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Police Co-operation and the Area of Freedom, Security and Justice

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1. INTRODUCTION

The European Union is frequently portrayed as the façade of a Greek temple resting on three columns. The first pillar encompasses broadly the European Community; the second is related to the 'common foreign and security policy' of the Member States; and the third, according to Title VI of the Treaty on European Union (TEU), deals with 'police and judicial cooperation in criminal matters'.

The purpose of the so-called third pillar is not to create an 'area of freedom, security and justice' of the territory of the European Union (EU). The objective of this pillar is not that ambitious: citizens are guaranteed a 'high level of safety' in this area. The text of Article 29 of the TEU is very clear in this regard. What is not clear is how high a 'high level' is or how high it should be. The Article refers to only two means by which that vague objective should be reached: 'by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters' and by 'combating racism and xenophobia'.

This essay is principally concerned with police co-operation as it is presented in the context of the third pillar with a focus on the set objective of development. Judicial co-operation will be examined only to the extent that this is necessary for a good understanding of police co-operation. This will also be the case with respect to police co-operation under the first and second pillars. These will only be considered in the light of police co-operation under the third pillar. However, just how the EU would generally like to see the police engaged in the 'area of freedom, security and justice' will not be considered at all. After all, a discussion of this would require that both the organization and the activities of the police systems in the Member States be included in the analysis. Such

an undertaking would not be possible within the scope of an essay such as this.[1]

Given the wide variety of lines of approach available, a great deal can be said about police co-operation under the third pillar. Thus, one cannot avoid making choices. The choices made for this essay are each linked to its overall objective: an evaluation of the future plans of the Convention on the Future of Europe (hereafter the European Convention) and the European Commission (hereafter the Commission) with respect to police co-operation in the EU on the basis of an analysis of its current development. Therefore, the essay will begin by considering what place police co-operation is assigned in general under the third pillar: within what limits must it be organized? What forms can and may it take? What concrete purpose or purposes must these forms of co-operation serve? Without an accurate definition of the institutional framework within which this co-operation is required to unfold, no well-balanced judgement can be made regarding the advances that have or have not been made.

Secondly, on the basis of this general definition, the question regarding the development police co-operation has undergone within the context of the third pillar in recent years will be examined at a formal level: the level of the conventions between the Member States and the decisions of the Council and the Commission.[2] In answering this question, particular attention will be paid to the increasing operationalization of cross-border co-operation, the growing interweaving of police and judicial co-operation, and the branching of police co-operation towards the first and third pillars. The choice of these three issues is based on the consideration that they provide a good demonstration of the institutional dynamics of police co-operation under the third pillar and also that they reflect the difficulties with which its development has had to struggle on the formal level.

Thirdly, the phenomena that are to be addressed by means of police co-operation in accordance with Article 28 TEU, namely various forms of crimes, organized and otherwise, will also be reviewed. The questions that will be raised in this connection each have a bearing not only on the nature, the scope, and the development of these crime problems, but also on the relationship between these problems and police co-operation as it is currently

[1] Among the publications that consider, comparatively or otherwise, the present police forces in the Member States of the European Union are: A. Semerak and G. Kratz, *Die Polizeien in Westeuropa* (Stuttgart: Richard Boorberg Verlag, 1989); J.-C. Monet, *Polices et Sociétés en Europe* (Paris: La Documentation française, 1993); J.M. Erbès *et al.*, *Polices d'Europe* (Paris: L'Harmattan, 1993); J.-J. Gleizal *et al.*, *La Police; le Cas des Démocraties Occidentales* (Paris, Presses Universitaires de France, 1993).

[2] See also for a general overview of legal developments, C. Chevalier-Govers, *De la Coopération à l'Intégration Policière dans l'Union Européenne* (Brussels: Bruylant, 1999), and M. Sabatier, *La Coopération Policière Européenne* (Paris: L'Harmattan, 2001).

organized under the third pillar: does the co-operation in fact bring the objective of a 'high level of safety' in relation to these problems closer? In comparison with the earlier formal question raised in this regard, it is here rather a matter of a substantive or content-oriented question: has this co-operation in fact added value in the concrete transnational fight against organized crime in the EU?

Finally, in connection with the answer to this last question, this essay will examine how the European Convention and the Commission perceive the organization of police co-operation between the Member States in their recent plans regarding the future of the EU. In discussion of this point, it will of course be acknowledged in particular whether they take account of the problems that exist at the formal and the substantive levels with respect to this form of mutual co-operation. In addition, in what follows from this, it is of course impossible to avoid the question whether these plans, to the extent that they address the relevant problems, also suggest solutions.

2. POLICE CO-OPERATION UNDER THE THIRD PILLAR: A GENERAL CHARACTERIZATION

The third pillar, like the second pillar, is often compared to the first pillar of the EU. In this comparison, the first pillar is often characterized as the Community pillar and the other two pillars are described as intergovernmental pillars. In addition, this comparison also expresses a great deal about this latter characterization. It is not without reason that the title of Chapter VI TEU reads 'Provisions on police and judicial co-operation in criminal matters' and in Article 29 this designation is specified in terms of police and judicial co-operation between the EU Member States and not, for example, between the Member States and the Commission. Further, one should not lose sight here of the fact that Article 34(2) provides that the Council shall act unanimously when taking measures, so ensuring that the sovereignty of the Member States is respected in the decision-making process as regards policy; thus, none of the Member States can in this regard be overruled by the other Member States. The recognition of national sovereignty is also found in Article 33 TEU: the provisions of 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'. Further, Article 32 is relevant here, stating that the Council 'shall lay down the conditions and limitations under which the competent authorities ... may operate in the territory of another Member State in liaison and in agreement with the authorities of that State'. In the case of police and judicial co-operation, in other words, each Member State remains in ultimate control of its own affairs.

By contrast, however, especially as a result of the amendments to the TEU brought about by the Treaty of Amsterdam, *communautaire* institutions like the Commission, the Court of Justice, and the European Parliament play more important roles than those provided in the Treaty of Maastricht. Through these changes the Commission has been given the right to take the initiative in developing policy to be sent to the Council (Article 34(2)). The Court of Justice has acquired the jurisdiction, subject to conditions, to give preliminary rulings on the validity and interpretation of, for instance, the framework decisions and Council decisions (Article 35(1)). And the European Parliament must in a number of cases be consulted regarding measures that the Council wishes to adopt (Article 39(1)). The third pillar, therefore, can only with difficulty still be called one of the two intergovernmental pillars of the EU. During the 1990s, this pillar assumed more of a dual nature. The hard core of Member State sovereignty was under this column gradually surrounded by the soft shell of the Community institutions.[3]

Nevertheless, the extent to which the notion of sovereignty still governs the third pillar is underlined by the manner in which police co-operation under Article 30 TEU is elaborated. The unarticulated hard core in the relevant provisions is that no executive power was provided for police agents involved in cross-border co-operation, still less was such power transferred to intergovernmental police agencies. The sovereignty of the Member States, therefore, remains completely intact in the field of public order and security. Accordingly, at home, the police remain the primary embodiments of the monopoly that is characteristic of the modern state: the monopoly over force. If the Member States had created or otherwise transferred such transnational powers, then this would instead have been a significant infringement of their monopoly over force and thus over their sovereignty. As is evident from Articles 32 and 33, it was precisely this that they did not want in any circumstances. Their only objective was to promote the conditions for cross-border operational co-operation between their police departments. What, then, does the key article concerned, Article 30 TEU, cover with regard to police co-operation?

First, paragraph 1 refers to police co-operation between the Member States in general: operational co-operation with respect to 'the prevention, detection and investigation of criminal offences', the 'collection, storage, processing, analysis and exchange of relevant information', 'co-operation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment and forensic research', and the 'common evaluation of particular

[3] For a more detailed discussion of the character of the third pillar see the contibutions of E. Regan ('Overview of the New Third Pillar') and D. Walsh ('How the Third Pillar Works') in E. Regan (ed.), *Cooperation against Crime in the European Union; the New Third Pillar* (Dublin: Brunswick Press, 2000), at 1, and S. Peers, *EU Justice and Home Affairs Law* (Harlow: Pearson, 2000), at 8.

investigative techniques in relation to the detection of serious forms of organised crime'. Secondly, paragraph 2 specifically addresses co-operation through Europol. It provides that the Council shall promote co-operation through Europol and especially—within five years from the date of entry into force of the Treaty of Amsterdam (1 May 1999)—shall enable Europol 'to facilitate and support the preparation, and to encourage the co-ordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity'; shall adopt measures 'allowing Europol to ask the competent authorities of the Member States to conduct and to co-ordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime'; shall promote 'liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol' and shall establish 'a research, documentation and statistical network on cross-border crime'. Each of these provisions indeed has nothing to do with the delegation or transfer of executive power to police agents from the Member States or Europol personnel. Most of the provisions turn on the creation or the improvement of the conditions according to which such power can be exercised by the police agents from the Member States or can otherwise be better exercised. Only a few are directly involved in the operational execution of cross-border criminal investigations, possibly with the assistance of Europol.

The question that then arises is what purpose does this form of co-operation between the Member States serve? The answer in Article 29 is that it is intended to guarantee citizens a 'high level of safety' in an 'area of freedom, security and justice'. As far as this is concerned, it has already been noted that nowhere in the Treaty is there an explanation of what is to be understood by a 'high level of safety'. Thus, this objective is fairly rhetorical in nature, especially if one considers it in the light of the crime problems described earlier in Article 29 as those apt for co-operation, in particular: 'crime, organised and otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud'.[4] These are not inconsiderable problems and, more particularly, not problems whose nature, scope, and development are easily measured quantitatively or qualitatively. Thus, how can it ever be established that in relation to these problems a certain level of safety has been reached, and, what is more, a 'high' level? The debates over what 'high'

[4] By way of a decision on 6 December 2001, the Council established that Europol could carry out its tasks in relation to all offences that are taken up in the appendix to the Europol Convention (OJ 2001 C362/1).

in this context means are potentially inexhaustible. A closely connected question is how effective are the available means of realizing this high level? To what extent—leaving aside judicial co-operation and customs co-operation—can police co-operation as elaborated under Article 30 provide an important contribution to the fulfilment of this goal?

If one were to consider the action plans that the Council has adopted in past years, then it is possible to draw the conclusion that in its sphere doubt has also slowly been raised in relation to the effectiveness of police co-operation under the third pillar. This was very clear at the Tampere Council summit on 15 and 16 October 1999. Not only was it proposed that a working group comprising European chiefs of police—the EU Police Chiefs' Task Force—be established to organize more and better operational approaches to transnational crime problems, but it was also proposed that there should be an immediate move towards establishing joint investigation teams for the fight against drug trafficking, trafficking in humans, and terrorism.[5] The nature of these two decisions demonstrates where, in police co-operation in particular, the EU was lacking in 1999—at least according to the members of the Council: namely multinational cross-border co-operation, which, in the fight against organized crime, is operationally critical. Apparently, they considered that the working out of the forms of co-operation articulated in Article 30 had become bogged down in setting up general facilities for the fight against organized crime and had palpably failed in the business of conversion into concrete action to deal effectively with cross-border crime.

In connection with the foregoing, it is necessary to indicate the policy that was set up after the attacks of 11 September 2001 for the promotion of, for instance, police co-operation between Member States with respect to terrorism.[6] This policy can indeed be seen as the Council's first serious attempt, since the TEU entered into force, to reconstruct this form of co-operation in a specific area and do so directly on all points using a more operational model. This is not so surprising, of course, given the nature of these attacks and the urgent imperative to undertake joint action against Islamic terrorism. What did this new domain of action involve? Aside from organizing meetings of the chiefs of intelligence services of the Member States and the chiefs of their 'counter-terrorist units' and the co-ordination of consultation between Europol, pro-Eurojust, and the EU Police Chiefs' Task Force, it includes in particular, the following two measures:

[5] Tampere European Council, 15 and 16 October 1999, *Presidency Conclusions*, SN 200/99 EN.

[6] European Council, 25 September 2001, *Conclusions Adopted by the Council (Justice and Home Affairs)*, 12156/01, JAI 99. For comprehensive comment on the anti-terrorism policy see, for example, F. Pastore, 'The Asymmetrical Fortress: the Problem of Relations between Internal and External Security Policies in the European Union', in M. Anderson and J. Apap (eds), *Police and Justice Co-operation and the New European Borders* (The Hague: Kluwer, 2002), at 59.

