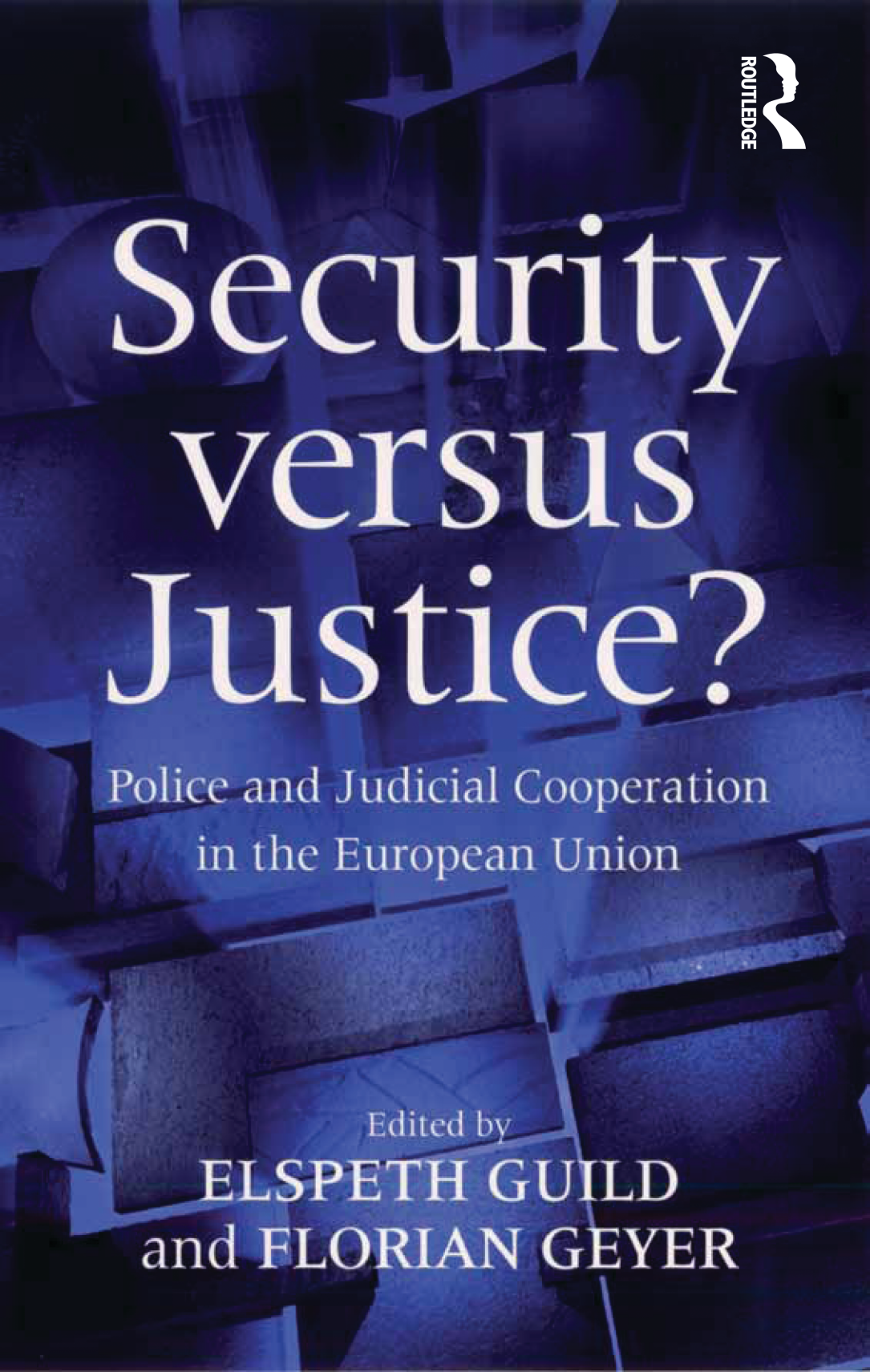
ROUTLEDGE
Security versus Justice?
Police and Judicial Cooperation in the European Union
Edited by
ELSPETH GUILD
and FLORIAN GEYER

SECURITY VERSUS JUSTICE?

This page intentionally left blank

Security versus Justice?

Police and Judicial Cooperation in the European Union

Edited by

ELSPETH GUILD
Radboud University, The Netherlands and Kingsley Napley, UK

and

FLORIAN GEYER
Centre for European Policy Studies, Belgium

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2008 by Ashgate Publishing

Published 2016 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN
711 Third Avenue, New York, NY 10017, USA

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
Security versus justice? : police and judicial cooperation
in the European Union
1. Police - European Union countries 2. Criminal justice,
Administration of - European Union countries 3. National
security - European Union countries
I. Guild, Elspeth II. Geyer, Florian
363.2'094

Library of Congress Cataloging-in-Publication Data
Security versus justice? : police and judicial cooperation in the European Union / [edited by] Elspeth Guild and Florian Geyer.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7546-7359-0
1. Judicial assistance--European Union countries. 2. Criminal justice, Administration of--European Union countries. 3. Law enforcement--Europe--International cooperation. I. Guild, Elspeth. II. Geyer, Florian.

KJE3795.S43 2008
345.24'052--dc22

2008002527

ISBN 978-0-7546-7359-0 (hbk)
ISBN 978-1-3156-0813-6 (ebk)

Contents

List of Graphs and Tables

Graph

Tables

This page intentionally left blank

Acknowledgements

The editors would like to express their sincere gratitude to Maricia Fischer-Souan whose invaluable help over the summer of 2007 has contributed immensely to the finalization of the manuscript. Many thanks as well to Sergio Carrera and Miriam Mir, our colleagues at the Justice and Home Affairs Section of CEPS, for their patience and incessant support throughout the entire project. Above all, of course, we are grateful to our authors for their careful work and countless efforts, for their ideas, their insights and perspectives. Finally, we would like to acknowledge the great support given to us by our editors, Kirstin Howgate and Margaret Younger at Ashgate.

This book falls within CHALLENGE—The Changing Landscape of European Liberty and Security—a research project funded by the Sixth Framework Programme of the European Commission's Directorate-General for Research (www.libertysecurity.org).

This page intentionally left blank

Notes on Contributors

Susie Alegre is a barrister and independent legal consultant. She is an expert on counter-terrorism, EU Justice and Home Affairs, human rights and international criminal law. She has published extensively on EU criminal justice including co-authoring a book, *Eurowarrant—A Solution Ahead of its Time?*. She has worked for Amnesty International, JUSTICE and most recently was anti-terrorism adviser at the OSCE ODIHR. She is an associate tenant at Doughty Street Chambers in London.

