

The Impact of Enlargement on Justice and Home Affairs

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Panel 11C
Enlargement: Implications for the European Union (Chair, Neill Nugent)

The long-expected enlargement of the European Union (EU) has been one of the most important influences on the development of justice and home affairs (JHA) in the EU since the very creation of the third pillar. Combined with EU's fundamental goal of promoting free movement within its borders, enlargement has posed many challenges for the internal security of the European Union. This paper begins with an examination of these challenges and demonstrates how enlargement has impacted the development of the JHA in three main time periods, namely evolution of the Treaty of Amsterdam, progress following the Tampere European Council of October 1999, the acceleration of cooperation after the terrorist attacks on the United States of September 11th, and the final preparations for enlargement that are now underway. The paper concludes with a brief consideration of the future of JHA in the EU, including the prospect that the ongoing European Convention will ultimately lead to a new approach for policy-making on JHA in a reformed European Union (whatever it may be called).

The Challenge of Enlargement to JHA

From the beginning, the addition of new member states has posed a threat to the internal security of the European Union. This has stemmed from the nature of transnational organized crime in Europe, the prospect of an enlarged Schengen free-travel area, the status of Candidate States a source- or transit-countries for transnational crime, the shifting responsibility for the EU's external border security to many of these states. It has also resulted from the need to coordinate and share information among an even greater number and variety of crime-fighting agencies, as well as to overcome differences among contending criminal codes in more

countries. Before demonstrating how these challenges have influenced the development of justice and home affairs in the EU since the creation of the third pillar, each issue will be briefly examined.

The member states of the EU have tried to deal with the common problem of transnational organized crime since the 1970s. Initially, this was attempted wholly intergovernmentally and outside the Treaties of Rome in the form of the Trevi Group. At the time, the main concerns regarding transnational crime were for terrorism and drug trafficking. Both types of crime entailed significant cross-border dimensions and had sources lying both inside of some member states, as well as outside of Europe. In the 1980s, pressure to perfect the common market and promote the free movement of goods, services, capital, and labor led to the inception of the Single European Act and Schengen Convention.

These, in turn helped provide the impetus for the creation of the third pillar covering JHA in the new "European Union," created by the Maastricht Treaty. Among its provisions on fighting crime was its prescription to establish a European Police Office, known as "Europol." This would be based on a liaison network and a shared data base used to help investigate transnational crimes and coordinate law enforcement activities. However, delays in drafting and ratifying the required Europol Convention and its related protocols meant that Europol would not become fully operational until July 1, 1999.

Meanwhile, in the immediate aftermath of the Cold War, illegal immigration and the related problem of the trafficking of human beings joined terrorism and drug trafficking as major transnational crimes impacting the internal security of member states. By the time the Maastricht Treaty entered into force and the third pillar was created in November 1993, other crimes with significant cross-border components had become significant problems as well in

Europe, including, for example, the trafficking of nuclear substances and stolen automobiles, cigarette smuggling, and counterfeiting.

These and other forms of transnational crime have long been problematic for the EU, mainly because organized crime groups have been able to operate across national boundaries, while law enforcement authorities have faced many barriers preventing their ability to do the same. One restriction has been the existence of different criminal codes among the member states of the EU, entailing different definitions of crimes and sanctions for these. This has inhibited the ability of policing agencies to agree on when and how to cooperate on crime fighting and whether to extradite suspects who may be apprehended. With criminal organizations operating in several countries simultaneously, the member states of the EU have also endeavored to exchange information, coordinate investigations, or share best practices for crime fighting.

The implementation and gradual expansion of the Schengen free travel area after 1995 only made these tasks more daunting for the member states. The movement of people and goods across national borders without any physical barriers to impede them turned out to be a boon for organized crime. Thus, while criminals and their illicit cargos moved freely across borders in the Schengen zone, national and sub-national crime-fighting agencies continued to be limited by their geographic jurisdictions.¹ At the same time, the Single Market's provisions for free movement of capital also facilitated the transfer and laundering of criminal revenues.