—Establishing a 'team of counter-terrorist specialists' within Europol responsible for collecting relevant information and intelligence and for setting up a threat analysis;
—Giving the Europol director the task of keeping the Council informed about the information that the Member States submitted to Europol with a view to integrating it into its work files on terrorism.

This operational approach is not entirely unprecedented. With a view to the introduction of the euro, a team of experts has also been created within Europol.[7] In particular, the team was charged with collecting information on attempts at or cases of counterfeiting of the new money. It is fair to say, however, that the anti-terrorist initiative is the most developed example of the new approach.

3. THREE IMPORTANT ISSUES IN THE CURRENT DEVELOPMENT OF POLICE CO-OPERATION

As stated in the introduction, this section will discuss three issues. First, the growing tendency to organize cross-border police co-operation increasingly according to an operational model will be examined at greater length. Secondly, attention will be given to the growing entanglement of police and judicial co-operation. Thirdly, this section will consider the branching of police co-operation toward the first and the third pillars. The choice of these three issues was explained in the introduction. They are suitable for demonstrating what formal progress police co-operation has made under the third pillar, and they also paint a picture of the substantive problems that arise in the development of this form of co-operation between the EU Member States. Furthermore, it is important to reveal both sides of the development because otherwise it would be difficult to give a balanced answer to the question whether the plans that are now being made in the framework of the European Convention and the Commission over the future of police co-operation, in both the positive and the negative sense, mesh with its current development at the formal level.

A. Making Cross-border Police Co-operation Work

If one looks far enough into the past of international police co-operation in Europe, the evidence suggests that such co-operation has always had a strongly operational character. Whether it was directed at controlling political opposition or clearing up serious criminal offences, the objective was

[7] Council Decision of 6 December 2001 on the Protection of the Euro against Counterfeiting, OJ 2001 L329/1.

always 'to get things done' by collecting or exchanging information, gathering material evidence, hearing witnesses (or allowing them to be heard), etc.[8] It should be emphasized in this connection, however, that states were traditionally not at all prepared to relinquish any of their sovereignty. Even the police co-operation agreements concluded by small countries like Belgium and the Netherlands before World War II offered no or very little room for cross-border action by their police officers.[9] The fact that the larger countries were also unprepared to surrender any of their autonomy on this point is apparent from the European Convention on Mutual Assistance in Criminal Matters of 1959 (hereafter European Convention 1959).[10] In that Convention, for instance, the presence in criminal investigations of police agents from the requesting state in the requested state remains within the gift of the requested state (Article 4). By contrast, the provisions concerning police co-operation in the Benelux Treaty on Extradition and Mutual Assistance of 1962 are a vast improvement (Articles 26–28). They not only allow the possibility for police agents to be of assistance in an advisory sense in implementing requests for mutual assistance but also conditionally permit cross-border pursuits and surveillance. In this way police co-operation was, for the first time in Europe, put into practice in the form of cross-border powers.[11]

The explanation for regulating these forms of police co-operation in the Benelux Treaty 1962 is found in the fact that the three countries concerned were of the opinion that one of the consequences of the creation of an economic union, namely, the abolition of internal border identity checks, would have to be counterbalanced by a strengthening of, among others, the co-operation between them in criminal matters.[12] This also explains why, midway through the 1980s, Germany, France, and the Benelux countries took advantage of European Community plans to integrate the domestic market and so abolish border controls to conclude in Schengen an agreement on measures designed to flank this political-economic process.[13] The result of

[8] M. Deflem, *Policing World Society: Historical Foundations of International Police Cooperation* (Oxford: OUP, 2002), at 45–77, 124–152, and C. Fijnaut, 'The International Criminal Police Commission and the Fight against Communism, 1923–1945', in M. Mazower (ed.), *The Policing of Politics in the Twentieth Century* (Oxford: Berghahn Books, 1997), at 107.

[9] C. Fijnaut and G. van Gestel, 'De Politiële Samenwerking in het Belgisch-Nederlandse Grensgebied', in C. Fijnaut (ed.), *De Reguliere Politiediensten in België en Nederland* (Antwerp: Kluwer, 1992), at 175.

[10] Council of Europe (ed.), *International Co-operation in Criminal Matters* (Strasbourg: Council of Europe, 1997), at 47–61.

[11] R.C.P. Haentjes, *Nederlandse Instrumenten van Internationale Rechtshulp in Strafzaken* (Arnhem: Gouda Quint, 1992), at 44–59.

[12] M.J. Constant, *Le Traité Benelux d'Extradition et d'Entraide Judiciaire en Matière Penal* (Nivelles: Imprimerie Administrative, 1962).

[13] C. Fijnaut, 'Naar een "Gemeenschappelijke" Regeling van de Politiële Samenwerking en de Justitiële Rechtshulp', in C. Fijnaut *et al.* (eds), *Schengen: Proefruin voor de Europese Gemeenschap?* (Antwerp: Kluwer, 1992), at 91–95.

this agreement was reflected in the 1990 Convention Implementing the Schengen Agreement of 13 June 1985 (hereafter 1990 Schengen Convention). Chapter 1 of Title III of this Convention ('Police and security') relates to police co-operation. It not only lays down in detail the modalities according to which cross-border pursuit and surveillance can take place but also provides for more facilities to exchange information within well-specified limits, to second liaison officers, and to adjust means of communication with each other. Moreover, Article 73 binds the Parties to create conditions for allowing 'controlled deliveries' in the context of the fight against drug trafficking. In addition, Titles IV and V of this Convention brought the Schengen Information System into being. This system gives the Parties the opportunity to inspect specific data regarding persons and goods under conditions that meet, notably, the standards in the European Convention for the Protection of Individuals with regard to the Processing of Personal Data of 1981.

It is difficult to describe the 1990 Schengen Convention as a breakthrough on all points in the organization of police co-operation in Europe. In certain respects—cross-border pursuit and surveillance—it was no more than a refined version of the Benelux Treaty 1962 and—where controlled deliveries are concerned—of Article 11 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.[14] What was new was its embedding of cross-border powers in a comprehensive system of police co-operation and the fact that a body of important European countries accepted this system with open arms. The result is well known. Over the years, the majority of the EU Member States has ratified the 1990 Schengen Convention and this agreement, along with the rest of the so-called Schengen *acquis*, has been integrated into the EU through a special protocol to the Treaty of Amsterdam.[15] Another striking feature of the Schengen system is its indication that the EU, at least its third pillar, has been shaping the institutional framework for cross-border operational co-operation between its Member States in a *bottom up* fashion, even if Article 30 TEU itself does not in any way provide for such a development. Yet this does not mean that Schengen constitutes a violation of the TEU, since Articles 43–45 concerning 'enhanced cooperation' in fact make it possible for developments of this type as part of the internal dynamic of the EU.

While the integration of the 1990 Schengen Convention can be described as a *bottom up* cross-border operationalization of police co-operation in the EU, the intention to include Europol more closely—in particular through joint teams—in criminal investigations of Member States in the field of organized crime can be called a *top down* attempt at cross-border operationalization of

[14] http://untreaty.un.org/English.

[15] European Council (ed.), *The Schengen Acquis Integrated into the European Union* (Luxembourg: Office for Official Publications of the European Communities 1999).

police co-operation in the EU. During the preparation of the Treaty of Maastricht, the Member States indicated clearly that under no circumstances did they want anything to do with a Europol whose staff had executive powers—even in the long term. For them, Europol was acceptable only if it were no more than an intergovernmental 'clearing house for information'.[16] Accordingly, this is what it became. The description of the objective of Europol, its terms of reference, and its organization, in the Convention on the Establishment of a European Police Office of 1995, left no misunderstanding on this point. Soon after the Convention was signed, and thus long before it entered into force in the Summer of 1999, the Member States nevertheless came to realize that such a Europol was too remote from the national police corps and their practical actions against organized crime to be able to contribute added value convincingly to the fight against this problem in the EU. This can be inferred from the *Action Plan to Combat Organized Crime*, which was passed by the Council on 28 April 1997.[17] It provides that Europol should in early course be given the increased operational powers—powers that were indeed soon to be incorporated into the Treaty of Amsterdam. This point was again hammered home in the *Action Plan on How Best to Implement the Provisions of the Treaty of Amsterdam in an Area of Freedom, Security and Justice* of 3 December 1998: Europol would have to play an even more operational role in the EU and the powers intended for this purpose should one way or another be made available.[18] In 1999, this desire was once again emphatically voiced at the meeting of the Tampere European Council, and it appears again—almost dutifully—in the action plan *The Prevention and Control of Organized Crime: a European Union Strategy for the Beginning of the New Millennium* of 2000.[19] However, it was not until November 2002 that an agreement would be reached within the Council regarding the manner in which a more operational role for Europol could be achieved. On 28 November 2002 the Council took the decision, through a new protocol, to change the Europol Convention in accordance with the provisions of Article 30 of the TEU.[20] A new Article 3a provides that 'Europol officials may participate in a support capacity in joint investigation teams' and a new Article 3b provides that 'Member States should deal with any request from Europol to initiate, conduct or co-ordinate investigations in specific cases and should give such requests due consideration'. With respect to the participation of Europol in joint teams, the future Article 3 further provides that:

[16] C. Fijnaut, 'The "Communitization" of Police Cooperation in Western Europe', in H. Schermers *et al.* (eds), *Free Movement of Persons in Europe* (Dordrecht: Martinus Nijhoff Publishers,1993), at 81.
[17] OJ 1997 C251/1.
[18] OJ 1999 C19/1.
[19] OJ 2000 C124/1.
[20] OJ 2002 C312/1.

—Europol personnel shall 'assist in all activities and exchange information with all members of the joint team', within the limits of the law of the Member State where the team is taking action and in accordance with the agreement concluded between the director of Europol and the authorized national authorities; and
—the staff will perform their duties 'under the leadership of the leader of the team' and, under certain conditions, the other members of the team may be supplied with 'information from any of the components of the computerised system of collected information' at Europol.

Since the Member States have yet to ratify this protocol, it could take a few years before these two powers can also in fact be used. The *top down* operationalization of cross-border police co-operation through Europol, therefore, is moving very slowly, even if, as in this case, it is not related to the assignment of executive powers.[21]

In the 1997 action plan on organized crime, reference was made not only to the need to follow an operational model for Europol but also to the plan to conclude an EU Convention on Mutual Assistance in Criminal Matters (hereafter 2000 EU Convention) in an extension to the European Convention 1959. The Member States signed this convention on 29 May 2000 and most must still ratify it.[22] In this convention, a few forms of mutual assistance were included, which can likewise be considered as just so many attempts to broaden the possibilities for cross-border operationalization of police co-operation. As regards the regulation under Article 12 concerning controlled delivery, it is not so much its originality that stands out. Indeed it constitutes nothing more than an extension of the regulation already provided under Article 73 of the 1990 Schengen Convention. The difference is that under the 2000 EU Convention, the application of this mechanism is not limited to a certain offence or a certain form of crime. In addition, one should not overestimate the importance of the possibilities provided under Articles 10 and 11 of this Convention allowing for persons to be heard by video and/or telephone. In any event, much more important is the regulation under Title III of the Convention for international interception of telecommunications. Such a detailed and far-reaching regulation will not be encountered in any other mutual assistance treaty.

However, the regulation for 'covert operations' under Article 14 and the regulation for 'joint investigation teams' under Article 13 are also particularly important for the operationalization of cross-border co-operation. As regards

[21] What Europol's supporting task as regards 'joint investigative teams' could involve was stated in the Council Recommendation of 30 November 2000, OJ 2000 C357/7.