Rocco Bellanova holds a Research Masters in political science and international relations (IEP-Paris) and graduated in international relations (University of Bologna). He has been visiting student at the University of Montreal and at the IEP in Lyon. He has collaborated with the German Member of Parliament Alexander Alvaro, member of the LIBE Committee and is author and member of the editorial team of the journal of the CERI Program for Peace and Human Security, in Paris.

Didier Bigo is professor of international relations at Sciences-Po, the Institut d'Etudes Politiques de Paris, researcher at CERI/FNSP and visiting professor at King's College London, department of War studies. He is the director of the Center for Study of Conflict and the editor of the quarterly journal *Cultures & Conflits* published by L'Harmattan. Together with Rob Walker he is the co-editor of the new ISA journal *International Political Sociology*, published by Blackwell. He works on critical approaches to security in Europe and the relation between internal and external security, as well as on sociology of policing and surveillance. He analyses the relations and tensions between international relations, politics and sociology.

Sergio Carrera is Head of Section and Research Fellow at the Justice and Home Affairs Section of the Centre for European Policy Studies (CEPS) in Brussels. He is a PhD candidate at the Faculty of Law of the University of Maastricht (The Netherlands). Carrera is an external expert on Justice and Home Affairs for the European Economic and Social Committee and the European Parliament. He is involved in the coordination and research in various trans-European projects such as CHALLENGE—*The Changing Landscape of European Liberty and Security*—a research project funded by the Sixth Framework Programme of DG Research (European Commission). His main areas of specialization are justice and home affairs, immigration, borders and security.

Florian Geyer is a trained lawyer, PhD candidate and Research Fellow at the Centre for European Policy Studies (CEPS) in Brussels. He previously held the post of

senior research assistant and lecturer at the Institute for European Constitutional Law at the University of Trier and worked in a law firm in Aachen, Germany. Together with Elspeth Guild he gave written and oral evidence to Committee inquiries of both Houses of the UK Parliament. For the European Parliament (Directorate-General Internal Policies) he provides external expertise on many issues related to the area of freedom, security and justice.

Elspeth Guild is professor of European migration law at the Radboud University, Nijmegen the Netherlands. She is also Senior Research Fellow at the Centre for European Policy Studies in Brussels and a partner at the London law firm Kingsley Napley. She is a visiting professor at the LSE in London and teaches in the department of War Studies at Kings College London. She has recently acted as special adviser to the House of Lords inquiry into EU Economic Migration (the report was published in November 2005) and is a member of the European Commission's expert group on the policy needs for data on crime and criminal justice.

Gloria González Fuster is a researcher at the Institute for European Studies and at the Law, Science, Technology and Society Research Group of the Vrije Universiteit Brussel, Belgium. She has worked for the European Commission and the Education, Audiovisual and Culture Executive Agency, and specializes in data protection.

Peter Hobbing is a CEPS Senior Associate Fellow in JHA matters. He obtained his PhD (Dr. iur.) at the University of Freiburg, Germany for a comparative thesis on European and Latin American drugs law. His professional experience includes (besides management posts at national and EU level) practical assignments as commander of a border surveillance unit in German customs as well as 20 years service in various border and criminal-law related departments of the European Commission (Customs and Indirect Taxation, Justice and Home Affairs). In recent years, his interest focused on the European concept of integrated border management as well as the specific challenges of EU-wide police cooperation.

Mar Jimeno-Bulnes is Associate Professor of procedural law in the University of Burgos and holds a PhD in Law by the University of Valladolid. Her thesis, "Preliminary Rulings under art.177 TEC," obtained a national distinction from the Spanish Royal PhD Academy and European funds by the Commission of the European Communities. She has also gained postgraduate qualification from the European Institute in Brussels. She has published widely in Spanish and international journals on matters of civil, criminal, social, constitutional and European processes. Currently she is also acting as temporary judge in the provincial court of Burgos, acting in the civil and criminal law sections.

Richard Lang holds a BA (Hons) from the University of Manchester and an LL.M in European law from University College London; he is a solicitor of the Supreme Court of England and Wales. He has previously worked at the European

Commission and the International Criminal Tribunal for the Former Yugoslavia in The Hague. He is currently Counsel to Crosby, Houben & Aps EU Law Firm in Brussels.

Valsamis Mitsilegas is Reader in law at Queen Mary, University of London. From 2001 to 2005 he was legal adviser to the House of Lords European Union Committee. Mitsilegas is a regular consultant to parliaments, international organizations and NGOs. He is a member of an experts' team drafting the annual Commission-funded report on the implementation of EU legislation on free movement of workers in the UK. He is also acting as expert adviser to the European Parliament LIBE Committee. His work explores the impact of national, EU and international measures justified as necessary to protect internal security on civil liberties and fundamental legal principles.

Pieter Paepe is a part time researcher at the Institute for European Studies of the Vrije Universiteit Brussel, Belgium. His research interests are European constitutional and criminal law. He is also a lawyer at the Brussels bar, mainly practising European and commercial law.

Sonja Puntscher Riekmann holds a chair at the Department of Political Science and Sociology for Political Theory and European Integration and is head of the Centre of European Union Studies at University of Salzburg. She has been professor for comparative politics at the Humboldt University of Berlin and lecturer at the Universities of Vienna and Innsbruck. She is a member of the Austrian Academy of Sciences, of the board of ECSA-Austria and of the Executive Committee of the CONNEX-Network of Excellence on European governance. A former MP, she is now member of the jury of the Lupac-Foundation for democracy of the Austrian Parliament. From 1998 to 2007 she has been the director of the Institute for European Integration Research (EIF) at the Austrian Academy of Sciences.

Eulalia Sanfrutos Cano is teaching assistant at the Legal Studies Department of the College of Europe, Bruges. She holds an LL.M in EC Law, College of Europe, Bruges, a *DEA Droit des Communautés européennes*, Robert Schuman University, Strasbourg, a *Certificat d'études politiques européennes, Institut d'études politiques*, Strasbourg and the *Licenciatura de Derecho*, University of Seville.

Julia Sievers is research associate and PhD candidate at the Jean Monnet Centre for European Studies (CEuS), University of Bremen, Germany. She studied political science at FU Berlin and Duke University, USA, and received her diploma in political science from FU Berlin.

Toine Spapens is a Senior Research Fellow at the Department of Criminal Law at Tilburg University. He previously worked at an institute for policy research in the Netherlands. He specializes in empirical research on organized crime and transnational law enforcement cooperation. He is also involved in the research

program "Regulation of Gambling in Europe" at Tilburg University, focusing on the relationship between gambling and (organized) crime. His current research relates to trafficking in illicit firearms for criminal purposes in the European Union, and the role of organized crime groups in cannabis cultivation in the Netherlands. He wrote his PhD thesis on the interaction between organized crime and law enforcement, based on the case of XTC production and trafficking.