In the context of these developments, the EU's expansion to the Central and Eastern European Countries (CEECs) has presented several challenges for its procedures and policies on JHA. By the mid-1990s, it was clear that these prospective members had become important source- or transit-countries for a wide variety of transnational crimes, including those originating

with organized crime groups based in Russia, the western Balkans, and the CEECs themselves. Combined with this was the fact that the criminal justice institutions in many of the candidate states were relatively weak, which inhibited their ability to fight crime and control their borders effectively. This was especially problematic given the likelihood that these future members would one day join the Schengen zone and take on the responsibility of policing the land, sea, and air boundaries of the free travel area with non-member states.

Thus, enlargement meant that the EU would take in crime problems that would impact existing member states more than ever before. That is, organized crime groups already operating in the new member states would be able to extend their endeavors into the established member countries. At the same time, the transnational crime groups located outside of the EU or Europe would find it easier to use the CEECs as transit states for entry into the lucrative criminal markets of Western Europe.

In this way, the addition of new member states would only add to the EU's existing problem of dealing with shared borders, which was already proving troublesome in the absence of properly developed common policies on immigration and asylum. In addition, the admission of new member states promised to exacerbate the difficulty of fighting transnational organized crime by coordinating the activities of policing, intelligence, and border security agencies. Likewise, enlargement would also make it more difficult for the EU to resolve differences among its members' criminal codes, for the variety of definitions and sanctions for some crimes would only increase with each new member country.

The Impact on the Treaty of Amsterdam

The challenges of EU enlargement for its internal security helped shape the Treaty of Amsterdam's modifications regarding justice and home affairs. The prospect of adding new members and expanding the Schengen free-travel area contributed to new resolve among EU member states to cooperate more effectively on JHA. This was necessary not just to strengthen the EU's internal security mechanisms, but also to make as much progress as possible before the addition of new member states made decision-making more complicated. Although this was true of virtually every area of EU policy, the need to make progress ahead of widening its membership was especially true for the third pillar, given that it remained relatively underdeveloped. Moreover, its intergovernmental approach was expected to endure, at least in the near term, meaning that decision-making in the JHA Council would be more difficult with the addition of new member states.

The increasingly evident crime problem in Western Europe (impacted by crime in the CEECs) was exacerbated by concerns over the post-Cold War refugee problem in the EU and came at a time of economic recession for most member states. For European leaders, strengthening cooperation on JHA offered them a new way to fight crime, as well as a means of placating publics that demanded that something should be done. The Treaty on European Union (TEU) had, itself, only been in force since November 1993, yet conditions in Europe had changed substantially since the Maastricht Treaty was negotiated and signed in the early 1990s. By 1996, the CEECs seemed on the path to eventual accession, but their criminal justice institutions had proved unable to deal with rising crime, which was, by then, impacting Western Europe as well. During this time, the EU had also experienced a refugee crisis stemming from the conflict in the Western Balkans. In addition, by 1995, the Schengen free travel zone had

been created for its original five signatories, plus Spain and Portugal. This suddenly enabled criminals, including transnational organized crime groups based in the CEECs and former Soviet states to have freedom of movement not enjoyed by the police. In essence, the external phenomena of enlargement pressure and crime stemming from the CEECs, combined with the functional spillover from cooperation on free movement, provided added impetus for the EU to increase its cooperative efforts on JHA.²

By 1996, these pressures had contributed to a desire to reform the third pillar as part of the IGC that began in March 1996. Although these modifications fell short of expectations (as with the hopes for broader institutional reform of the EU), the resulting Treaty of Amsterdam, unveiled in June 1997, changed JHA in a number of ways. The new treaty established the goal of a creating an “Area of Freedom, Security, and Justice,” and entailed a number of amendments to the TEU to bring this about. First, the entire Schengen *acquis* was to be brought into the TEU, with the provision that it would not apply to the UK or Ireland, unless they chose to opt-in at a later date. Given that a free-travel area that already existed among the five Scandinavian states, special provisions were included to allow the participation of the two non-EU members in Schengen zone, namely Iceland and Norway.