[22] OJ 2000 C197/1. For detailed comment see G. Vermeulen, *Wederzijdse Rechtshulp in Strafzaken in de Europese Unie: naar een Volwaardige Eigen Rechtshulpruimte voor de Lid-Staten* (Antwerp: Maklu, 1999).

the actions mentioned first, the intention is that the Parties have the ability to assist one another in criminal cases by exchanging police infiltrators ('officers acting under covert or false identity'), the deployment of whom is to be set out in a contract for each occasion. This Article repeatedly stresses that their deployment can only occur in compliance with the law of the state in which they are to set up their operations. The creation of joint investigation teams—which, as we have seen, is further elaborated in the new Protocol to the European Convention—must likewise take place on the basis of a contract entered into by the parties concerned regarding the objective of the investigation, the composition of the team, the conditions according to which the deployment of the team members by national authorities is governed, and so on.[23] Furthermore, it should be clearly stated that the team is bound by the law of the Member State where it undertakes its operations. This, however, does not mean that only the team members from the state where the team is operating may carry out criminal investigations. Indeed, paragraph 6 explicitly provides that the team leader can assign the performance of certain criminal investigations to other team members—seconded from other Member States. This provision is more important than it appears, and this for the simple reason that it constitutes a complete reform of the regulation of cross-border investigation. Indeed, never before has a treaty such as this made it possible for police agents from one Member State to perform their duties on the territory of another Member State for such a long period of time for the purposes of carrying out criminal investigations without—through a request for mutual assistance, for example—a prior determination of which proceedings it involves and/or without the proceedings being based on a form of co-operation that is specifically provided for in a treaty, for example cross-border pursuit. This regulation is thus just as innovative as the regulation under paragraph 7, which makes it possible for seconded members directly to ask their own competent authorities to conduct, or have someone conduct, criminal investigations in their respective states, as the former regulation obviates in cases of a joint team the need to submit requests for mutual assistance for every possible eventuality.

The observation that can ultimately be made from the foregoing is that with the previously mentioned Convention the EU has in fact now assumed the pioneering role that had traditionally been played by the Council of Europe in the field of mutual assistance in criminal matters. This changing of the guard was already anticipated in the 1990 Schengen Convention. In that convention, certain forms of police co-operation—cross-border pursuit and

[23] For that matter, one must not lose sight of the fact that the Council in its Framework Decision of 13 June 2002 with a view to the fight against terrorism, has already made the establishment of 'joint investigative teams' possible (OJ 2002 L162/1). In its considerations on this decision, the Council also expressly refers to the possibility of Europol personnel taking part in these teams.

surveillance—were regulated which until then did not appear to be achievable within the Council of Europe. That the EU has recently taken over the pioneering role from the Council of Europe on the issue of co-operation in criminal matters is only reinforced by the fact that the Second Protocol to the (Council of Europe) European Convention 1959, which was opened for signature in November 2001, is to a great extent a copy, in the domain of police, of the relevant provisions in the 1990 Schengen Convention and the 2000 EU Convention.[24]

For all their limitations, then, the achievements of the EU, as regards the conversion of formal frameworks into further operationalization of cross-border police co-operation should not be underestimated. This co-operation goes to the heart of state sovereignty, and so by definition is a very demanding matter. To then develop over no more than ten years through treaties that must be negotiated by more and more Member States an entire spectrum of more and more operational forms of co-operation is certainly considerable. In a longer historical view, indeed, this can be interpreted as a great success. Before 1990, police co-operation in Europe was for the most part an informal, even a secret, affair that often remained limited to the exchange of information.

Yet this does not alter the fact that it can still take a great deal of time to translate policy plans into workable agreements. Often this demands years of negotiations at the EU level, which is then followed by years of decision-making in the states themselves. As far as this is concerned, the establishment, coming into force, implementation, and amendment of the Europol Convention can still, without exaggeration, be viewed as a long-winded affair.

B. The Entanglement of Police Co-operation and Judicial Co-operation

The backlog accumulated by the Council of Europe over recent years in the domain of police co-operation is to a degree a result of the choice that was made in the establishment of the European Convention 1959. On the authority of experts, it was then indeed decided not to regulate this form of co-operation in the treaty: 'They thought it best not to force the existing practice of the police into a rigid mould, besides which, the Statute of the International Criminal Police Organisation (Interpol) already regulated mutual assistance between police authorities'.[25] Thus, very deliberately, only regulations regarding judicial co-operation were adopted. However, later attempts within the Council of Europe to rectify this choice and still make room for important forms of police co-operation in the treaty under consideration failed. With so many more countries than the EU Member States coming to the bargaining table, it appeared as though reaching a

[24] http://conventions.coe.int. [25] Ibid.

consensus on this matter would prove impossible. This was another indirect indication that this politically highly sensitive domain of interstate co-operation can only be organized with countries which have a great deal in common politically, economically, and culturally and which intend among themselves to expand further their union in these fields.[26] Be that as it may, however, until the 1980s the multinational organization of police co-operation in Europe followed a completely different route from that of judicial co-operation.

These two routes were for the first time expressly channelled toward one another in the Schengen Agreement and the 1990 Schengen Convention. Indeed Title III of this Convention deals with both police co-operation (Chapter 1) and judicial co-operation (Chapters 2–5). In this respect, the Convention was an innovation in the overall organization of assistance in criminal matters in Europe. Furthermore, Article 39 (Chapter 1) clearly states where the boundary between the two forms of co-operation in criminal matters lies. Indeed, paragraph 1 states that police co-operation is only possible 'in so far as national law does not stipulate that the request has to be made through the judicial authorities and provided that the request or the implementation thereof does not involve the application of measures of constraint by the requested Contracting Party'. Paragraph 2 adds a third criterion to these two, namely, that information that is exchanged between police departments on the basis of paragraph 1 cannot be used 'as evidence of the criminal offence other than with the consent of the competent judicial authorities of the requested Contracting Party'. The line drawn here between police and judicial co-operation therefore lies above all in the application of compulsory measures and in the use of evidence.

Now, if we look at the 2000 EU Convention in this light of the 1990 Schengen Convention, it can be stated, first, that no distinction is drawn here between police and judicial co-operation, and, secondly, that forms of co-operation regulated here can often be considered as much forms of police co-operation as forms of judicial co-operation. One may think, for example, of controlled delivery and the deployment of police infiltrators. In the Second Protocol to the European Convention 1959, which was cited above with regard to these matters, both the relevant forms of cross-border police co-operation from the 1990 Schengen Convention and those from the 2000 EU Convention are adopted. For its part, therefore, the new protocol to the 1959 Convention also indicates that police co-operation and judicial co-operation in Europe are becoming increasingly interconnected.

[26] C. Fijnaut, 'Transnational Organized Crime and Institutional Reform in the European Union: the Case of Judicial Cooperation', in P. Williams and D. Vlassis (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (London: Frank Cass, 2001), at 276.

It is possible to speculate on the reasons for this. One factor is certainly the cases brought before the European Court of Human Rights pursuant to Articles 6 and 8 of the European Convention on Human Rights. This case law has increasingly raised the issue that criminal investigation practice must be taken into consideration when deciding whether the suspect has had a fair trial. Consequently, the public prosecution department and sometimes also the examining magistrate—who traditionally in some manner or form has authority over the performance of judicial tasks by police departments in continental Europe—must increasingly, and certainly in extensive and complicated criminal cases, satisfy themselves from the outset of the lawfulness of the criminal investigation.[27]

This entanglement of the two forms of co-operation in criminal matters and the related convergence of police and justice institutions need not of itself be a problem in cases of multinational co-operation based on the 1990 Schengen Convention and the 2000 EU Convention. Both Conventions, using terms like 'competent authorities', are so openly formulated that they are applicable in the most divergent institutional relationships between police and justice in the Member States. In addition, while the requested state may on the basis of Article 4(1) of the 2000 EU Convention be required to adhere to 'the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this convention', the subsequent condition—'provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested State'—again limits the scope of this duty considerably. Thus the provisions of this Convention, like those of the 1990 Schengen Convention, do not impair the relationship of authority between the public prosecution department—and possibly the examining magistrate—on the one hand, and police departments on the other hand, as it has evolved in the Member States throughout history and as is specified in criminal and police legislation. In a certain sense, then, the provision under Article 13 of the 2000 EU Convention (regarding the establishment of a joint investigation team), that the leader of a team must be 'a representative of the competent authority participating in criminal investigations from the Member State in which the team operates' and that he/she will work 'within the limits of his or her competence under national law', is therefore unnecessary. However, the drafters of this Convention evidently did not want to leave any room for doubt on this point.

It is different in cases of police co-operation where Europol is involved. Europol is perhaps the most controlled police agency in Europe. Besides the internal management, there are now two important agencies based on the Convention that monitor the goings-on within Europol: the 'management board', which chiefly performs management tasks, and the 'joint supervisory

[27] J. Pradel and G. Corstens, *Droit Pénal Européen* (Paris: Dalloz, 1999), at 347.

body', which monitors the observance of the regulations for the protection of personal data. However, these two agencies do not operate independently but rather merely represent extensions of national authorities and organs. The members of the 'management board' are representatives of the Member States and fall as such under the ministerial responsibility of their respective ministers. Their actions can thus be monitored in this way. The 'joint supervisory body' is composed of representatives from those authorities in the Member States that have the right to verify for themselves whether Europol has properly handled the personal information that originates from their country. Furthermore, in many Member States, the public prosecution department ultimately decides which information can be transferred to Europol and under what conditions. As a result of the great distrust that existed at the beginning of the 1990s in many Member States with respect to the establishment of Europol, there is truly no deficiency in the monitoring of the organization.[28] This same distrust is also responsible for Europol having been placed at so great an initial distance from the actual criminal investigations in the Member States that it has subsequently required a great deal of effort to involve it still to any extent, as has already been shown above. At the beginning of the 1990s, most of the Member States wanted nothing remotely to do with even a subordinate 'executive Europol'.

What then does the discussion on monitoring Europol concentrate on? It concentrates on the question whether, aside from the existing structures of control, direct judicial control of this organ must also be provided. The European Parliament has long been a proponent of this and sees in a European prosecutor in particular the figure who in the future must take responsibility for judicial control of Europol.[29] However, as long as the very institution of such a prosecutor remains highly controversial, the idea that he or she must be made responsible for the control in question is not a realistic option.[30] Thus, this proposal can be safely left outside of consideration for the moment. Eurojust is another matter. This new organ under the third pillar should perhaps be able to fulfil such a function subject to conditions.

[28] Amongst the most recent analyses of Europol in Europe are those of G. Aschmann, *Europol aus Sicht der Deutschen Länder* (Frankfurt: Peter Lang, 2000) and of T. Petri, *Europol: Grenzüberschreitende Polizeiliche Tätigkeit* (Baden-Baden: Nomos Verlagsgesellschaft, 2001). See also European Commission, *Democratic Control over Europol*, Brussels, 26 February 2002, COM(2002)95 final. For what is meant in particular by the protection of information see P. de Hert and J. Vandenborght, *Informatieve Samenwerking over de Grenzen heen* (Brussels: Politeia, 1996), ii, at 427–462, 503–588, and S. Sule, *Europol und Europäischer Datenschutz* (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

[29] European Parliament, *Working Document on the Green Paper on Criminal-law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, Brussels, 26 June 2002, PE 315.771.

[30] C. Fijnaut and M. Groenhuijsen, 'Een Europees Openbaar Ministerie; Kanttekeningen bij het Groenboek', 77 *Nederlands Juristenblad* (2002), at 1234.

The Council, and thus the Member States, however, anticipates nothing here for the moment, as it clearly appears from the relevant provisions in the TEU. Article 31, as amended by the Treaty of Nice, provides that the Council shall encourage judicial co-operation through Eurojust as regards assistance in criminal investigations into serious cross-border crime 'by promoting Eurojust ... particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol'. There is no way to understand these words as meaning that there should be a relationship of authority between Eurojust and Europol. Further, that such a relationship cannot be read into the legal text can also be inferred from the description of the duties of Eurojust in the Council Decision of 28 February 2002—by which this agency was properly established after a brief trial period.[31] Article 7 provides that Eurojust, established in the form of a board, 'may assist Europol, in particular by providing it with opinions based on analyses carried out by Europol'. Eurojust must, according to the European Commission, thus be considered the 'judicial counterpart of Europol' for the time being. At this stage, the word 'counterpart' would not 'refer to judicial supervision of Europol but to the fact that Europol's activities need to be backed up and complemented by co-ordination of prosecutions. Europol not only might need legal advice on certain judicial questions but its activities will also have to be supported by co-ordination of the relevant activity of national prosecuting authorities.'[32]

The position taken by the Council and the Commission is not rejected in the literature. As long as Europol does not acquire executive powers and so cannot conduct criminal investigations in its own name on the territory of the Member States, it has been considered unnecessary by several authors that a specific organ should exercise judicial control over Europol's performance of duties. On the other hand, it is a broadly held belief that the implementation of the powers that Europol is given in the Treaty of Amsterdam—especially of course for supportive participation in multinational criminal investigations—must be accompanied by the partial abolition of the immunity enjoyed by Europol personnel so that they may, in concrete cases, justify themselves before the national judge for their part in the investigations.[33] The Council agrees with this. An amendment to Article 8 of the Protocol on the Privileges and Immunities of Europol was also provided for in the same decision in which the protocol that led to the amendment of Article 3 of

[31] Council Decision of 28 February 2002, OJ 2002 L63/1.