Judit Tóth holds a PhD in law, is Associate Professor of constitutional law (Department of Constitutional law, Faculty of Law—Szeged University) and Senior Research Fellow at the Centre for Migration and Refugee Studies (1991–2000) and Minority Studies since 2000 (Hungarian Academy of Sciences). She has published widely on refugee law, migration policy of contemporary Hungary, EU enlargement as well as on diaspora in legal regulation and policy. She has worked in international research teams on migration and human rights issues since 1991, recently in the Sixth Framework Programme project CHALLENGE —*The Changing Landscape of European Liberty and Security*. Tóth has been involved in legislative preparatory work as adviser since 1986 (Ministry of Environment, Ministry of Social Affairs, Ministry of the Interior, Parliamentary Committee on Constitutional Reform, Prime Minister's Office, Ministry of Justice). She represented Hungary on CAHAR (Council of Europe) from 1990 to 1996.

Jiří Vlastník graduated from the Police Academy of the Czech Republic (2000) and from the Law Faculty of the Charles University in Prague (2005), where he pursues his doctoral studies working on his dissertation thesis on the institutional framework of the cooperation in criminal matters in the EU. He participated in several international conferences concerning cooperation in criminal matters in the EU and published several articles on this topic. He is the author of the monograph "Television Violence and the Law" (2005). He is an Attorney Trainee in a Law office in Prague.

List of Abbreviations

AFSJ	Area of freedom, security and justice
API	Advance Passenger Information
Art. 29 WP	Article 29 Working Party
BES	Bureau voor Euroregionale Samenwerking
CCTV	Closed-circuit television
CEPEJ	European Commission for the Efficiency of Justice
Cepol	European Police College
CFSP	Common Foreign and Security Policy
CIS	Customs Information System
CISA	Convention implementing the Schengen Agreement
CT	Draft Treaty establishing a Constitution for Europe
DG	Directorate-General
DNA	Deoxyribonucleic acid
DPO	Data Protection Officer
EAW	European arrest warrant
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEC	European Economic Community
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EP	European Parliament
EPICC	Euroregionales Polizei-Informations-Cooperations-Centrum
EPP	European Public Prosecutor
EU	European Union
EUCPN	European Crime Prevention Network
FRA	Fundamental Rights Agency
FWD	Framework decision
HVD	High-value detainees
Ibid.	*Ibidem*—in the same place
IBM	Integrated Border Management
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs

JHT	Joint Hit Team
JSA	Joint Supervisory Authorities
JSB	Joint Supervisory Body
LIBE Committee	EP Committee on Civil Liberties, Justice and Home Affairs
LSJ	Liberty, security, justice
MEP	Member of the European Parliament
NGO	Non-governmental organisation
No.	Number
NSB	National Supervisory Body
OJ	Official Journal of the European Union
OLAF	Office européen de lutte anti-fraude (European Anti-Fraud Office)
Op. cit.	*Opus citatum*—the work cited
OSCE	Organization for Security and Cooperation in Europe
P.	page
PACE	Parliamentary Assembly of the Council of Europe
Para.	Paragraph
PNR	Passenger Name Record
Pp.	Pages
RABIT	Rapid Border Intervention Teams
SCIFA	Strategic Committee for Immigration, Frontiers, Asylum
SCO	Shanghai Cooperation Organisation
SIS	Schengen Information System
Sitcen	EU Situation Centre
SOFA	Status-of-Forces Agreement
SSR	Security Sector Reform
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFU	Treaty on the Functioning of the Union
TREVI	Terrorisme, radicalisme, extrémisme et violence internationale (whether TREVI actually stands for this is disputed)
VAT	Value-added tax
Vol.	Volume
XTC	Ecstasy

Chapter 1

Introduction: The Search for EU Criminal Law—Where is it Headed?

Elspeth Guild and Florian Geyer

One of the most dynamic fields of EU law since the great changes brought to the EU constitutional order by the Amsterdam Treaty in 1999 has been cooperation in the fields of policing and criminal justice. Irrespective of whether the Reform Treaty is ratified by the member states, these two areas will continue to be high on the political and legislative agenda. Both fields have already been the subject of substantial legislative effort in the EU and an increasing amount of judicial activity in the European Court of Justice (ECJ). The original three treaties—creating the economic community, atomic energy community and steel and coal community—did not expressly anticipate the inclusion of policing and criminal law. Similarly, the objective of economic integration while requiring a mechanism of enforcement did not foresee the use of criminal law and the concomitant police involvement as a central part of the structure. In 2007, the Reform Treaty planned wide ranging changes to both EU police cooperation and judicial cooperation in criminal matters. In the meantime, the ECJ has found the use of criminal law sanctions in pursuit of Community law objectives to be lawful.[1] In order to understand these changes we must first review how we got to the Reform Treaty, what have been the key struggles in competence and how the Reform Treaty changes fit into the transformation of police and judicial cooperation in criminal matters in the EU.

To seek for answers to these questions is one of the main objectives not only of this introductory chapter, but also of this entire volume. This book is in large parts the outcome of a doctoral training school that was held in April 2007 at the Centre for European Policy Studies in Brussels, organized within the framework of CHALLENGE—an integrated project funded by the Sixth Framework Programme for Research of the European Commission. Its task was to explore the question: "Police and judicial cooperation in criminal matters in the EU: Which future for the EU's third pillar?" And in fact at the time of the Training School this future was rather bleak. Hardly anyone would have dared to take a bet that a couple of months later European heads of state and government would actually

1 C-440/05 *Commission v. Council* 23 October 2007.

be able to agree on a text that addresses some of the more notorious flaws in the institutional setting of the third pillar.

The circumstances accompanying the production of this volume allow us to take a look at major third-pillar issues from a unique perspective: assessing and analysing their present form (as influenced by their past) while being able to take the changes into account expected to be brought about by the Reform Treaty. As stated above, it is this perspective that makes us understand the envisaged new setting.

Furthermore the origin of this volume enabled us to bring together a unique combination of contributors from many different disciplines all across the EU: young researchers at doctoral level together with renowned experts, academics and practitioners alike.