Second, the Treaty of Amsterdam established the goal of moving all free-movement-related aspects of the third pillar to the first pillar by 2004 (e.g., the Schengen *acquis*, visas, immigration, asylum, etc). This eventual “communitization” of policy-making on these matters would eventually entail the power of co-decision for the EP, qualified majority voting (QMV) in the Council, and the sole right of initiative of legislative proposals for the Commission. The Treaty also provided the possibility that communization could be done sooner than this for any of these items, provided that the Council could decide unanimously to do so.

In addition, the EU's third pillar (i.e., Title VI of the TEU) was renamed, "Provisions on Police and Judicial Cooperation in Criminal Matters," having been stripped of its articles related to free movement. In this regard, the Treaty of Amsterdam bestows the right of initiative on the Commission for all JHA matters, but it must share this power with individual member states for issues in Title VI. The Council continues to vote by unanimity, but may decide upon implementation measures using the QMV. The EP has been granted the right of consultation, meaning that the Council must at least wait for Parliament's opinion on a proposal before deciding definitively on the item.

An important legislative innovation of the Treaty of Amsterdam for the third pillar was the mechanism of the "framework decision," which is intended to facilitate the approximation of criminal laws in the member states (e.g., regarding definition of crimes, lengths of criminal sentences, etc.). Similar to the "directives" of the first pillar, framework decisions are binding on the member states but do not entail direct effect. This means that national authorities are left to decide the particular form of legislation to achieve the intended results of the EU legislation. Just as the EU attained its Common Market mainly through the use of directives, it was hoped that framework decisions, once transposed into national law, would enable the EU to achieve the newly prescribed AFSJ.

Soon after the Treaty of Amsterdam entered into force on March 1, 1999, the EP approved Romano Prodi's nomination as Commission President, and he assembled his new team, including Portugal's António Vitorino as the new Commissioner for JHA. Concerning the prospect of making progress on JHA, Vitorino has enjoyed three distinct advantages over his predecessor, Anita Gradin. Compared to her, Vitorino was more experienced on JHA matters and surrounded himself with a more competent cabinet.³ Second, the Treaty of Amsterdam gave

the Commission the ability to be pro-active on shaping JHA policy, though it still had to share its right of initiative with individual member states. Third, to facilitate the Commission's new role, a Directorate-General (DG) was finally created for JHA policy within the Commission's bureaucracy and placed under the direction of Adrian Fortescue of the UK.⁴ All of this has increased the overall role of the Commission on JHA matters, which was intended to help expedite the realization of the AFSJ before the impending enlargement both exacerbated the problem of transnational crime and made decision-making more difficult.

Propelling Events after the Tampere European Council

Soon after the Treaty of Amsterdam took effect and with twelve countries officially recognized as candidate states for accession (at the time), the Finnish Presidency hosted a special meeting of the European Council devoted to forging new progress on JHA. Held in Tampere on October 16, 1999, this summit is notable not only for what it prescribed, but also for the resulting strategy by which the EU would achieve many of these goals. The conclusions of the Tampere European Council laid down ten general "milestones" for progress toward the AFSJ, subdivided into sixty-two more specific points of action. Many of these items had already been proposed in previous EU action plans on JHA, but others were new, including proposals for the creation of new bodies aimed at helping member states better fight crime. Among these was a European judicial unit ("Eurojust"), which would serve as the nexus of a liaison network of national criminal prosecutors.

In addition, the Tampere milestones emphasized that the AFSJ should be established on the principle of "mutual recognition" in criminal matters. This entails the mutual recognition of criminal laws and judgments on JHA matters, just as the EU's Common Market has been built

on the application of mutual recognition of standards regarding health and safety that could otherwise be used to impede the free flow of goods. In this regard, for example, the Tampere European Council proposed the virtual elimination of traditional criminal extradition and its replacement with an arrest and surrender warrant that would be mutually recognized throughout the EU (i.e., a Euro-warrant).

As with the Common Market however, mutual recognition on criminal matters would have to be supplemented by some approximation (i.e., harmonization) of criminal law among the member states, and for this, the new mechanism of the framework decision would be used. Together with the principle of mutual recognition, the harmonization of criminal law that would occur through the use of the framework decision would create a new legal infrastructure of crime fighting in EU. This would work in tandem with the newly created JHA institutions to help the EU realize the AFSJ, which needed to be in place before the next enlargement. In addition, progress on developing the JHA *acquis* would serve as a legislative target for the candidate states as they began to prepare for accession.