[32] European Commission, *On the Establishment of Eurojust*, Brussels, 22 November 2000, COM(20000)746 final, at 10–11.

[33] See, for example, S. Glesz *et al.* (eds), *Justitielle Einbindung und Kontrolle von Europol* (Freiburg: Edition Iuscrim, 2001), ii, at 607–638, and T. Schalken and M. Pronk, 'On Joint Investigation Teams, Europol and Supervision of Their Joint Actions', 10 *Eur.J Crime Cr.L Cr.J* (2002) 1, at 70.

the Europol Convention was accepted. This change provides that employees of Europol enjoy no immunity 'in respect of official acts required to be undertaken in fulfilment of the tasks set out in article 3a of the convention regarding the participation of Europol officials in joint investigation teams'. This amendment, in the author's opinion, is also wholly in keeping with the intergovernmental position and the duty to provide assistance that Europol has on the basis of the Europol Convention.

C. The Branching of Police Co-operation toward the Second and First Pillars

In the debate surrounding police co-operation in the EU, this form of co-operation is usually treated exclusively as a matter that plays a role only under the third pillar. This approach, however, overlooks the branching of police co-operation toward the second and first pillars. These connections between the pillars are important because their operation determines for the most part to what extent the objective of police co-operation under the third pillar can be attained. Therefore, they certainly cannot be overlooked for the purposes of this essay.

1. Branching toward the Second Pillar

In view of the objective of police co-operation under the third pillar—a high level of safety in relation to (organized) crime—it has, since the entry into force of the Treaty of Maastricht, gone without saying that this form of co-operation could not remain limited to the domestic policy of the Member States but would sooner or later also have to be related to their foreign policy—thus the domain of the second pillar—even though there is on this point no explicit connection made between the two pillars in the provisions of Title VI of the TEU. The fact is that many variants of organized crime include illegal trade in persons, goods, services, and capital and are frequently committed at geographic levels that originate beyond the territorial borders of the European Union. Consider, for example, the intercontinental trade in humans, the trade in illicit drugs, and trade in illegal weapons. This international, not to mention worldwide, dimension of organized crime was of course also not unknown to the creators of the third pillar. This can be seen best in various provisions of the Europol Convention and in particular in its Article 18, which, subject to a number of conditions, offers room for exchange of information with third countries and third organizations.

Nevertheless, it was not until the Tampere Summit in 1999 that the Council expressly took a position with respect to the role of police and judicial co-operation in EU foreign policy. One of the conclusions at this Summit reads that 'clear priorities, policy objectives and measures for the

Union's external action in Justice and Home Affairs should be defined. Specific recommendations should be drawn up by the Council in close co-operation with the Commission on policy objectives and measures for the Union's external action in Justice and Home Affairs, including questions of working structure, prior to the European Council in June 2000'.[34] The question is what until now has come of this plan, particularly in the domain of police co-operation?

Until now, the Council has certainly developed a few starting points for the foreign dimension of the third pillar, but it has not yet developed a general policy plan according to which the objectives and main points of the policy are elaborated, how the deliberation regarding this policy is organized within the EU, in what way it is thought the objectives can be reached, and so on.[35] Thus the development of such a policy is still just in the initial stages, as the European Parliament recently observed.[36] There are doubtless various reasons why this policy remains in its infancy. It is certainly worth mentioning the great obstacles already present under the second pillar to pursuing a common foreign policy, the enormous diversity of subject matters on which police co-operation can focus, and the great variety of states with which the EU in one way or another has a relationship with a security dimension. This, however, is certainly not to say that nothing has occurred since Tampere. Since that summit, each Presidency of the EU, along with its predecessor and successor, has formulated a 'troika programme for external relations in the field of Justice and Home Affairs'. These programmes explain which policy is or will be pursued as much with respect to (combinations of) countries and international institutions as with respect to specific subject matters like migration and organized crime.

Where it involves the role police co-operation occupies in these programmes, it must be stated that this subject matter comes up for discussion unevenly in both sectors and not always in connection with the theme to which it is most relevant, namely organized crime.[37] Due to this it is only through meticulous analysis of policy papers in all possible fields that any insight can be gained into the role police co-operation plays in foreign policy. Even then the picture is still very fragmented. For example, in the policy

[34] C. Fijnaut, 'Het Politiebeleid van de Europese Unie', in G.J.M. Corstens and M.S. Groenhuijsen (eds), *Rede en Recht* (Deventer: Kluwer, 2000), at 249.

[35] European Council, *European Union Priorities and Policy Objectives for External Relations in the Field of Justice and Home Affairs*, Brussels, 6 June 2000, 7653/00, JAI 35.

[36] European Parliament, *Report on the Council Report on Justice and Home Affairs: EU Priorities and Policy Objectives for External Relations*, Brussels, 21 November 2001, A5-0414/2001 final.

[37] See, for example, European Council, *Multipresidency Programme for External Relations in the Field of Justice and Home Affairs (2001–2002)*, Brussels, 3 January 2002, 5004/02, JAI 1, and European Council, *Troika Programme for External Relations in the Field of Justice and Home Affairs*, Brussels, 5 July 2002, 10685/02, JAI 159.

regarding Russia, justice and home affairs co-operation plays an important role, but the relevant policy documents make no similar mention with respect to countries with whom such co-operation is just as important in certain respects.[38] The same can be said for the subject-matter centred policies. For example, even the action plan for the years 2000–2004 concerning the production, trafficking, and use of drugs scarcely mentions police co-operation with countries in Central Europe or South America.[39] This is almost inconceivable as police co-operation with these parts of the world in the field of drug trafficking is so important and needs to be very intensive.

The 'rest of the world' does not include the countries that will soon become members of the European Union. Police co-operation plays as important a role in the general policy that, as of 1997, was generally pursued towards accession, as in the particular policy that, in this same connection, was especially pursued with respect to the fight against organized crime. Accordingly, here one should consider co-operation not only as understood under Article 30 TEU, but also for reforming the police systems in the candidate countries such that they fulfil, as regards both organization and powers, the conditions imposed by the EU with a view to their accession.[40] It would be going too far here to enter into a discussion of how much of the so-called EU *acquis* in the field of police the future Member States have already incorporated into their legislation and their institutions.[41] What should be noted, however, is that it is exceptionally difficult to obtain a clear picture—not only because it is unclear what this *acquis* precisely consists of but also because it is scarcely possible to infer, from the official public reports concerning their accession, the points on which the candidate countries fulfil the requirements and the points on which they do not (yet).[42] However, it also appears from the literature that a number of these countries have made a great deal of effort, at least in the formal sense—via

[38] European Council, *Common Strategy of the European Union of 4 June 1999 on Russia*, OJ 1999 L157/1. Compare this policy plan with the plans that have been set out in agreements with South America or North Africa, for example, European Council, *Council Decision of 7 April 1998 Concerning the Conclusion of a Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its Member Countries*, OJ 1998 L127/10.

[39] European Commission, *Communication on a European Union Action Plan to Combat Drugs*, Brussels, 26 May 1999, COM(99)239 final.

[40] European Commission, *Agenda 2000: for a Stronger and Wider Union*, Brussels, 15 July 1997, COM(97)2000 final, and European Council, *Pre-accession Pact on Organised Crime between the Member States of the European Union and the Applicant Countries of Central and Eastern Europe and Cyprus*, OJ 1998 C220/1.

[41] In a recent communication, the Commission also gave the candidate countries new guidelines in the domain of 'justice and home affairs' with a view to their integration into the EU. See European Commission, *Further Indicative Guidelines for the Candidate Countries*, Brussels, 12 March 2003, COM(2003)110 final, at 10–11.

[42] C. Fijnaut, 'De Uitbreiding van de Europese Unie en de Strafrechtsvergelijking', in E.H. Hondius (ed.), *De Meerwaarde van de Rechtsvergelijking; Opstellen Aangeboden aan prof. Mr. H.U.*

adjustment of the legislation and reorganization of services—to become acceptable to the EU on this point. Whether everything also works in practice as the EU would like is another matter.[43]

This also applies to police co-operation in a narrow sense, especially as regards Europol. In March 2000, the Council empowered the director of Europol, subject to conditions, particularly in matters concerning the protection of personal information, to enter negotiations with third countries—above all the future EU Member States—and with international organizations—in the first place Interpol—with a view to concluding co-operation agreements.[44] In the context of this authorization, Europol has drafted two kinds of agreements: agreements for strategic and technical co-operation and agreements for operational co-operation. Only the latter kind of agreement makes exchange of personal information possible.[45] It is fairly difficult to know with which countries and organizations co-operation agreements have in the meantime been concluded because they are not published in the Official Journal. Europol's annual reports, however, do indicate what progress has been made on this point. It appears from the 2001 annual report that agreements have been reached with Estonia, Hungary, Iceland, Norway, Poland, Slovenia, and the United States as well as with Interpol.[46] As to what in each case the agreements are about, it is or is almost impossible to say because their texts are generally not accessible to third parties. Nevertheless, in some cases one can get a better picture here on the basis of Council documents. One can, in this sense, consider both the agreement between Europol and Interpol and the—contentious—complementary (operational) agreement between the United States and Europol regarding the exchange of personal data.[47]

Jessurun d'Oliveira (Deventer: Kluwer, 1999), at 201. There are certainly exceptions to this rule, for example, the reports on training the police in candidate countries. See Association of European Police Colleges, *Ten Candidate Member States on Their Way to the EU* (2001).

[43] See, for example, R. Cholewinsky and E. Slavenas, 'Foreign Policy Implications of the EU Justice and Home Affairs Acquis: the Case of the Baltic States', in Anderson and Apap (eds), *supra* note 6, at 103; D. Polt, 'Transborder Operational Activities', and N. Dimitrova, 'Police and Judicial Cooperation in Combating Organized Crime', both in B. de Ruyver *et al.* (eds), *Strategies of the EU and the US in Combating Transnational Organized Crime* (Antwerp: Maklu, 2002), at 189–196, 245–250.

[44] Council Decision of 27 March 2000, OJ 2000 C106/1.

[45] C. Rijken, 'Legal and Technical Aspects of Co-operation between Europol, Third States and Interpol', in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague: T.M.C. Asser Press, 2001), at 577.

[46] European Council, *Europol Annual Report 2001*, Brussels, 30 April 2002, 8381/02, Europol at 25, 23.

[47] European Council, *Authorisation of the Director of Europol to Conclude a Co-operation Agreement between Europol and Interpol*, Brussels, 21 May 2001, 8803/01, Europol 43, and *Draft Supplemental Agreement between the United States of America and the European Police Office on the Exchange of Personal Data and Related Information*, Brussels, 4 November 2002, 13689/02, Europol 82.

Europol's annual plans do reveal some of the activities that, in the framework of these agreements, are developed with respect to the fight against (organized) crime. They certainly cover the exchange and analysis of information, but also the deployment of liaison officers at Europol, setting up multinational investigation teams and criminal investigations, training investigators with a view to the application of special investigation techniques, and so on.[48] What these plans do not reveal, of course, is how these forms of co-operation operate in practice and what effects they have on the nature, the scope, and the development of (organized) crime in Europe. However, this is also true for police co-operation that Member States organize with countries in Central and East Europe outside the framework of the European Union.