Hence the first part of the volume is dedicated to some of the major actors of police and judicial cooperation in criminal matters, notably the agencies and bodies set up at EU level to facilitate cooperation and coordination of national authorities, as well as the European Court of Justice (ECJ) and member states themselves. Accountability, transparency, democratic and judicial control, emerge to be the underlying themes of this first part, themes, however, that constantly reverberate throughout the subsequent chapters. The first part sets off with *Sonja Puntscher Riekmann* providing (in Chapter 2) a comparative analysis of provisions relating to accountability and transparency in the legal acts setting up Europol (third pillar) and Frontex (first pillar). *Jiří Vlastník* then adds to this by assessing the current and future setting of Eurojust, the European Judicial Cooperation Unit, posing the question whether this unit can be perceived as precursor of a federal style of European criminal justice (Chapter 3). Control exercised by the European Court of Justice in the third pillar is the topic of *Eulalia Sanfrutos Cano's* contribution in Chapter 4. A contentious issue as the ECJ was originally intended to play only a minor role in this field. However, "by way of its cautious yet at the same time audacious jurisprudence, the Court has questioned the intrinsic characteristics of intergovernmental cooperation in criminal matters" as she observes. In contrast, the absence of control and the lack of transparency are the major issues of *Judit Tóth's* contribution (Chapter 5) concluding this first part on the actors. Drawing from recent reports of the Council of Europe and the European Parliament she addresses EU member states' complicity in CIA activities on European territory and assesses member states' reactions to these reports.

The second part of the book is dedicated to "Concepts and Instruments." It commences with a critical assessment by *Didier Bigo* of the EU development in the area of freedom, security and justice and how this affects national sovereignty. Putting a question mark behind the axiom that we live in a world of unprecedented threats, he raises the question whether state sovereignty is merely an old-fashioned argument masking egoistic self interest or whether it is the ultimate argument against global security hegemony (Chapter 6). In the chapter that follows *Bigo's* more conceptual assessment, *Julia Sievers* concentrates on the flagship instrument of EU-wide judicial cooperation: the framework decision on the European arrest warrant. Applying an empirical approach, she analyses first experiences with the

application of this instrument, comparing Germany and the UK with regard to legislative implementation and everyday application by national courts. "Too different to trust?" is the provocative starting point of her contribution (Chapter 7). Returning to a more conceptual and theoretical approach *Gloria González Fuster* and *Pieter Paepe* scrutinize the contrasting cases of EU data protection and criminal law based on the reflexive governance theory. Their objective is to propose a reflexive assessment of these case studies that may benefit EU third pillar governance (Chapter 8).

Under the headline "Law and Policy" *Valsamis Mitsilegas*, *Mar Jimeno Bulnes* and *Rocco Bellanova* in three separate chapters address some of the most contentious third pillar issues in recent years: the Community's (first pillar!) competence to define legally binding criminal sanctions and penalties (*Mitsilegas*—Chapter 9); the adoption of common procedural safeguards for suspects in criminal proceedings throughout the EU (*Jimeno Bulnes*—Chapter 10); and the "Prüm experience" hailed by some as the way forward, criticized by others as a sign of contempt towards EU structures and procedures, lacking parliamentary oversight and involvement (*Bellanova*—Chapter 11). None of these three issues had been entirely settled at the time of preparation of this volume. And as it appears, not even the Reform Treaty will be able to solve all the questions and struggles that are inherent in them.

The last part mainly concentrates on practical questions: "Practice—Achievements and Obstacles" starts off with a contribution by *Toine Spapens* providing a criminological assessment of trans-frontier criminality in the Meuse-Rhine Euroregion and how EU and bilateral police and judicial cooperation impacts on this "laboratory" (Chapter 12). In the subsequent chapter entitled "Uniforms without uniformity," *Peter Hobbing* sticks to the practicalities of police work. He reports on his frustrating quest to find "common EU standards in policing," a concept often referred to in EU political statements and legal texts but still far from being reality (Chapter 13). Turning away from policing and the professionals of security, *Richard Lang* hence shares insights and experience he has acquired as a solicitor in practical cases affected by EU law. In three concise case studies he illustrates different ways in which practitioners can encounter the third pillar (Chapter 14). In the final chapter of this part, *Susie Alegre* takes a wider perspective, leaving to a certain extent the third pillar behind and investigating the intended global impact of the language and position of human rights in the EU Counter-Terrorism Strategy 2005. She criticizes the absence of any clarity as to how the EU ensures respect for human rights while combating terrorism and states that this makes it difficult for the EU to act as a promoter of human rights in this context outside its borders (Chapter 15).

Finally, in the concluding chapter of this volume *Sergio Carrera* and *Florian Geyer* assess the impact of the Reform Treaty on the common area of freedom, security and justice (Chapter 16).

Having outlined the genesis and structure of this volume, let us return to our introductory chapter and the questions initially posed: how did we got to the Reform Treaty? What have been the key struggles in competence? How will the

Reform Treaty fit into the transformation of police and judicial cooperation in criminal matters in the EU?

The EU's Engagement with Police and Judicial Cooperation in Criminal Matters

An EU engagement with policing and criminal law began quite gradually—mainly as a response to the proposal to abolish intra member state border controls (Brouwer 2007). The Schengen Agreement of 1985, although outside the framework of the European Economic Community (EEC) as it then was, first brought to the legislative table the issue of policing. The inclusion in that treaty (which began with five of the then 12 member states) of provisions on police cooperation was the first visible manifestation of member states' concerns regarding the abolition of intra member state border controls and the effects on policing. In the Single European Act, signed in 1986 to amend the EEC Treaty, the abolition of these border controls was agreed with a deadline of 31 December 1991 without any express reference to policing and criminal justice (Guild 2006). 1990 brought two key changes to the European legal landscape on policing and criminal justice—on the one hand the signing of the Schengen Implementing Agreement which specifically provided for police cooperation across borders complete with the principle of *ne bis in idem* (the legal principle that an individual cannot be the objective of a criminal trial twice for the same cause of action or double jeopardy); and secondly the signing of the first EUROPOL convention establishing an institution loosely connected with the EU which would provide the engine for EU wide police cooperation.

The Rhodes Council of December 1988 tied progress on the abolition of border controls for the free movement of persons with progress on police cooperation and criminal law: "The European Council is aware that in the latter area, [free movement of persons], the achievement of the Community's objectives, especially the area without internal frontiers, is linked to progress in intergovernmental cooperation to combat terrorism, international crime, drug trafficking and trafficking of all kinds." To make progress on these issues the Council set up a Coordinators' Group charged with presenting a report on the field. The result, the Palma Document, was presented to and approved by the Council in 1989, set out, both clearly the framework for police and judicial cooperation in the EU. It is worth going back to that document to examine the agenda which it set out and where we are now. The Coordinators suggest that "The achievement of an area without internal frontiers could involve as necessary, the approximation of national laws and their rules of application and scope, collaboration between national administration and a prior strengthening of checks at external frontiers." They recommend two mechanisms—one entitled "ad intra" which are the measures needed within the EU to achieve the abolition of border controls. The other they called "ad extra" which relates to external border controls.