As noted above, the Tampere European Council was important not only for what it proposed to create, but also for *how* it suggested that the EU implements its objectives on JHA. The summit endorsed the creation of a so-called JHA “Scoreboard” that brought together the goals of the Tampere milestones, along with those expressed in various EU action plans already endorsed by the European Council, but yet unattained. The Commission was charged with creating the Scoreboard, and this eventually took the form of a chart detailing about fifty distinct objectives, specific actions needed to achieve these, the actors responsible for taking these measures, the timetable for doing so, and the current “state of play” regarding progress. In addition, the Commission was also given the responsibility to monitor progress on the objectives,

update the state of play on these, and add any new goals to the Scoreboard as they were adopted. It was hoped that the JHA Scoreboard would foster steady progress toward the realization of the AFSJ, just as the “1992 clock” had helped foster the timely development of the Common Market following the entry into force of the Single European Act.

Beyond the genesis of new objectives and the Scoreboard, the Tampere European Council was also significant for its expression of renewed political will at the highest level of the EU for more progress on JHA. However, as in other policy areas, the mere agreement on ambitious goals by the heads of state and government did not automatically, or even easily, translate into the implementation of actual policies, even with EU moving ever closer to accepting new members. Accomplished according to the plan identified by the Scoreboard, the building of the new institutional and legal infrastructure of cooperation on JHA would indeed take place more rapidly than ever before. However, it would not be without its disagreements among the member states and utter lack of progress in some areas (e.g., immigration and asylum policy).

Throughout 2000, work on the Tampere Milestones continued simultaneously with the IGC on institutional reform. The resulting Treaty of Nice contained little in the way of significant change for justice and home affairs. The most important amendment to the TEU in this regard was its elimination of individual member states’ right to block “enhanced cooperation.” Other JHA matters covered by the new treaty include the nature and role of Eurojust and the partial and deferred switch to QMV voting regarding some aspects of refugee and asylum policy (part of Title IV of the Treaty Establishing the European Community – TEC).

Of course, the broader importance of the Treaty of Nice for the candidate countries was that it kept the promise of accession alive by resolving many thorny issues of institutional reform

that potentially stood in the way of enlargement. In addition, by approving the Commission's roadmap for negotiating with the candidate states and declaring that the EU would be ready for new members by June 2004, the Nice European Council made EU enlargement seem likely in near term, adding to the pressure for timely progress on JHA. Thus, as the EU continued to develop its new legal and institutional infrastructure for JHA, the applicant states were presented with a constantly moving target regarding their goals of accession.

In this endeavor, the applicant states were guided by their accession partnerships (APs), which were drafted in 1998. Concerning JHA, these APs identified the need to reinforce external border facilities in the short-run, as well as meet several longer-term goals, including institution-building and the strengthening of administrative capacity for a whole range of JHA entities (e.g., ensuring sufficient and properly trained personnel for police, courts, etc.). The applicant states were also reminded of the need to reform their asylum procedures, fight organized crime, and, eventually, to adopt and effectively implement the Schengen *acquis*.

The CEECs also participated in the PHARE program, which was re-oriented in 1998 to encompass JHA and began to fund horizontal programs and "twinning" projects (i.e., personnel exchanges). These efforts entailed direct collaboration between member and applicant states, as well the transfer to the latter of technical and administrative know-how to help improve the performance of new criminal justice institutions. In addition, the applicant states also participated in a number of so-called "structured dialogue" sessions with the member states on JHA, resulting, for example, in an important pre-accession pact on organized crime in 1998. This spelled out a number of common objectives and priorities, including the need for candidate states to forge formal ties with Europol prior to their accession.