2. *Branching toward the First Pillar*

The first pillar includes everything that traditionally belonged to the European Community (EC). The Treaty of Rome (1957), on which the EC was founded (ECT), was revised on important points (including points as regards police co-operation between Member States of the EC/EU) as much through the Treaty of Maastricht as through the Treaty of Amsterdam. Of central concern here is Article 280, which deals with the fight against fraud against EC resources (EC fraud) and Title IV (Articles 61–69), which, since the Treaty of Amsterdam, have covered issues concerning asylum, immigration, and other aspects of the free movement of persons. Although the manner in which the Commission currently tracks down breaches in the sphere of competition law often seems to resemble closely the way in which criminal investigations are carried out, this quasi-criminal approach by the Commission will not be addressed here.[49]

The fight against EC fraud is an issue that has been the cause of many policy headaches in Brussels since the 1960s. Toward the end of the 1980s, special measures were only just beginning to be taken to tackle the fraud in question. Of particular relevance here was the establishment of the *Unité de la Coordination Anti-fraude* (UCLAF) within the framework of the Commission in 1988. This unit—then chiefly comprising representatives of the Commission and of the relevant regulatory agencies of the Member States—can be considered as the embryo from which, after the resignation of the Commission in 1999 as a result of a report from a committee of experts regarding the dishonest action of (at any rate) one of the members of the

[48] See, for example, European Council, *Europol Work Programme 2003*, Brussels, 30 April 2002, 8385/02, Europol 27.

[49] C. Harding, *European Community Investigations and Sanctions: the Supranational Control of Business Delinquency* (Leicester: Leicester UP, 1993). See also the Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

Commission, the OLAF (*Office de la Lutte Anti-fraude*) was formed.[50] OLAF can be considered a genuine executive police department of the EC, but with the understanding that for the performance of its tasks it only has administrative powers and no judicial powers. In other words, formally OLAF is not a criminal investigation department in the true and strict sense of the word. This can in part be inferred from Article 280(4), in which the Council is given the power to take measures to fight fraud, but where it is expressly stated that these measures cannot affect the application of national criminal law or the national administration of justice. The limited competence of the new office also emerges very clearly from the regulations issued by the Council on 18 December 1995 and 11 November 1996 with a view to organizing the fight against fraud.[51] On the basis of these regulations, the members of UCLAF/OLAF only have the power to carry out inspections 'on the spot'. That the reports they draft regarding their investigations on the basis of Article 8(3) of the last-mentioned regulation may serve in certain circumstances as evidence in criminal cases does not alter the basically administrative character of the investigations. Yet this possibility also reveals that OLAF, in spite of its limited powers, can nevertheless operate under certain conditions—and in fact does so operate—as a supranational quasi-investigation department in criminal investigations into EC fraud.[52] The Commission's proposal to set up a European public prosecution department, again with a view to the protection of the financial interests of the EC, is in essence nothing more than an attempt to give shape to this (form of) supranationalization of criminal justice at the level of prosecution as well.[53]

It may seem anomalous that the EU Member States have indeed accepted an independent police department (OLAF) within the context of the first pillar while in the context of the third pillar they did not under any circumstances want to establish a similar force (Europol). This inconsistency may be to a

[50] J. Vervaele, *Fraud against the Community: the Need for European Fraud Legislation* (Deventer: Kluwer, 1992), and also his article, 'Towards an Independent European Agency to Fight Fraud and Corruption in the EU?', 7 *Eur. J Cr. Cr.L Cr.J* (1999) 3, at 331. See further S. White, *Protection of the Financial Interests of the European Communities: the Fight against Fraud and Corruption* (The Hague, Kluwer, 1998).

[51] OJ 1995 L312/1, and OJ 1996 L292/2.

[52] The annual reports of OLAF do not allow for any misunderstanding here. See European Commission, *Report of the European Anti Fraud Office: Activity Report for the Period 1 June 2000–31 May 2001*, OJ 2001 C365/31, and European Commission, *Report of the European Anti Fraud Office: Third Activity Report for the Year Ending June 2002*, OJ 2002 C128/1.

[53] European Commission, *Green Paper on Criminal-law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, Brussels, 11 December 2001, COM(2001)715 final. For a commentary on the history, the foundation, and the content of this proposal, see Fijnaut and Groenhuijsen, *supra* note 30. See also, for example, F. Bruner and H. Spitzer, 'Der Europäische Staatsanwalt; ein Instrument zur Verbesserung des Schutzes der EU-Finanzen oder een Beitrag zur Verwirklichung eines Europas der Freiheit, der Sicherheit und des Rechts', 22 *Neue Zeitschrift für Strafrecht* (2002) 8, at 393–398.

certain extent illusory, since *both* cases demonstrate that the Member States in the final analysis apparently do not want to relinquish any of their criminal jurisdiction. Yet it remains worthy of note that the one (supranational) service, without too many problems, has enjoyed administrative powers that it can apply independently in a quasi-criminal manner within the territories of the Member States, while the other (intergovernmental) service, even after many years of intense discussion, has scarcely assumed a supporting role when participating in criminal investigations in the Member States.

However this asymmetrical relationship between the two forces may in fact have originated, it creates problems in the relations between them that appear to be scarcely soluble. For years there have been fruitless discussions over a co-operation agreement between OLAF and Europol.[54] These difficulties are certainly a result of their different positions in the EU and the different institutional concerns that are at play under the first and third pillars. Yet they also stem from the fact that the two forces are competent to address an overlapping range of crime problems. The fight against fraud is not monopolized by OLAF since fraud is also one of the kinds of (organized) crime governed by Article 29 TEU and is thus also a matter that can, in the context of the third pillar, be the subject-matter of police co-operation. The Member States, however, have scarcely made use of this possibility until now. Indeed, in the agreement concluded in 1995 better to protect the financial interests of the EC against fraud, direct co-operation between their police departments did not play a role.[55] What then is the source of the friction between OLAF and Europol? It is because overlap is no mere theoretical possibility, as a (small) part of EC fraud is *in fact* committed in the context of organized crime. Both forces thus have good reason to demand a role in the co-ordination and support of criminal action of the Member States where such fraud is involved.[56] Europol cannot remain aloof in cases, for example, of worldwide cigarette smuggling, in which large crime syndicates from South America, Europe, and Asia also play active roles. In such cases the financial interests of the EC are not the only security issues at stake![57] With a view to a co-ordinated

[54] Recently—on 18 February 2003—after two years of negotiations, a framework agreement was concluded ('Administrative Agreement on Co-operation between the European Commission and the European Police Office') between the European Commission and Europol. The agreement covers, for instance, mutual exchange of information (not yet published).

[55] OJ 1995 C316/48.

[56] C. Fijnaut, 'De Connecties tussen EG-fraude en Georganiseerde Misdaad', in H. de Doelder (ed), *Bestrijding van EG-fraude* (Arnhem: Gouda Quint, 1990), at 87–96, and C. Fijnaut, 'De Strafrechtelijke Bescherming van de Financiële Belangen van de Gemeenschap tegen Fraude', 30 *Delikt en Delinkwent* (2000) 10, at 972–988.

[57] See, for example, the complaint of the European Community against, among others, R.J. Reynolds Tobacco Company before the United States District Court, Eastern District of New York. See also in this context L. Joossens, *Smuggling and Cross-border Shopping of Tobacco Products in the European Union* (Health Development Agency).

approach to such crime problems, it is thus desirable that this institutional conflict be settled. But how? This is difficult not only on account of the different structural positions of these two services in the EU but also because of long-term dilemmas concerning the regulation of their mutual relations. In the long run, does the EU want to distribute its police capacity over special services organized according to the problem or complex of problems, or does it prefer a concentration of this power in one or more general services?

This strategic question leads to the second common ground between the third and first pillars on the police domain: policing of the EU's external borders. Articles 61 and following of the ECT, inserted by the Treaty of Amsterdam, assign the Council the task of taking a number of measures, with a view to achieving an 'area of freedom, security and justice', in the sphere of free movement of persons and especially in the field of asylum and immigration. With these measures, the concern is, for instance, the prevention of and fight against crime in conformity with Article 31(e) TEU, and police and judicial co-operation in criminal cases in conformity with Articles 30 and 31 of the same Treaty. That the pillars ultimately are parts of one and the same structure—the EU—in the field of police co-operation finds expression nowhere better than here. Before the TEU entered into force, the otherwise traditional connection between immigration policy and police policy was already clearly expressed in the 1990 Schengen Convention. While Title II of this Convention deals with the 'abolition of checks at internal borders and movement of persons', Title III, as already noted above, has to do with 'police and security'. As the section of this Convention that deals with the free movement of persons—Title II—was incorporated into the first pillar as a result of the Treaty of Amsterdam, and the other section—Title III—into the third pillar, it is certainly not surprising that, with a view to the elaboration of the above-mentioned provisions of the EC Treaty—and under pressure from the future integration of a number of Central and East European countries into the EU at a time when the issue of massive (illegal) immigration and those of organized crime and terrorism in the existing Member States are high on the political agenda—the Amsterdam drafters explicitly referred back to the relevant sections of the Schengen agreement. Indeed, it would be reasonable to say that Title IV EC, rather than replacing Schengen as such, has simply provided a new constitutional foundation for this part of the 1990 Schengen Convention.

In the context of the current revision of the 1990 Schengen Convention, the Council decided in May 2001 to identify 'best practices' as regards external border controls in order to create optimal standards for their execution. This research led to the establishment of a catalogue of recommendations—issued in February 2002.[58] This catalogue demonstrates manifestly

[58] European Council, *EU Schengen Catalogue: External Borders Control, Removal and Readmission*, Brussels, 28 February 2002.

that police co-operation such as that developed under the third pillar is becoming increasingly interrelated with police co-operation undertaken in the context of Title IV of the first pillar. In more than one place, indeed, it is contended that 'border checks and border surveillance, based on risk analysis' not only enhance the fight against illegal information, smuggling, and trade in humans but also the fight against cross-border (organized) crime in general. This document argues therefore in favour of forming 'specialised multidisciplinary units fighting border-related crime'.

In May 2002, following discussions on the way in which external border controls must be organized in the future, the Commission published a communication that set out not only challenges faced by the EU at its external borders with a view to its domestic safety but also how an 'integrated management of the external borders' might look. In the opinion of the Commission 'the effectiveness of the fight against illegal immigration, while respecting the principles of the right to asylum, trafficking in human beings and trafficking of all kinds connected with organised crime, including drugs' belongs squarely to the challenges facing the EU. With a view to the improvement of the effectiveness of this fight, the Commission prepared a large number of proposals for the short and medium terms among which were the exchange of liaison officers, the conclusion of bilateral border agreements, the adoption of risk analysis, and the forming of multidisciplinary units. It considered the formation of a European Corps of Border Guards desirable in the long term.[59] In December 2002, the European Parliament had itself placed its support behind most of these proposals.[60] On some points, it would like to go even further than the Commission. It would, for instance, like to see Europol responsible for drafting risk analyses, and co-operation between Europol and Schengen intensified. Should this indeed occur, then the *top down* and *bottom up* approaches to police co-operation in the EU will become increasingly intertwined.

The European Parliament earlier passed a resolution on 20 September 2001 in which, in a familiar refrain, it complained of the fact that the Council and the Commission did not involve it enough in the incorporation into the EU of key agreements such as the 1990 Schengen Convention, and also criticized the lack of transparency with regard to the manner in which police co-operation between the Member States is organized in the EU at present and the confusion that this deficiency instils in ordinary citizens.[61] This criticism can only be endorsed here. Police co-operation under and between

[59] European Commission, *Towards Integrated Management of the External Borders of the Member States of the European Union*, Brussels, 7 May 2002, COM(2002)233 final.

[60] European Parliament, *Report on the Communication from the Commission entitled 'Towards Integrated Management of the External Borders of the Member States of the European Union'*, Brussels, 10 December 2002, A5–0449/2002 final.