Looking then, at the ad intra facet, the Coordinators call for three sets of measures which are central to the current area of freedom, security and justice:

- Combating terrorism, drug trafficking and other illicit trafficking: the creation of an area without internal frontiers, in accordance with the Treaty, will require checks at the external frontiers to be tightened up which will involve increased inter-governmental cooperation.
- Improved cooperation on law enforcement: this improvement will in particular involve closer cooperation between the member states' law enforcement agencies, and an improved system for exchanging information.
- Judicial cooperation: judicial cooperation should be intensified, particularly in criminal matters, in order to combat terrorism, drug trafficking, crime and other illicit trafficking. In this context, the possibility of harmonizing certain provisions should be studied.

Just as the deadline for the abolition of intra member state border controls approached, the EU embarked on a new intergovernmental conference which finished in 1991 and resulted in the Maastricht Treaty which reframed very substantially the EU (indeed, the EU per se was only created as a result of the Maastricht Treaty). The famous pillar structure of the EU was created through a new treaty—the Treaty on European Union (TEU). The original three treaties were stuffed into the so called "first pillar," the only one with legal personality; the common foreign and security policy inhabited the shadowy "second pillar" and the "third pillar" covered justice and home affairs, issues stretching from immigration and asylum to policing and drug trafficking.

It is worth noting at this point, that the Coordinators recommended to the Council that terrorism and drug trafficking remain inter-governmental. Cooperation on law enforcement they considered in effect as a practical matter which required law enforcement agencies to speak to one another. Judicial cooperation in criminal matters was tied to combating terrorism and here the Coordinators envisaged the possibility of harmonization. At least it was a subject to be studied. In the event, in the 1991 Treaty, everything went into the third pillar which was definitely intergovernmental in form—run by the member states (primarily the justice and interior ministries)—sheltered from the inquisitive eye of the European Parliament which was entitled only to an annual report; and protected from judicial control by the ECJ. The result may have been satisfactory for some of the actors in the Union but was a source of great friction between and among the EU institutions whose competences were chopped up and divided and the EU institutions and many non-governmental organizations which demanded greater transparency, democratic and judicial accountability.

The 1999 Compromises

The shape which the EU took once the Maastricht Treaty came into force in 1993 (the delay a result of a rejection by referendum in Denmark) did not actually last that long. By 1996 a new intergovernmental conference was opened the purpose of which was to achieve a greater degree of institutional and structural order in the EU. A number of fundamental flaws were appearing in the fabric of the

EU—judicial challenges among the institutions regarding their competence for policy areas split between the first and third pillars (see for instance ECJ case C-170/96 *Commission v. Council* 12 May 1998 on the correct legal basis for airport transit visas) and between the Parliament and just about everyone else over the right to participate in the law making process in the split first and third pillars (see for instance C-392/95 *Parliament v. Council* 10 June 1997 on the legislative procedure regarding the visa list) were cropping up regularly. The result being that the ECJ was ultimately responsible for determining the political structure of the EU.

Another source of trouble was the development of the Schengen area and *acquis*. As the objective of the Schengen Implementing Agreement 1990, the lifting of intra party border controls on the movement of persons, was finally realized in March 1995, and ever more member states became parties to the Schengen system, in the end leaving only Ireland and the UK outside, the EU objective of lifting intra member state border controls on the movement of persons was realized outside the EU but among most of the member states (Brouwer 2007). This perverse situation was made possible through an ever increasing amount of secondary legislation drawn up in the Schengen Secretariat to enable the system to work. However, this mass of measures was a dreadful jumble of policy decisions, operational instructions and determinations of specific cases, just to name a few. The insertion of the whole body into the EU was increasingly seen as a highly desirable outcome.

The result in the Amsterdam Treaty was quite dramatic. A new objective was inserted—the creation of an area of freedom, security and justice. First, immigration, asylum and border control was moved (almost entirely) out of the third Pillar into the first. Secondly, the third pillar (until then titled "Provisions on Cooperation in the Fields of Justice and Home Affairs") was renamed "Provisions on Police and Judicial Cooperation in Criminal Matters." The third pillar was made subject to the scrutiny of the European Parliament and judicial control by the ECJ—though by a rather peculiar *ad hoc* system whereby the member states had to opt in to judicial control by the ECJ. Thirdly, the Schengen *acquis* (that is everything that anyone was able to identify as belonging to the Schengen treaties and their implementing measures) was transferred into the EU either as part of the first pillar or if agreement was not reached that it had a legal basis in the first pillar then by default in the third pillar. One can well imagine just what an exact art it was to determine which bits belonged where. The Commission announced that as far as the first pillar measures were concerned it would be rapidly proposing proper EU legal measures—directives or regulations to replace the somewhat heterogeneous Schengen *acquis*. Finally, reference was made in the EU Treaty (third pillar) to EUROPOL and the relationship of the EU with the institution which was designed to facilitate police cooperation (article 30 (1) (c) TEU).

Sadly, this reorganization of the deck chairs did not resolve the problems of creating the area of freedom, security and justice. The intergovernmental legacy was still too strong. The addition of the Schengen *acquis* exacerbated the intergovernmental problems which beset the area. Elsewhere we have identified these key problems as follows (Guild 2006):

- Operational data and transparency: complaints to the EU Ombudsman and decisions of the ECJ have resulted in new and wide rules on transparency regarding documents in the possession of the Council. The principle in favor of transparency means that to reserve a document there must be a decision on the basis of the facts of each case. This is time consuming;
- Operational action and legislative weakness: the lack of a firm legislative procedure with a mechanism to control what is on the agenda has resulted in a rather heterogeneous list of measures adopted on the initiative of the member states in response to national or local concerns in the Council's Police Cooperation Working Party.
- Operational decisions first, legal bases later: where there is a need identified for a body to coordinate an activity, all too often one is created without regard to the available legal base;
- Operations, legislative and judicial supervision: when Schengen was inserted into the EU and police and judicial cooperation in criminal matters were divided between the first and third pillars, different rules of jurisdiction of the ECJ apply to the fields depending on where they are.

Until these problems would be addressed, there would be deep divisions among the member states about how to act in the field.

Mutual Recognition as the Organizing Principle

The organizing principle which was adopted for police and judicial cooperation in criminal matters was mutual recognition rather than approximation or harmonization (Mitsilegas 2006). This principle was strongly supported by a number of member states though the Commission was less enthusiastic about it (Wasmeier and Thwaites 2004). The institutions have returned frequently to the issue of mutual trust—itself a manifestation in the field of police and judicial cooperation in criminal matters of inter-governmentality (Mitsilegas 2006a). The principle is that rather than harmonize an area of law, member states can retain their national rules. In order to make the national rules fit together after a fashion, they agree that they will accept as equivalent the decision, practice or measure of one member states for the purposes of its effects in another (Peers 2004).

According to the Commission's Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between member states[2] "reinforcing mutual trust is the key to making mutual recognition operate smoothly." The Commission suggests that mutual trust can be reinforced by legislative and flanking measures.