Justice and home affairs would prove to be among the most difficult and time-consuming issues in the accession negotiations. The six candidate states of the so-called Luxembourg group begin deliberations with the EU in March 1998, but it was not until late in the Portuguese Presidency of 2000 that the EU could even produce draft common positions on JHA for negotiations with these countries, allowing talks on Chapter 24 of the accession treaties to be opened with these states that May. By June 2001, accession negotiations on JHA were under way with all of the candidate states aside from Romania, which would not start talks on Chapter 24 until April 2002.

In the wake of the terrorists attacks on the United States of September 11, 2001, the ongoing accession negotiations with the candidate states took on greater significance. The ability of these countries to control their borders (in the future, with non-Schengen states) and to share information and cooperate with law enforcement in the member states was viewed as being crucial in fight against terrorism. In this context, Hungary became the first candidate state to close negotiations on Chapter 24 (provisionally) in November 2001, followed within a month by Cyprus, Slovenia, and the Czech Republic. The remaining candidate states that were set to join the EU in 2004 closed their chapters of accession on JHA during 2002, with Poland becoming the last do so in July of that year. Accession negotiations on JHA with Bulgaria are scheduled to be concluded before June 2003, while talks with Romania will likely continue beyond this.

JHA and Enlargement after September 11th

If the Treaty of Amsterdam brought the Commission “from the sidelines to the center stage” in JHA policy-making (Uçarar),⁵ then the terrorist attacks on the United States of September 11, 2001 moved the entire field of JHA from off-Broadway to the silver screen. The

shocking images of death and destruction at the World Trade Center and Pentagon propelled internal security to the forefront of the EU and created new political will among the member states to hasten their progress toward the AFSJ. Nevertheless, aside from the freezing of assets of groups and individual suspected of being involved in the attacks, the actions taken by the EU to fight terrorism after September 11th had either already been in its legislative pipeline or had at least been prescribed in the Tampere milestones (or in related actions plans, conventions, etc.). This included the new European arrest warrant and a framework decision establishing a common definition and sanction for terrorism. In other words, the impact of the terrorist attacks on the United States was the acceleration of policy-making on JHA, rather than the inspiration for wholly new endeavors.⁶

Following September 11th, the capacity of the candidate states to adopt the *acquis* on JHA and reform their criminal justice institutions became more important than ever before – and not just because these measures were needed to allow the timely enlargement of the EU and the eventual extension of the Schengen free travel zone. Rather, after the attacks on the United States, new importance was placed on the ability of the candidate states to strengthen their external borders, monitor the travel of third country nations through their territory, and cooperate with police authorities the member states and at the EU-level in overall fight against terrorism (e.g., via Europol and Eurojust). Thus, both in the EU and in the candidate countries themselves, the implications of EU enlargement for JHA became all the more significant after September 11th, helping to expedite progress on a variety of crime-fighting initiatives.

The fight against terrorism temporarily overshadowed the problem of illegal immigration, which had emerged the most prominent transnational crime problem in Europe in the period before September 11th and was the subject of several initiatives on the EU's legislative agenda.

However, as several candidate states continued to be major source- or transit-countries regarding the flow of illegal immigrants, this problem remained high on the EU's internal security agenda, especially as enlargement drew nearer. For example, the regularly scheduled JHA Council session on September 27-28, 2001 featured an open and televised debate with the candidate countries on the trafficking of human beings (THB). This joint meeting of the ministers of justice and the interior from the member and candidate states also served as the occasion for the signing of a twelve-point document of mutual commitment to enhance cooperation and crime-fighting on THB.

In the ensuing Spanish Presidency of 2002, internal security issues continued to top the EU's overall policy agenda. However, as the memory of September 11th began to fade, attention in the EU began to shift away from terrorism and back to the problem of illegal immigration. The first signal of this change came in February when the JHA Council approved a new global action plan to combat illegal immigration and the trafficking of human beings. This served as the start of a series of activities on border control issues that culminated in the Seville European Council in June 2002, which was virtually dedicated to this topic.