[61] OJ 2002 C77/141.

the three pillars has become even for specialists a non-transparent matter, and with respect to an issue that is so politically sensitive—immigration, (organized) crime, and terrorism in an enlarged EU—this is particularly undesirable. Inadequate organization of police co-operation is not only an obstacle to achieving the purposes of this co-operation, but may also promote, however unintentionally and inadvertently, public perceptions of immigration flows and immigrants that are entirely inappropriate and a danger to peace and tolerance in the EU.[62]

4. POLICE CO-OPERATION AND (ORGANIZED) CRIME

As stated in the introduction, we want to ask not only how police co-operation is evolving at the level of agreements between the Member States and the decisions of the Council but also whether this co-operation adds value through increased safety as regards cross-border (organized) crime in the EU. The first question is a matter of prescribed rules and institutional designs, and, through reference to a wide variety of documentary sources, is, all in all, relatively easy to answer. The great majority of the literature on police co-operation is engaged for good reason at this formal level. Conversely, the second question is empirical, and, due to the poverty of research and data, is more difficult to answer than the prescriptive question. Why is it more difficult? Or perhaps expressed better: why is this—certainly at the level of the EU in its entirety—in fact impossible? It is so for a combination of two reasons: as much for a lack of overview and insight into (organized) crime as for a lack of overview and insight as regards (a part of) the solution, namely police co-operation. These two questions are examined in turn below.

A. The Lack of Overview and Insight with respect to Organized Crime

The first reason is, as stated, shaped by the fact that, for all intents and purposes, it is impossible to have an overview of the nature, scope, and development of (organized) crime in the EU and its neighbouring countries. The only sources that provide a general picture of this is Europol's annual reports.[63] Certainly since they were recently adapted to a new model,

[62] See with respect to this the contributions of G. Wyn Rees and M. Webber ('The Governance of Crime and Insecurity across Europe'), J. Goodey ('Whose Insecurity? Organised Crime, its Victims and the EU'), and H. Albrecht ('Immigration, Crime and Unsafety') in A. Crawford (ed.), *Crime and Insecurity: the Governance of Safety in Europe* (Cullompton: Villan, 2002), at 77–101, 135, and 159.

[63] These reports can be found on the Europol website, http://www.europol.eu.int. The last report is the *2002 EU Organised Crime Report* (non-classified version), dated 31 October 2002. Europol also regularly issues informative reports on special problems in the sphere of

these reports have given in some respects a considerable impression of the picture that the police in a number of Member States have of organized crime, but they are nevertheless for all manner of methodological reasons of only limited use as an indicator of this crime in Europe. Anyone wanting to use these reports as such must complement them at least with the analyses prepared annually by the police services in various Member States, for example, by the *Bundeskriminalamt* in Germany, the National Criminal Intelligence Service in England and Wales, and the *Federale Politie* in Belgium. Moreover, the reader should consider them alongside the results of academic research on organized crime that has been done until now in the EU and, more broadly, in Europe. This research is, however, scarce. As yet, there have been no scholarly studies that attempt to chart organized crime in Europe or the EU. Why not? First of all, in most of the Member States there are simply too few researchers to carry out such studies, and, secondly, the Commission has not as yet been prepared to finance such studies. Why is there a lack of qualified researchers in many Member States? Several reasons can be given for this but the important ones are, in particular: lack of interest in organized crime in the research field and, where there is interest, often insufficient access to police and judicial sources to be able to conduct such studies on any scale.[64] And why is the Commission not interested in European studies with respect to organized crime? Because it does not consider that such studies have sufficient practical use.[65]

Nevertheless, scholarly research on organized crime is making progress. This is apparent from the publication of studies on the manner in which organized crime can be researched and the way in which the results may be analysed.[66] In addition, more studies on the nature, scope, and development of forms of organized crime are appearing in some more Member States. In this respect, one can first consider the broad research regarding the nature and

organized crime, in 2001, for example, a *European Union Situation Report on East European Organised Crime; Based on Information from 1996 to 2000.*

[64] C. Fijnaut, 'Empirical Criminological Research on Organised Crime; the State of Affairs in Europe', in *L'Evolution de la Criminalité Organisée: Actes du XVIIIe Cours International de Haute Spécialisation pour les Forces de Police, Paris 17–24 Septembre 1996* (Paris: La Documentation française,1996), at 47–60.

[65] This is based on the author's personal experiences with the Commission in obtaining financing for research as it is meant here. In collaboration with L. Paoli from the Max Planck Institute for Foreign and International Criminal Law in Freiburg, I set up a self-funded European project on which at least thirty researchers from all over Europe are working. The title of the project is 'Organized Crime in Europe: Conceptions, Patterns and Policies in the European Union and Beyond'. The results will be published as a book sometime in 2004.

[66] C. Besozzi, *Organisierte Kriminalität und Empirische Forschung* (Chur: Verlag Rüegger, 1997), and C. Black *et al., Reporting on Organized Crime: a Shift from Description to Explanation in the Belgian Annual Report on Organised Crime* (Antwerp: Maklu, 2001).

development of organized crime in the Netherlands[67] and also the recent in-depth studies on the Mafia in Italy,[68] collections of comparative articles on organized crime in Germany, Austria, Italy,[69] and also in accession countries such as Hungary and the Czech Republic,[70] and publications on organized crime in European regions like the Balkans and the region around the Baltic Sea.[71] Secondly, one can refer to research on specific forms of organized crime. This is often concerned with human trafficking, but research on the arms trade can also be cited.[72] However, the progress that has been made is insufficient, whether or not in combination with the reports from Europol and from national police services, to permit reliable statements about the nature, scope, and development of the problem of organized crime in Europe or the EU. This is only possible, within certain limits, for a few Member States. The only thing that can be argued is that the problem of organized crime in the EU indeed shows certain dominant characteristics—above all it has to do with the illegal trade in goods and humans on the one hand and the illegal supply of services on the other hand—but that the situation differs from country to country on important points. The situation in Denmark is simply completely different from that in Italy. While in one country organized crime in certain regions exerts illegal control over legitimate sectors of the economy, such a situation is not at all the case in other countries.[73]

[67] C. Fijnaut *et al., Organized Crime in the Netherlands* (The Hague: Kluwer, 1998), and E. Kleemans *et al., Georganiseerde Criminaliteit in Nederland* (The Hague: WODC, 2002).

[68] L. Paoli, *Fratelli di Mafia: Cosa Nostra e 'Ndrangheta* (Bologna: Il Mulino, 2000), and M. Jacquemet, *Credibility in Court: Communicative Practices in the Camorra Trials* (Cambridge: CUP, 1996).

[69] C. Mayerhofer and J-M. Jehle (eds), *Organisierte Kriminalität; Lagebilder und Erscheinungsformen: Bekämpfung und Rechtliche Bewältigung* (Heidelberg: Kriminalist Verlag, 1996), V. Militello *et al., Organisierte Kriminalität als Transnationales Phänomen* (Freiburg: Editions Iuscrim, 2000), and C. Reiners, *Erscheinungsformen und Ursachen Organisierter Kriminalität in Italien, den USA und der Bundesrepublik Deutschland* (Frankfurt am Main: Peter Lang, 1989).

[70] P.C. van Duyne *et al., Cross-border Crime in a Changing Europe* (Tilburg: Tilburg UP, 2000).

[71] N. Miletitch, *Trafics et Crimes dans les Balkans* (Paris: Presses Universitaires de France, 1998), and *Organized Crime in the Baltic Sea Area* (Toulouse: Erès, 1998).

[72] See with respect to smuggling humans, for example, F. Laczko and D. Thompson (eds), *Migrant Trafficking and Human Smuggling in Europe: a Review of the Evidence with Case Studies from Hungary, Poland and Ukraine* (Geneva: IOM, 2000) and D. Heine-Wiedenmann and L. Ackerman, *Umfeld und Ausmasz des Menschenhandels mit Ausländischen Mädchen und Frauen* (Stuttgart: Kohlhammer, 1992). As regards arms smuggling consult, for example, A. Spapens and M. Bruinsma, *Smokkel van Handvuurwapens vanuit Voormalige Oostbloklanden naar Nederland* (Tilburg: IVA Tilburg, 2002).

[73] C. Fijnaut, 'Georganiseerde Misdaad: Echt een Bedreiging voor de Europese Unie?', in B. Raaymaekers and A. van de Putte (eds), *Lessen voor de Eenentwintigste Eeuw XXI* (Leuven: Universitaire Pers Leuven,1998), at 165–185.

For this reason, therefore, it is at present impossible to state whether, through police co-operation—and disregarding all the other factors that play a role in the development of organized crime—safety in the EU as regards this problem has improved. There is simply a lack of sufficient understanding of organized crime itself to be able to determine this.

B. The Lack of Overview and Insight as regards Police Co-operation

The second reason why the added value of police co-operation in terms of increased safety and protection from organized crime cannot presently be determined, certainly indeed at the level of Europe or the EU, is that there is no, or hardly any, research being carried out on how this co-operation actually operates and what effects it has on the problem of crime. As already stated, most of the literature about this co-operation is normative, formal by nature, and completely disregards the practice of police co-operation or reflects only the personal impressions of the researchers on this point.[74]

Thus, in fact, almost nothing can be said about the way in which Europol functions in practice. The annual reports from this service do indicate that it was, in past years, involved in one way or another in hundreds of investigations in the Member States of the EU, but what this involvement represented in practice, what added value was gained from these investigations, what effects these investigations had on the problem of organized crime and so on are all questions which an outsider cannot in fact answer in the absence of scholarly research.[75] And the messages—both positive and negative—about the functioning of Europol that are circulating in the literature do not, of course, form an alternative to such research.[76] From the rare reports from members of Europol on the way in which co-operation with police services in the Member States in fact operates, particularly in cases of significant forms of organized crime like counterfeiting of the euro, smuggling humans, and drug trafficking, it can in fact be surmised that this co-operation varies a great deal from case to case. The gathering of the necessary information does not always proceed quickly enough and must regularly be stimulated in less bureaucratic and more direct ways, while the final preparation of analyses or the granting of technical assistance evidently normally

[74] P. Tak, 'Bottlenecks in International Police and Judicial Cooperation in the EU', 8 *Eur.J Cr.Crim.L Crim.J* (2000) 4, at 343–360.

[75] These annual reports have been published recently and can be accessed through the Europol website, http://www.europol.eu.int.

[76] For an example of the positive role of Europol see J. Mooney, *Gangster: the Inside Story of John Gilligan, His Drugs Empire and the Murder of Journalist Veronica Guerin* (Edinburgh: Cutting Edge Press, 2001), at 121–134. The sceptical attitude of Belgian police agents towards Europol a few years ago was expressed by J. Vanderborght, *Over de Grens: Internationale Politiesamenwerking Getoetst aan de Praktijk* (Brussels: Politeia, 1997), at 249–268.

operates reasonably smoothly. Why Europol cannot always immediately offer the added value in concrete cases that is expected of it, particularly in the sphere of policy circles, has as much to do with, for example, the rigidity of procedures that Europol must comply with as it does with the lack of collaboration that Europol receives from the police services in Member States.[77]

The direct co-operation between police services of the Member States at the national level in the fight against (organized) crime is just as difficult to assess as their mutual co-operation through Europol. Throughout the EU, there is, to the knowledge of the author, no research in which this form of co-operation is systematically examined. Whether it operates in most of the cases satisfactorily for all parties and thus delivers a significant contribution to the fight against (organized) crime or not is thus an open question. Unfortunately, this matter has not until now formed a part of the reciprocal evaluation of co-operation in criminal matters to which the Member States are bound. Because of this, there is also no general evaluation report of police co-operation available comparable to that prepared for judicial co-operation. In fact, that report belies the often very pessimistic voices on the manner in which judicial co-operation operates in the EU, its first general conclusion stating in any case that 'while mutual assistance does not have the level of perfection and reliability expected by many practitioners, it does not operate as badly as some claim'.[78] Thus, perhaps police co-operation, too, does not operate as badly as is sometimes certainly suggested.

Police co-operation in border regions is certainly being studied empirically. However, the problem with this research is that it usually cannot be determined to what extent the results of this research refer to problems of organized crime. Even in cases of cross-border surveillance there is not necessarily an issue of (organized) crime, as surveillance can be applied to all possible forms of (cross-border) crime.[79] The only study in which, based on a number of cases, police co-operation in a number of border regions in the domain of (organized) crime was researched, was carried out recently under the supervision of M. den Boer and A. Spapens.[80] This study revealed that trust and reciprocity between the two parties involved are of prime importance for co-operation to be successful. The willingness to co-operate increases through actual co-operation with each other; police co-operation

[77] See the case histories in *From Europol to Parlopol: Interparliamentary Conference on Democratic Control of Europol* (Amsterdam: Boom, 2002), at 44–124.

[78] I mean here the *Final Report on the First Evaluation Exercise—Mutual Legal Assistance in Criminal Matters*, OJ 2001 C216/14.