Under legislative measures it suggests:

a) improving guarantees in criminal proceedings—a reference to the stalled framework decision proposal;

2 COM (2005) 195 final, 19 May 2005.

b) presumption of innocence—a human right in article 6 ECHR—recognized as not being co-extensive across the Union;
c) minimum standards on gathering evidence in criminal cases;
d) decisions *in absentia* (where the defendant is not present at the trial);
e) transparency in the choice of court—fundamentally linked to the *ne bis in idem* principle;
f) further approximation of substantive criminal law.

Under flanking measures it recommends:

a) reinforcing evaluation mechanisms—this includes evaluating the specific practical needs of the justice system;
b) identifying barriers before new instruments are adopted;
c) specific practical conditions for implementation, in particular best practices;
d) a general evaluation of conditions in which judgments are produced to ensure high quality;
e) promoting networking among practitioners of justice and developing judicial training;
f) support for the development of quality justice—to provide funding for contacts and exchanges between practitioners, strengthening judicial training and improving access to justice.

Commissioner Frattini, in welcoming the Communication, stated: "the principle of mutual recognition of judicial decisions is the cornerstone of judicial cooperation, but mutual trust between member states is the necessary adjunct, the key to its success. Nobody can impose trust: it has to be built up bit by bit."[3]

The list of things needing to be done is impressive. It is hard to imagine trying to get a system of mutual cooperation in criminal matters going without many of these issues being resolved, such as decisions *in absentia*. Condemning a person in a criminal trial where he or she is not present is high contentious in many member states. The rules around when this is permissible and when it is not differ substantially (Alegre 2003). Thus one might think it would be unwise to proceed with a system of mutual recognition of criminal decisions before this matter has been resolved. None the less it is exactly in this manner that the EU went forward in the field.

The key measure adopted by the EU in judicial cooperation in criminal matters is the framework decision on the European arrest warrant (EAW).[4] This measure, which sped through the legislative process aided by a political argument that it was needed for counter terrorism purposes, replaces the system of extradition among the member states (Wouters and Neart 2004). The EAW, on the basis of the principle of mutual trust, provides that where an individual is present in one member state but is sought in another member state to stand trial or to serve a

3 Press Release, IP/05/581, 20 May 2005.
4 OJ L 190 18 July 2002.

criminal sentence, the second member state authorities may issue an EAW for the individual to be handed over whereupon the authorities of the other member states must arrest and surrender the individual with limited procedural guarantees (Guild 2006). There is no approximation of rules about trials *in absentia*.

There are three main ways in which the EAW system differs from classic extradition. First, for a list of 32 offences contained in the framework decision there is no need to check that the offence is also an offence in the second member state—the double criminality requirement. Secondly, member states are obliged to extradite their own nationals, something which was contrary to a number of member state constitutions; and thirdly, there is no political offence exception. All three key transformations of the extradition process are based on a presumption that the member states trust one another. They must trust that the definition of offences in one member state's national law reflects that of another. They must be confident that their own nationals will receive a fair trial in the other member state and thus partially abandon their constitutional duty to protect the citizen (as that duty has been interpreted in some but not all member states). They must be confident that the criminal justice systems of all other member states are not tainted by political considerations which might prejudice the fairness of the charges or trial. This is a tall order for trust among states let alone individuals, particularly when the EAW was not accompanied by what many considered to be the necessary complimentary measure—a framework decision on the rights of suspects and defendants (Morgan 2003), let alone the resolution of all the issues set out by Commissioner Frattini above.

In its first substantive judgment on judicial cooperation in criminal matters, the ECJ acknowledged the mutual trust principle as a foundation of the field.[5] The specific situation related to the *ne bis in idem* provision of the Convention Implementing the Schengen Agreement 1990 (CISA). It held:

> In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied. For the same reasons, the application by one Member State of the *ne bis in idem* principle, as set out in Article 54 of the CISA, to procedures whereby further prosecution is barred, which have taken place in another Member State without a court being involved, cannot be made subject to a condition that the first State's legal system does not require such judicial involvement either.

The ECJ repeated its finding again in *van Esbroeck*[6] stating:

> There is a necessary implication in the *ne bis in idem* principle, enshrined in that article, that the Contracting States have mutual trust in their criminal justice systems and that

5 C-187/01 *Gözütok and Brügge* 11 February 2003.
6 C-436/04 *Van Esbroeck* 9 March 2006.

each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.

The problem is that mutual trust is perhaps more evident in the declarations than the practices of the member states (Mitsilegas 2006a).

Mutual trust finds a central place in the opinion of Advocate General Sharpston in *Gasparini*[7] again a case regarding the application of *ne bis in idem*. She considered the ECJ's finding that the *ne bis in idem* principle implies the existence of mutual trust among the parties in respect of each other's criminal justice systems. The legal consequence of mutual trust then is the fact that different legal classifications in the criminal justice systems of the member states should not be an obstacle to the application of the principle. She noted that while in *Gözütok* and *van Esbroeck* the ECJ treated the lack of harmonization of national criminal codes and procedures as no obstacle in applying *ne bis in idem* in other cases it has taken a different approach requiring a decision on the merits. She also noted a tension between *ne bis in idem* as requiring only unity of the legal interest protected and its construction as a fundamental principle of EC law requiring a threefold unity of identity of facts, unity of offender and unity of the legal interest protected. In her opinion, Sharpston argued for a limitation of the mutual trust principle which she considered would permit, at least in the field of *ne bis in idem*, criminal jurisdiction shopping for instance to find a non-time barred jurisdiction or the opposite.[8]

Advocate General Colomer, in his opinion in *Advocaten voor de Wereld VZW*[9] regarding the European arrest warrant also struggled with the concept of mutual trust in the area of freedom, security and justice, though when the ECJ handed down its judgment it was less concerned with this aspect. He considered that inspired by mutual trust cooperation, this field is based not on the coming together of separate interests but on the common provision—the EAW itself. He places mutual trust also in the framework of subsidiarity and proportionality in effect if there is mutual confidence and the reciprocal recognition of judicial decisions then a joint approach is justified notwithstanding the subsidiarity principle.

One of the more telling statements in his opinion on the issue of mutual trust relates to mutual distrust—at para. 80 he stated, regarding the need for the ECJ to give interpretative authority to the EU Charter of Fundamental Rights: "in that way it might be possible to avoid repeating past misunderstandings with national courts which have been reticent about the capacity of the Community Institutions to protect fundamental rights."

When the judgments came out in *Gasparini* and *van Straaten* (both on the same issue and both published on 28 September 2006), the trust of the accused is

---

7 C-467/04 *Gasparini* 15 June 2006 (date of opinion).

8 On this basis Sharpston continued, variations in age of criminal responsibility should not be the subject of an application of mutual trust which would bar prosecution where the age limit is offended in one member state but not in another.