The most direct impetus for this renewed attention to illegal immigration was its increased importance in public debate in several member states. This came largely in response to two kinds of forces. The first was the series of dramatic incidents involving the tragic deaths of illegal aliens (e.g., at Dover, UK in June 2000 and Wexford, Ireland in December 2001) and the sudden arrival of boatloads of refugees (e.g., at Sicily in March 2002). The second factor was the apparent rise in support of ant-immigrant political parties throughout the EU in the spring of 2002, notably in France and the Netherlands, coming as some member states were debating tightening national regulations (e.g., Italy and Denmark). These forces, along with pressure from

Spanish presidency and the UK, contributed to the nature and outcome of the Seville European Council, which helped expedite cooperation on issues related to border control, human trafficking, and asylum in the subsequent Danish and Greek Presidencies.

All of this took place as the accession negotiations with ten of the candidate states neared their conclusions and the prospect of a “big-bang” enlargement of the EU in 2004 increased. Although it was recognized that the future EU members would not immediately become part of the Schengen zone upon their accession to the EU, this eventuality contributed to the sense of urgency to develop common policies under the framework of the AFSJ. Although many illegal immigrants found their way into the EU directly, by air, sea, or rail, the candidate states remained important source- or transit-countries for much of this transnational human traffic. As in the past, it was widely recognized that these states would soon share in the responsibility of maintaining the EU’s external borders and protecting its internal security, and that their ability to do so effectively would require having many common policies already in place, as called for in the Tampere milestones. Moreover, adopting the outstanding legislative items on the JHA Scoreboard in this regard would only become more difficult with addition of new member states to the EU, meaning progress had to be made sooner, rather than later.

Crime-Fighting and Border Management in the New EU

When the European Union expands, its new member states must be ready to participate fully in the EU’s emerging institutional infrastructure of crime-fighting, as well as meet its increasingly “Europeanized” standards regarding criminal legislation and the training, strategies, and tactics of crime-fighting authorities. In preparation for this, the candidate states are already associated with many of the new crime-fighting bodies at the EU level and are participating in

various training and exchange programs designed to foster a common police culture for fighting transnational crime. At the same time, the candidate states are trying to make legislative progress to meet their commitments embodied in the accession agreements and to adopt and implement the EU's entire *acquis* on JHA.

The EU itself must prove ready to incorporate the ten additional member states into its new institutional infrastructure of crime fighting, including the management boards that oversee individual bodies. Among the new institutions are the following crime-fighting bodies:

- **Europol.** Based in The Hague and home to a growing staff, Europol is responsible for helping member states to fight a recently expanded list of transnational crimes. Lacking executive policing powers (e.g., the authority to make arrest, use coercive measures, etc.), Europol relies instead on maintaining data bases comprised of information supplied by the member states. It uses this data to analyze crimes and request the launching of investigations, while utilizing its liaison network to facilitate international information exchanges and coordinate multi-national police operations (e.g., simultaneous operations or, more recently, joint investigative teams).
- **Eurojust.** Prescribed in the Tampere milestones and provisionally based in The Hague, Eurojust began official operations in 2002 and oversees the operation of a liaison network of national criminal prosecutors. This is used to help facilitate and coordinate criminal investigations by encouraging better contacts among investigators, helping to simplify the execution of "letters of rogatory" (i.e., international court to court requests for assistance or information), and advising Europol on its operations. It works in conjunction with the European Judicial Network (EJN), which is a decentralized network of legal contact points in the EU created in 1998. It is expected to play a key role in the execution of the new European Arrest Warrant, agreed upon in 2001 following the terrorist attacks of September 11th (see below).
- **The Police Chiefs Task Force,** prescribed in the Tampere milestones, this group is intended to help high-level national police officials to share best practices and information on current trends in cross-border crime and contribute to the planning of joint operations. It has convened every six months since the Portuguese presidency of 2001, outlining various common priority areas on each occasion (e.g., community policing, drug trafficking, etc.).
- **Common Unit for External Border Practitioners.** Created late in the Danish Presidency in the second half of 2002 under a mandate by the Seville European Council, this body will soon oversee a larger liaison network of national immigration officers. By March 2003, the new unit had directed a number of joint operations and pilot projects. Along with the development of common training curriculum for immigration personnel, this new unit may serve as the forerunner of a common border patrol for the EU.