[79] S. Brammertz, 'Cross-border Operational Activities', in de Ruyver *et al.* (eds), *supra* note 43, at 133–154.

[80] M.G.W. den Boer and A.C. Spapens (eds), *Investigating Organised Crime in European Border Regions* (Tilburg: IVA Tilburg, 2002).

across borders is thus something that must first be *put into practice* if long-term results are to be hoped for. For some time, the available treaties have not always been fully implemented. They have tended to be invoked and utilized only to the extent necessary for the exchange of information. Yet information is what organized crime is chiefly about, and so remains the key to its challenge. Procedural issues, organizational problems, and cultural differences may certainly hinder cross-border co-operation, but precisely because of informal contacts between police agents, the negative effects of these difficulties on the progress of investigations can be reduced.

Thus direct police co-operation in the EU in practice operates perhaps more smoothly than is generally thought, just as judicial co-operation does. However, this does not alter the fact that it has also been demonstrated that there is not much that can be said at the moment about the precise value that direct and indirect police co-operation adds to the level of safety in the EU in relation to (organized) crime. There has simply been no systematic research into whether there is added value and in what this concretely consists.

C. Police Co-operation and Terrorism

The problem of terrorism has been intentionally put to one side up to this point. For the TEU, this issue is a part of the problem of (organized) crime, although this viewpoint is certainly not shared by everyone in Europe, given the difference—at least in theory—between the aims of each form of crime. Organized crime is generally associated with financial gain, while terrorism is considered to have political motives. However this may be, police co-operation in the EU with a view to the fight against terrorism cannot be disregarded here, all the more because—as was described earlier—it has seen a comparatively sharp increase since the attacks of 11 September 2001.

What applies to the problem of organized crime certainly applies to that of terrorism. Apart from a single exception, there are no comprehensive studies on the nature, scope, and development of this problem in the EU or Europe.[81] Anyone who wishes to gain a complete and profound picture must thus gather together a broad range of studies and press releases about terrorist movements (in the Basque Country, Northern Ireland, Corsica, and so on) or about certain kinds of terrorism (Islamic terrorism). Europol also prepares reports about the situation in the EU on this point, but in any case the open versions of these reports merely give a superficial picture of what is really going on.[82] In the absence of clear insight into this situation, it is thus

[81] See, for example, X. Crettiez and J. Ferret (eds), *Le Silence des Armes? L'Europe à l'Epreuve des Séparatismes Violents* (Paris: La Documentation française, 1999).

[82] European Council, *Non-confidential Report on the Terrorism Situation and Trends in Europe*, Brussels, 20 November 2002, 14280/02, ENFOPOL 140.

by definition all but impossible to say anything in general about the effectiveness of police co-operation in the EU on this point.

Yet it might still be possible to say something of substance about effectiveness if one at least had a good understanding of the practice of co-operation. However, this is also lacking here. What holds for police co-operation in general applies all the more to police co-operation as regards terrorism in the EU: the vast majority of what has been written about this co-operation deals with its formal organization and completely disregards its practical function.[83] Considering the small number of researchers in Europe who are interested in terrorism and considering the large barriers to access to police and judicial information on this issue, this is of course understandable, but the lack of understanding is no less serious for that. From Council documents—concerning the policy launched after the 11 September attacks—it can at least be inferred that there are plans to integrate the Counter-Terrorism Task Force at Europol in its standard organization and that attempts have been made to allow the Council's Working Group on Terrorism to work more coherently and more efficiently.[84] On other points, police co-operation as regards terrorism is still very much in the formative stage. Relations between the EU and the US remain a concern, as does the formation of joint teams specifically for investigating the financing of terrorist activities.[85]

5. VISIONS FOR THE FUTURE OF THE EUROPEAN CONVENTION AND THE EUROPEAN COMMISSION

The contemporary development of police co-operation in the EU has been considered in terms of a formal and material analysis in consecutive steps. This analysis has been made with a view to evaluating the plans for the future laid by the European Convention, including the contribution made by the Commission. To do this, it is obvious that their content must first be set out. However, before doing so, a brief summary of the principal results of the

[83] See, for example, N. Cettina, *Les Enjeux Organisationnels de la Lutte contre le Terrorisme* (Paris: L.G.D.J., 1994); P. Lejeune, *La Coopération Policière Européenne contre le Terrorisme* (Brussels: Bruylant, 1992), F. Thuiller, *L'Europe du Secret; Mythes et Realité du Renseignement Politique Interne* (Paris: La Documentation française, 2000), and R. Wehner, *Europäische Zusammenarbeit bei der Polizeilichen Terrorismusbekämpfung aus Rechtlicher Sicht; Aufgezeigt am Beispiel der Bundesrepublik Deutschland* (Baden-Baden: Nomos Verlagsgesellschaft, 1993).

[84] European Council, *Draft Recommendations of the Management Board to the Council on the Future of the Counter-terrorism Task Force*, Brussels, 8 November 2002, 13699/1/02, EUROPOL 86, and European Council, *Role and Future Working Methods of the Working Group on Terrorism*, Brussels, 31 July 2002, 11231/02, COTER 41.

[85] European Council, *European Union Action Plan to Cambat Terrorism—Update of the Roadmap*, Brussels, 14 November 2002, 13909/1/2, JAI 243, 6, 14, and 31.

foregoing analysis is provided. This will simplify somewhat the evaluation of the plans.

A. Summary of the Analysis of Present Development

The initial formal analysis brought to light the fact that in past years important *bottom up* as well as *top down* work was developed under the third pillar: starting from the TEU and the corresponding action plans, a comprehensive framework of significant possibilities for stimulating police co-operation between the Member States was created—as much through the 1990 Schengen Convention and the 1995 Europol Convention as through the 2000 EU Convention. This, however, does not alter the fact that it gradually became evident that sooner or later a solution to a number of resilient problems would have to be found. One should recall the procedural problem of a very complicated decision-making mechanism in which policy initiatives would be translated into concrete implementation measures often only after many years. A telling example of this is the delayed amendment of the Europol Convention to implement the letter of the Treaty of Amsterdam. However, one should also recall institutional issues, in particular, the tenacity of the distinction between the three pillars in the domain of police. The connection between these three fields of work of the EU has now become increasingly apparent, and the policy of the Council and the Commission has been stressing this coherence more strongly. There are also various matters of substance for which sooner or later solutions must be found. First, reference here can be made to the very problematic relationship between Europol and OLAF, with the question behind it being how the EU wants to organize its policing power in the long run—given that the pillar structure is set to be largely dismantled. Secondly, there is the question of the difficult prospects for a transparent and coherent EU foreign police policy being pursued across what will remain the somewhat diverse institutional landscape presently inhabited by the three pillars. Thirdly, on the horizon there is the problem of judicial authority over the actions of Europol and OLAF, as much in the form of the construction of a European public prosecution department as in the form of further involvement of the Court of Justice in Luxembourg.

The subsequent material analysis sought to demonstrate that it is in fact impossible to say what the actual effect is or was of the efforts that the EU has made over the last ten years in police co-operation in terms of safety levels in the face of (organized) crime in the 'area of freedom, security and justice'. No one is likely to dispute that the opportunities that have arisen to co-operate in various cases have certainly played a role in the successful completion of criminal investigations. Why should these opportunities otherwise have been taken? However, considered more generally—at the level of the nature, scope, and development of crime in the EU—not much, if anything, can be said

about effectiveness. On the one hand, this is because there is insufficient research as regards (organized) crime in the EU, certainly in relation to the forms of this crime that are listed in the TEU. On the other hand, it is because very little or no research has been done on the practice of police co-operation in the sphere of (organized) crime, not to mention into the effects of this on safety in the EU. This is, of course, a rather unfortunate conclusion after so many years of co-operation and debate over co-operation, but it is a conclusion that forces itself on anyone who wants to recognize the facts. This means that the third pillar is still more of a political undertaking than a governmental operation. Political ideas still carry more weight than hard facts.

Before evaluating the plans of the European Convention and the independent contribution made by the Commission in light of the foregoing conclusions, these proposals must of course first be set out.

B. The Proposals of the European Convention

On 28 October 2002, the chairperson of the Convention revealed the rough draft of a Constitutional Treaty that in his opinion should form the future foundation for the EU. This Treaty would have to take the place of the two existing treaties, the TEU and the ECT. The Treaty would contain a section provisionally entitled 'Internal Security' that would no longer deal only with police and judicial *co-operation* but with 'policy on police matters and against crime'[86] more generally. The meaning of these nebulous words can to some extent be inferred from the final report of Working Group X on 'freedom, security and justice'.[87] This working group concluded that all the provisions in the new Treaty concerning the 'area of freedom, security and justice' must be placed under a single title and that, for their development, elements of the Community method—legislative measures decided by a (qualified) majority of votes, power of co-decision for the European Parliament, and so on—must be combined with strengthened co-ordination of operational co-operation at the level of the EU and simultaneous strengthening of the role of the national parliaments. The working group favoured such a sweeping change because most of the existing 'third pillar' conventions of the EU have still not been ratified by all the Member States—and even if ratified are then very difficult to change—and because the 'softer' alternatives such as decisions and resolutions do not have any direct effect at the national level. Other instruments are thus required.

[86] European Convention, *Preliminary Draft Constitutional Treaty*, 28 October 2002, CONV 369/02.

[87] European Convention, *Final Report of Working Group X 'Freedom, Security and Justice'*, 2 December 2002, CONV 426/02.

In July 2003, the analyses of the various Working Groups and of the many plenary deliberations of the Convention eventually bore fruit in a draft Constitutional Treaty. As far as the Area of Freedom, Security, and Justice was concerned, the draft Treaty largely confirmed the proposals of Working Group X, including the abolition of the Pillar structure.[88] In what follows, however, we will concentrate on the Working Group Report itself rather than the later draft Treaty, and this for three reasons. First, the Working Group Report (as is also the case with the Commission proposals), unlike the draft Treaty, is a reasoned document, and so provides some indication of the underlying philosophy behind reform. Secondly, as already noted, the draft Treaty largely follows and gives textual form to the conclusions of the working group. Thirdly, the draft Treaty is in any event not the final word. The fate of its text is in the hands, first, of the Intergovernmental Council which began its work at Rome in October 2003, and, secondly and ultimately, the Member States of the EU which will be required to ratify the conclusions of the Intergovernmental Council. It might be premature, therefore, to set too much store by the draft Treaty.

As regards police co-operation, the working group indicates that the general description of it under Article 30 TEU is 'broadly adequate'. By contrast, in its eyes the distribution of operational responsibilities between national services, Europol, OLAF, and in the future perhaps a European Border Guard lacks 'efficiency, transparency and accountability'. To correct these problems, the legislative tasks within the Council should be distinguished from the operational tasks and the latter should be assigned to a special organ.[89] It does not, however, argue for merging, for example, Europol and OLAF. The description of Europol's tasks should be replaced by a more general provision in the new Treaty to allow the legislator more play 'to develop Europol's tasks and powers'.[90] This room should be used not only to mark off Europol's central role in European police co-operation but also to indicate that Europol's powers may 'include powers relating to intelligence, co-ordination and carrying out of investigations, as well as participation in operational actions to be carried out jointly with Member States services or in joint teams'. Certainly if Europol were to develop into a similar executive investigation service to OLAF, democratic control over this service should come to reside in the European Parliament and the Council and judicial control in the European Court of Justice.[91] Other issues were more

[88] OJ 2003 C169/3. See in particular, Part III, Title II, Chapter IV on the 'Area of Freedom, Security and Justice' (Arts. III–158–178).