9 C-303/05 *Advocaten voor de Wereld VZW* 12 September 2006 (date of opinion).

given a high level of respect by the ECJ. Most telling is the Court's statement "[Ne bis in idem] ensures that persons, who, when prosecuted, have their cases finally disposed of are left undisturbed" (para. 27). The justification for the tranquillity of the individual is found in para. 30 of the judgment:

> There is a necessary implication in the *ne bis in idem* principle, enshrined in Article 54 of the CISA, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.

The Court's judgment in *Advocaten voor de Wereld VZW* presents a somewhat different picture of the debate. So far it is the only decision from the ECJ on the subject, though a number of national constitutional courts have considered the legality of the national measures which transpose the EAW framework decision, not always favorable for the member state (Guild 2006). The ECJ, however, considered that:

> The mutual recognition of the arrest warrants issued in the different Member States in accordance with the law of the issuing State concerned requires the approximation of the laws and regulations of the member states with regard to judicial cooperation in criminal matters and, more specifically, of the rules relating to the conditions, procedures and effects of surrender as between national authorities. (para 29)

Already one can see that the ECJ is concerned about the approximation of the effects of surrender. The use of the word approximation is politically charged as it is one of the alternative organizing principles to mutual recognition (Peers 2004). While approximation does not go as far as harmonization, it at least indicates that trust is based on legal elements which go beyond statements of officials of what may (or indeed may not be) equivalent for the purposes of mutual recognition. None the less, the ECJ did not consider inadequate the list of 32 offences in respect of which the requirement of double criminality no longer applies in the EAW.

At the same time that the principle of mutual recognition in criminal matters began to raise serious issues, a small group of member states decided to push ahead with their own version of mutual recognition in the field of police cooperation—the Prüm Treaty 2005. Here five member states—Austria, France, Germany, the Netherlands and Spain entered into an agreement which provides for exchange of police information and data in a wide field (Balzacq et al. 2006). This treaty, parts of which are also now the subject of a proposed Council decision which, if adopted, would move them into the EU, avoids both the idea of approximation and harmonization. It is only concerned with mutual recognition and primarily concerned with improvement of police cooperation. It is, however, popular, quite a number of member states have expressed an interest in joining the treaty and the proposal for a Council decision has substantial support.

The Reform Treaty does not change substantially the emphasis on mutual recognition in this field but approximation has an enhanced position in relation to it. It will certainly be possible, depending on the political will of the member states and the political and judicial pressures which may arise in the area to move towards greater legal certainty in judicial cooperation in criminal matters. While this would undoubted be political sensitive and slow, in the longer term it would enjoy greater legitimacy. However, as examined in the next section, there are still major obstacles to a common understanding of the role of criminal law in the member states. These differences may make the attempt to create an area of freedom, security and justice in these fields particularly complicated.

A Common Area of Police Cooperation and Judicial Cooperation in Criminal Matters?

The EU's area of freedom, security and justice in the field of police and criminal matters depends on coherence in our understanding of what policing is and how criminal justice works. If the social understanding of the two are not sufficiently coherent then the area's organizing principle of mutual recognition will prove also its Achilles heel (Wasmeier and Thwaites 2004). In order to examine a little further the extent of convergence in member states' understanding of criminal justice it is useful to have regard to the way in which criminal justice is delivered in the member states. Here the Council of Europe's report *European Judicial Systems* (edition 2006) of the European Commission for the Efficiency of Justice (CEPEJ) is invaluable.

If one starts with the number of courts per 100,000 inhabitants competent for a robbery trial, it appears that in Austria the figure is 0.19 while in Bulgaria it is 1.87 and in Spain it is 3.45. Clearly there is a quite substantial difference in the perceived need for courts with this type of jurisdiction depending on which member state one considers. More striking is the comparison of numbers of criminal cases dealt with by public prosecutors in 2004. Taking the same criterion, the number per 100,000 inhabitants, a short table of only some member states reveals the picture shown in Table 1.1.

Clearly, Denmark uses its criminal court system to a much greater extent than Latvia does. It would seem that the role of criminal justice in the regulation of disputes in these states is substantially different—thus the needs of criminal courts must vary substantially. The numbers of persons who find themselves engaged in criminal court cases will also be very different. For instance, in Denmark there is a 16 per cent chance of an individual being involved as a defendant in a criminal case each year while in Latvia it is 0.6 per cent. The relationship of the society with the criminal justice system is informed by the frequency with which the members of the society find themselves engaged with that system. Such a substantial difference indicates quite a different engagement. The relationship of convictions and acquittals is also interesting to note in different member states. These figures are not presented by reference to number of inhabitants but are interesting by comparison to one another (see Table 1.2).

Table 1.1 Numbers of criminal cases dealt with by public prosecutors in 2004

Country	Number of first instance criminal cases received by the public prosecutor per 100,000 inhabitants (2004)
Austria	7,697
Czech Republic	1,093
Denmark	16,531
Estonia	2,522
Finland	1,680
Italy	5,454
Latvia	669
Luxembourg	10,630
Portugal	4,739
Spain	9,214
Sweden	2,055

Table 1.2 Criminal cases in court 2004

Member state	Convictions	Acquittals
Bulgaria	57,383	2,953
Denmark	131,298	–
Finland	54,018	3,486
France	1,115,823	47,800
Germany	442,356	37,243
Latvia	13,222	209
Netherlands	126,174	6,353
UK	1,548,500	50,948

While in France there are more than twice as many convictions of individuals as in Germany, the number of acquittals is only 10,000 apart. Bulgaria and Finland have fairly similar numbers of convictions but the acquittal rates diverge. While Latvia may not bring many people before its criminal courts, it has a low acquittal rate. The UK has substantially more convictions even than France but its acquittal rate is only marginally higher. The relationship of acquittals and convictions may provide some indication of the relative importance which various member states place on achieving an EU measure on the rights of the defence. It is clear that different countries achieve quite different outcomes in respect of their criminal justice systems.

The number of public prosecutors per 100,000 inhabitants also gives some indication of the variations which exist among the member states. For example, in Austria there are 2.6 while in Cyprus there are 15.5. In Denmark one finds 10.4 while in Latvia there are 26.0. In the Netherlands there are only 3.7 while in Scotland there are 28.1. Clearly different member states and jurisdictions consider there are very different needs for prosecutors as a percentage of the population. It is surprising, though, when one compares Denmark and Latvia that one finds so many prosecutors in Latvia but few criminal cases and few convictions while in Denmark there are fewer prosecutors but many more criminal cases.

