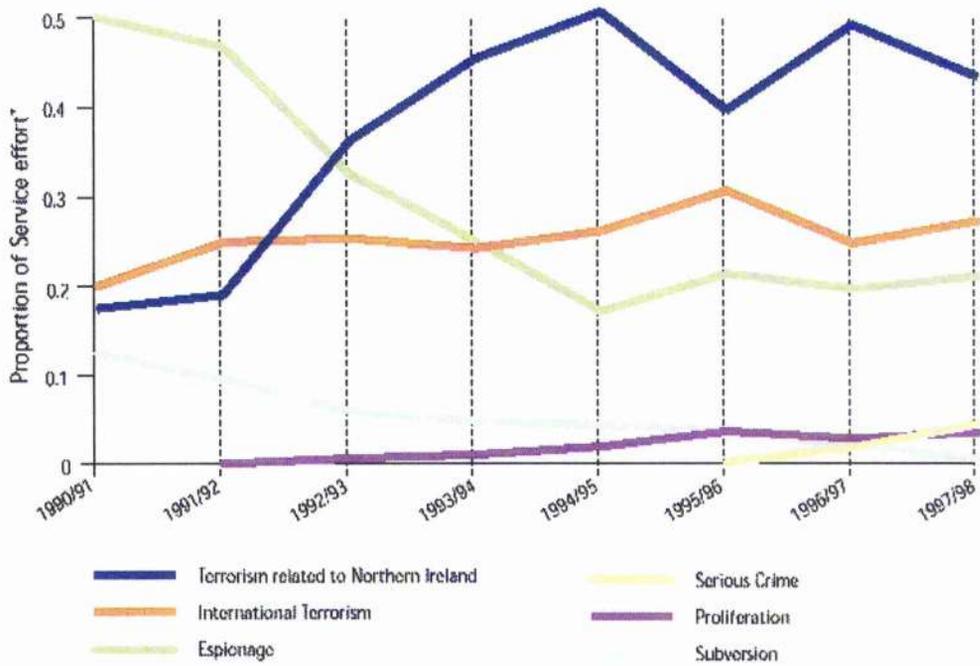
⁵ *Statewatch, Schengen: an annual report shows over 14 million entries in the Schengen Information System* Vol. 8, No. 3 & 4 May – August 1998, p28

⁵ *ibid.*, p27

Austria	381	72
Greece	182	16

The number of "hits" recorded show that there were 15,669 "hits" recorded for the ten Schengen states where the originating country had a "hit" abroad (termed "external") and 21,280 "hits" where a country recorded a hit based on an "alert entered abroad".⁶

GRAPH I ⁷



*Shows distribution of effort, ie expenditure on each threat plus a proportionate share of the costs of protective security work and administrative and support areas.

⁷ FAS Intelligence Resource Programme Website *Budget and Staff - Security Service MI5*
www.fas.org/irp/world/uk/mi5/budget.htm

Table VII

**Council of Europe Membership and signature and ratification of the
European Convention on the Suppression of Terrorism 1977**

Member States	Date of Signature	Date of Ratification	Date of entry into force	R: Reservations D: Declarations T: Territorial Decl.
Albania				
Andorra				
Austria	27/01/77	11/08/77	04/08/78	
Belgium	27/01/77	31/10/85	01/02/86	R
Bulgaria	11/09/97	17/02/98	18/05/98	R
Croatia				
Cyprus	27/01/77	26/02/79	27/05/79	R/D
Czech Rep.	13/02/92 <i>i</i>	15/04/92 <i>ii</i>	01/01/93	
Denmark	27/01/77	27/06/78	28/09/78	R/T
Estonia	03/05/96	27/03/97	28/06/97	R
Finland	16/11/89	09/02/90	10/05/90	R
France	27/01/77	21/09/87	22/12/87	R/D/T
Germany	27/01/77	03/05/78	04/08/78	
Greece	27/01/77	04/08/88	05/11/88	R
Hungary	03/05/96	06/05/97	07/08/97	R
Iceland	27/01/77	11/07/80	12/10/80	R
Ireland	24/02/86	21/02/89	22/05/89	
Italy	27/01/77	28/02/86	01/06/86	R
Latvia	08/09/98			
Liechtenstein	22/01/79	13/06/79	14/09/79	
Lithuania	07/06/96	07/02/97	08/05/97	
Luxembourg	27/01/77	11/09/81	12/12/81	
Malta	05/11/86	19/03/96	20/06/96	R
Moldova	04/05/98			
Netherlands	27/01/77	18/04/85	19/07/85	R/T
Norway	27/01/77	10/01/80	11/04/80	R
Poland	13/09/95	30/01/96	01/05/96	
Portugal	27/01/77	14/12/81	15/03/82	R
Romania	30/06/95	02/05/97	03/08/97	
Russia				
San Marco				
Slovakia	13/02/92 <i>i</i>	15/04/92 <i>ii</i>	01/01/93	
Slovenia				
Spain	27/04/78	20/05/80	21/08/80	
Sweden	27/01/77	15/09/77	04/08/78	R
Switzerland	27/01/77	19/05/83	20/08/83	R
"the former Yugoslav Republic of Macedonia"				
Turkey	27/01/77	19/05/81	20/08/81	
Ukraine				
United Kingdom	27/01/77	24/07/78	25/10/78	T

Table VIII

Criminal Acts Permissible for Surrender under the EU Common Arrest Warrant: Article 2.2

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

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