[89] See now Art. III–162, draft Constitutional Treaty

[90] See now Art. III–177, draft Constitutional Treaty

[91] There is considerable improvement in the degree of judicial oversight by the ECJ in the draft Constitutional Treaty, but the exclusion of jurisdiction 'to review the validity or proportionality of operations carried out by the police or other law-enforcement services of

contentious in the working group. Opinions were sharply divided both over the expansion of Eurojust to a European public prosecution department and over the formation of a public prosecution department to serve the sole purpose of protecting the financial interests of the EC.[92]

C. The Proposals of the European Commission

The Commission found two ways to reveal its opinions about the reforms to the foundations of the EU. First, on 4 December 2002, indirectly in answer to the proposal of the Convention, it issued a communication on the future institutional structure of the EU. Secondly, through its Presidency it published a rough draft of a constitution for the EU that had been prepared by a group of experts.[93] In both of these documents, the Commission concurred with the Convention's opinions that there must be a single constitutional treaty. Not a great deal of attention was devoted to what is now the third pillar. It is only noted that, with the pillar structure falling away, there is no longer any reason not to allow police and judicial co-operation in criminal matters to fall under the same general rules as those that are applicable to the policy of the EU in general. Part III, Section 3, of the rough draft deals with the 'reinforcement of the area of freedom, security and justice', and here 'criminal law and police co-operation' come up for discussion.

Article III–91 provides a more detailed description of the subjects that qualify as police co-operation in general: collection and so on of information, training and outfitting, and common operations by services of a number of Member States. Where Europol in particular is concerned is set out in paragraph 2 of Article III–92. Its task will be 'to organise the collection and processing of relevant information that the services of the Member States submit to it and to organise and co-ordinate specific investigation activities and operational activities carried out by the authorities of the Member States or by joint teams involving a number of such authorities'. Otherwise, Europol is designated as an 'agency of the Union' for which the structure and operation will be laid down in a separate law.

To get a complete picture of how, in the framework of the Commission, the future of police co-operation is assessed, one should examine its earlier

a Member State or the exercises of responsibilities . . . with regard to the maintenance of law and order and the safeguarding of internal security, where such action is a matter of national law' is continued. See Art. III–283, draft Constitutional Treaty.

[92] In the event, the draft Constitutional Treaty provides very general permission for the establishment of 'a European Public Prosecutor's Office from Eurojust' (Art. III–175).

[93] European Commission, *For the European Union Peace, Freedom, Solidarity; Communication of the Commission on the Institutional Architecture*, Brussels, 11 December 2002, COM(2002)728 final/2, and European Commission, *Constitution of the European Union; Contribution to a Preliminary Draft; Feasibility Study*, Brussels, 4 December 2002.

communications on the future of the EU.[94] In these communications, it views police and judicial co-operation in close association with border patrol and policy on foreign nationals: 'The removal of economic borders and freedom of movement go hand in hand with rights and guarantees and are difficult to reconcile with the maintenance of police and judicial borders which protect the perpetrators of illicit activities.' Furthermore, the foreign dimension of this complicated issue may also certainly not be disregarded 'for it will add to the close and privileged relations the Union intends to cultivate with its neighbours'. In terms of policy all this means that collective action is necessary in the sphere of 'control and surveillance of our external borders' and in the sphere of 'immigration and asylum'. In addition, to be able to take effective action against organized crime and terrorism it is necessary to develop a common framework 'for inter-country judicial and police cooperation in investigations and prosecutions'.

The Commission explains which precise task the EU must fulfil in this context when in the same communication it is stated that, in the field of police co-operation, most of the goals can be reached by co-operation between the police authorities of the Member States: '[t]he Union's potential action should be limited, within the Treaty, to defining conditions for introducing mechanisms whereby the national authorities can exchange information and co-operate effectively'. In its view, this does not alter the fact that Europol, in operational terms, must be placed at the same level as Eurojust 'in order to guarantee the effective running of police and judicial investigations at the European level'. It adds here that in the future the issue of the democratic and judicial control of Europol must also be resolved, although it offers no opinion on how to do so. The Commission, finally, does argue for the formation of a European public prosecution department with a view to the protection of the financial interests of the EC and, as an extension of this, asks for the 'adoption of rules on criminal proceedings in cases of cross-border fraud'. The Commission, however, completely disregards OLAF, let alone examines the relations between this 'first pillar' police service and Europol.

D. An Evaluation of the Proposals in the Light of the Analyses of Present Developments

In evaluation of these proposals for the future development of police co-operation in the light of the conclusions as regards the current development of it, the following remarks are offered.

[94] European Commission, *A Project for the European Union*, Brussels, 22 May 2002, COM(2002)247 final.

First, the proposal of both the Convention and the Commission, subsequently endorsed in the draft Constitutional Treaty, to abolish the pillar structure and create from the existing treaties a single constitutional treaty with a single institutional template can only be approved. The existing structure has in the past played a very important role in developing formal frameworks for operational co-operation in the field of police, but now it is largely an obstacle to further development. To be sure, considering the role of the police in upholding the sovereignty of the Member States and in the performance of their monopoly over force—there is a strong case for reserving for police co-operation its own distinctive place in the institutional and procedural structures of the EU as they are defined in the final Constitutional Treaty, but still to shape decision-making as regards this form of co-operation in broad accordance with the general Community method so as to shorten substantially the distance between policy initiatives and their practical implementation.

Yet, secondly, it must be noted that the Convention does not in fact associate any significant consequences with the abolition of the pillar structure, and thus in essence clearly has no consideration for the need to integrate the diversity of police policy that is presently managed under the three pillars. In its proposals, it limits itself—oddly enough—chiefly to observations on police co-operation as it has been organized up to the present in the framework of the third pillar. The Commission, by contrast, clearly indicates that an integrated police policy must be sought across the EU in its entirety. Yet it still does not grasp the core of what is necessary to launch such policy. As to what is necessary in this regard, one can certainly refer to one theme that is mentioned briefly by the Convention: the organization of the Council and, it may be added, the organization of the Commission. Are these institutions sufficiently able to develop a suitable police policy in consultation with the European Parliament and the national parliaments and to monitor adequately its implementation and exercise? In the current situation, definitely not.

Thirdly, it is obvious that both the Convention and the Commission overlook various important issues that relate to the organization of the police in the EU. In particular, neither of them says anything about the relationship between OLAF and Europol. Was this topic simply too hot to handle? Be that as it may, it cannot be ignored. With an eye to the disappearance of the pillar structure, the Convention cannot avoid tackling the question of how the EU police apparatus should be organized in the future. Another important point is that the Convention—as opposed to the Commission—is sensitive to a more executive Europol in the future but, strangely enough, it ignores the issue of judicial authority over this service. Of course, this omission, too, is not sustainable in the long term: the issue must be settled, and preferably sooner rather than later. Clearly, the difference in opinion over the future of

Eurojust and the European Public Prosecution department played a part in the irresolution of the Convention. The Commission rightfully indicated that this issue calls for a settlement, yet it in fact has no great plans for the future accountability of Europol. Finally, there is the point that the Commission does clearly state that in the new EU police co-operation between the Member States remains of the greatest importance, while the Convention in general pays no attention to the role of the Member States in this area. This is all the more unusual because, in May 2002, the Commission had already indicated the direction it wanted to take on this point: the introduction of 'mechanisms' to promote this co-operation. In addition, the question of which 'mechanisms' there may be in the future is thus certainly very relevant. Is it because the Convention, more than the Commission, was still blind to police co-operation between the Member States as it actually occurs every day?

Fourthly, in connection with this last observation, it is a remarkable fact that neither offering at any point raises the question of the effectiveness of police co-operation or the sufficiency of our present understanding of it. What has in fact been achieved under the third pillar appears to be of little account to either the Convention or the Commission when addressing the future. Evidently 'Brussels' has complete faith in the individual impressions of the factual situation and/or it allows itself to be completely led by the political salience of proposals. The question whether or not the proposals that are finally decided will add to the safety of the European Union has thus not been posed, and certainly not answered one way or another. That this is an unwarranted course of action speaks for itself. Safety, for many citizens in the EU, is justifiably a great concern and the damage to it by various forms of organized crime is a serious problem. For policy makers, it is therefore a matter of assessing the extent of this problem (or allowing it to be assessed) as accurately as possible and making proposals commensurate with its seriousness to deal with it.

6. CONCLUSION

The focal point of this essay was the hard core of police co-operation as governed by Articles 29–30 TEU: co-operation to control (organized) crime, including terrorism. That the accent was placed on the repressive element of the fight against such crime is not surprising. The preventive form, however important it also is, has still not properly emerged in the framework of the EU.[95] Police co-operation in the sphere of public order and assistance, due to

[95] See, for example, C. Fijnaut (ed.), *The Administrative Approach to (Organised) Crime in Amsterdam* (Amsterdam: City of Amsterdam, 2002).

a lack of space, was not considered at all,[96] although it is becoming ever more important for the EU Member States.[97]

In its 'Biannual update of the scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union', the Commission gives a moderately positive opinion on the progress that was achieved in the sphere of police co-operation: '[t]he fight against crime, including terrorism, is a Union priority on which substantial progress was made both in operational cooperation and in the European-level legislative basis to promote and facilitate such cooperation'.[98] This evaluation, as far as legislation is concerned, matches the evaluation made in the present essay. A great deal has indeed been achieved where it comes to the creation of formal frameworks for police co-operation. As far as the operational aspect is concerned, however, the evaluation made in this essay is much more reserved. It is difficult to say whether there has in fact been so much progress in operational co-operation. Considering the various reports on Europol's operation there is reason to doubt the validity of this claim. From the lack of scholarly research into the actual circumstances of police co-operation as regards (organized) crime in the EU, it is difficult to establish who is correct.

Nevertheless, doubt about the level of recent real achievement is not the only reason to ask for more independent and impartial research concerning an issue that is so high on the European political agenda. The other reason is the need for a more open and more in-depth debate about the future of police co-operation in the EU. In this regard it was demonstrated that the proposals made by the Convention and the Commission give no or insufficient answers to important formal and material questions. Moreover, because they are in no way related to the actual problems of (organized) crime in the EU, they do not appear to be very innovative; indeed they appear even bureaucratic. Partly for this reason, following the example the Hubert Committee set in France a few years ago, a great deal can be said for developing or having developed scenarios in which, in the context of concrete problem formulations and given certain political and juridical frameworks, one examines the manner in which police co-operation between Member States can or should be developed.[99] Such a methodology not only stimulates the imagination but also generates a profound discussion about what is at stake.

[96] The Police Co-operation Working Party has, in the past, mapped out in which domains co-operation takes place or where it is at least possible. See European Council, *Police Cooperation Matrix*, Brussels, 27 May 2002, 9231/02, ENFOPOL 70.

[97] A good example of this is the co-operation at large football events. Compare O. Adang and C. Cuvelier, *Policing Euro 2000; International Police Co-operation, Information Management and Police Deployment* (Beek: Tandem-Felix, 2001).

[98] European Commission, Brussels, 30 May 2002, COM(2002) 261 final, 8.

[99] Commissariat Général du Plan, *Quels Avenirs pour l'Europe de la Justice et de la Police? Rapport du Groupe Presidé par Patrick Hubert* (Paris: La Documentation française, 1999).

Consider, for example, the Commission's standpoint that the Union must limit itself in the future to 'defining conditions for introducing mechanisms whereby the national authorities can exchange information and co-operate effectively'. This task formulation can be interpreted very narrowly: further refinement of the treaties that must make all this formal. However, it can also be interpreted very broadly and—following the example set by the Commission with respect to modernizing European law of trusts—mean that the Union must not only further refine the network of treaties but also must have the authority to generate standards to which the organization and the operation of police apparatuses in the Member States must comply with a view to EU policy priorities and their mutual co-operation in their accomplishment.[100] And not only must the EU have the authority to generate paper standards but it must also be allowed to determine whether these standards are being met in practice. It was with this kind of comprehensive monitoring and learning exercise in mind that the Hubert Committee prepared its problem-solving scenarios.

It must, in a sense, be regretted that the Convention that produced the new Constitutional Treaty and the subsequent IGC have operated at such a high tempo and without much by way of public dialogue with a wide variety of interested and concerned groups. Consolation may be found in the fact that with such a treaty the EU is certainly not complete. Over the coming years, there will be plenty of room for debate over its further design, certainly on the very sensitive issue of police co-operation. In addition, perhaps future constitutional debate will make policy makers more aware of the need for adequate scholarly research into (organized) crime and police co-operation. The conduct and evaluation of such a comprehensive research programme would, indeed, confront them with all sorts of new questions.

[100] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Brussels, 28 April 1999, Commission Programme 99/027. See in this context C. Fijnaut, 'De Strafrechtelijke Bescherming van de Financiële Belangen van de Gemeenschap tegen Fraude', 30 *Delikt en Delinkwent* 2000, at 972–988.