Another interesting comparator examined in the Council of Europe study is the status of judges and prosecutors by reference to their levels of pay. In Ireland, for example, the gross annual salary of a first instance profession judge at the beginning of his or her career is €125,563 while that of a prosecutor is €57,630. In Sweden the comparable figure is €23,364 for a starting judge and €38,000 for a prosecutor. In Slovakia the figures are for a judge €17,632 and a prosecutor €12,750. In Poland and Germany however, both judges and prosecutors start at the same level, for Poland €11,633 and for Germany €38,829. In France there is only a small difference: judges start on €49,095 and prosecutors on €50,923. In Denmark, however, judges start on €83,000 and prosecutors on €40,191. Of course these figures are only meaningful in the context of the way in which the different services are organized. But it is important to note that the differences in salary levels between the two professions do not follow the traditional divisions regarding systems of law. Clearly, the duties and roles which prosecutors and judges perform in the member states vary substantially and are remunerated very differently. One must then ask the question whether a decision made by a prosecutor in Slovakia should be equivalent in legal force to that of one made in Sweden. On the basis of their comparative salaries, clearly the Swedish prosecutor is more highly valued in relation to the judge than in Slovakia where the judge is more highly valued in terms of pay.

Clearly, it is not for the EU to seek to establish a hierarchical scale of pay for judges and prosecutors in the member states. However, it is incumbent on the EU to recognize that there are very fundamental differences in the importance of different actors in the criminal justice systems of the member states. The holy grail of trust among the member states will be hard to achieve if this difference which, one must suspect, is reflected in the relative authority of the different actors in the national system is not taken into account.

Conclusions

After having outlined origin, purpose and structure of this book, we have reviewed in this chapter where the EU's engagement with judicial cooperation in criminal matters has come from. We have plotted the gradual development of policy spheres then laws in the area over a period of 20 years. In doing so the importance of the abolition of border controls among the member states on the movement of persons has been central as a catalyst. Not least as a result of this starting place,

the organizing principle of mutual recognition based on trust appears increasingly inadequate for the job. At the heart of the challenges which confront the EU in this field is the diversity which is inherent in it. We have highlighted this diversity through the very divergent figures on criminal systems in the member states. On account of this quite impressive diversity, it is clear that mutual recognition as the operative tool is not satisfactory. When the role performed by the criminal justice systems of the member states differs so dramatically, all efforts to reduce or abolish the effects of jurisdictional limits, the equivalent of border controls for the movement of persons, must be based on a sound understanding of the effect that any measure will have in each member state. This can only be possible on the basis of approximation, where the elements of the criminal justice system are painstakingly assessed and evaluated and only then are they given an equivalence dependent on their effects on the individual and within the community.

References

Alegre, S. (2003), "Human Rights and the Future of Extradition in the European Union: Implications of Recent Case Law in the United Kingdom, France and Spain," *ERA Forum*, vol. 4 no. 4, 63–69.

Balzacq, T., Bigo, D., Carrera, S. and Guild, E. (2006), *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, Working Document no. 234 (Brussels: Centre for European Policy Studies).

Brouwer, E. (2007), *Digital Borders and Real Rights; Effective Remedies for Third Country Nationals in the Schengen Information System* (Nijmegen: Wolf Legal Publishers).

Fijnaut, C. (2004), "Police Cooperation and the Area of Freedom, Security and Justice," in Walker, N. (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: Oxford University Press), pp. 241–82.

Guild, E. (2004a), "Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice," *European Law Journal*, vol. 10 no. 2, 218–34.

Guild, E. (2004b), "The Variable Subject of the EU Constitution, Civil Liberties and Human Rights," *European Journal of Migration and Law*, vol. 6 no. 4, 381–94.

Guild, E. (ed.) (2006), *Constitutional Challenges to the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers).

Mitsilegas, V. (2006a), "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", *Common Market Law Review*, vol. 43 no. 5, 1277–1311.

Mitsilegas, V. (2006b), "Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance," in Balzacq, T. and Carrera, S. (eds), *Security versus Freedom? A Challenge for Europe's Future* (Aldershot: Ashgate, 2006), pp. 279–89.

Morgan, C. (2003), "Proposal for a Framework Decision on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union," *ERA Forum*, vol. 4 no. 4, 91–99.

Peers, S. (2004), "Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?," *Common Market Law Review*, vol. 41 no. 5, 5–36.

Wasmeier, M. and Thwaites, N. (2004), "The 'Battle of the Pillars:' Does the European Community Have the Power to Approximate National Criminal Laws?," *European Law Review*, vol. 29 no. 5, 613–35.

Weyembergh, A. (2005), "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme," *Common Market Law Review*, vol. 42 no. 6, 1567–97.

Wouters, J. and Naert, F. (2004), "Of Extradition Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after '11 September,'" *Common Market Law Review*, vol. 41 no. 4, 909–35.

Actors

This page intentionally left blank

Chapter 2

Security, Freedom and Accountability: Europol and Frontex

Sonja Puntscher Riekmann

From time immemorial security issues have been driving forces for the integration of political communities and the centralization of political power. This holds true not only for external but as much as for internal security which is to be achieved by maintaining public order, combating crime, and border control. Modern states were mainly formed by warfare and by securing the life and the property of their subjects (Weber 1922; Tilly 1975; Tilly 1992). Hence, policing became a central feature of statehood and intelligence an instrument of utmost importance. However, in the course of the republican and democratic revolutions the powers of the Hobbesian Leviathan were balanced by institutions capable of ensuring civil liberties, political participation and the rule of law. Thus, the subjects became citizens enjoying the right to be protected *by* the state, but also *against* the state. This paradox can never be ultimately resolved, but has to be tackled by ever new compromises to be deliberated and negotiated in democratic institutions. The outcome will depend on the contingencies of historical developments, tending towards greater freedom in times of peace and stability as well as to the contrary in times of war and unrest. Since its inception, the state has defined internal and external security as core matters of sovereignty, in particular with regard to the question of who rules in the state of emergency. European integration has slowly but continuously changed this reality by gradually shifting security issues onto the European level in reaction to the rise of problems such as international organized crime, terrorism, and illegal immigration. The process has been steady and cumbersome, whereas member states have chosen different forms of cooperation within and outside European law and institutions, one important feature being the creation of (more or less) independent agencies in particular to carry out the tasks of data collection and exchange (McGinley and Parkes 2007). The institutional choice gives reasons to question its quality in terms of democratic control regarding the preservation of civil liberties or their constraints. Democratic control is first and foremost dependent on the modes of accountability governing the agencies in question.

In the first decades of European Union history these aspects did hardly play a role, the TREVI cooperation on terrorism (1975) being the sole early experience in that respect. Being set up in the wake of the terrorist killings at 1972 Olympic Games in Munich and the rise of drug problems in Europe this rather loose form