Along with these new collaborative bodies, cooperation in the area of crime fighting in the EU is supported by a number of shared data bases. As mentioned above, Europol manages a common pool of criminal information supplied by the member states, as well as number of “analysis work files” created by its own staff on particular crimes or investigations. There is also the Schengen Information System (SIS), which gives police officials in participating states access to criminal data. In addition, the EU has recently implemented the Eurodac system for storing the fingerprints of asylum seekers throughout the EU, aimed at combating both “asylum shopping” and illegitimate claims. In general, the EU must overcome any technological barriers preventing the full participation of the candidate states in these data-bases after their accession, as well as insure that the resulting increased amount of information can be managed and utilized effectively.

Along with all of this, horizontal cooperation among law enforcement authorities is also being promoted through a number of co-financing programs offered by the EU. Among these is the new Agis program, which has combined and replaced a number of smaller programs (i.e., Grotius, Oisin, Stop, Hippocrate and Falcone) to provide collaboration, personnel exchanges, and training in the area of organized crime, crime prevention, customs, judicial/prosecutorial cooperation, the trafficking of human beings, etc. In addition, the new Argo program has taken over for the Odysseus program to co-finance cooperative projects for the administration of asylum, immigration, and border control. These programs are already open to the participation of the candidate states, but it is likely that they will require much more funding to maintain their effectiveness after the coming big-bang accession.

Just as the EU’s institutional infrastructure of crime fighting must prove able to meet the needs of enlargement, so too must its burgeoning legal infrastructure regarding internal security.

Several member states are still working to transpose the European Arrest Warrant into national law, which will simplify, replace and consequently expedite extradition among the member states for a list of thirty-two crimes. The "Euro-warrant" is projected to come into effect by 2004, and must be adopted as well by the candidate states.

The future members of the EU must also transpose into their national laws the growing number of framework decisions that have been passed by the EU. Intended to supplement the principle of mutual recognition, these measures, which define crimes and sanctions, will result in the approximation of penal codes for several crimes, including the counterfeiting of the euro, money laundering, terrorism, the trafficking of human beings, child sexual exploitation, fraud and counterfeiting of non-cash payments, and, very recently, environmental crime and cyber-crime (i.e., attacks on information systems). A few of these items are awaiting formal passage pending the expected lifting of parliamentary scrutiny reservations, and most are in still process of being transposed into national law, with deadlines in 2003 or 2004. Meanwhile, enduring dissent in the Council has continued to inhibit agreement on proposals for framework decisions covering racism and xenophobia and drug trafficking, while a new measure covering the illegal trafficking of human organs has only recently been proposed. In addition, by March 2003, significant progress had finally been made in the Council on several components of the Commission's legislative package aimed at creating a common asylum policy (e.g., regarding national responsibility for applicants and a common definition of "refugees"). However, more needs to be accomplished prior to the enlargement of the EU to meet the goals and deadlines set by the Seville European Council.

The gradual approximation of criminal law and asylum practices illustrates the Europeanization of JHA in the EU, which, as explained above, can be at least partly attributed to

concerns for enlargement's expected impact on internal security in the EU. Europeanization is evident not only in this legal harmonization, but also in the sharing of best-practices and strategies for law enforcement stemming from the work of the newly created bodies comprising the emerging institutional infrastructure of the EU, as well as the projects sponsored by the two new co-financing programs and their predecessors (discussed above). In addition, the EU has established a new European Police College (often known by its French acronym, CEPOL), which acts as a virtual training academy for high level officers and was instituted with the explicit intention of building a common police culture among law enforcement agencies in the EU. Combined with the ongoing development of the common training curriculum for border patrol personnel and instructional- and strategy-sharing projects sponsored by the Agis and Argo programs, the various seminars administered and funded by CEPOL (but planned and run in and by the member states) will further contribute to the Europeanization of crime-fighting in the EU. As with many of the other bodies and program and noted above, CEPOL already permits and encourages the participation of the candidate states in its activities, but its capacity and effectiveness will be further tested after the enlargement of the EU, when the ability of the new member states to make positive contributions to the fight against transnational crime will become even more important.

JHA in an Enlarged European Union

This paper has examined how the coming enlargement of the EU has contributed to the development of the common policies on JHA, from the period leading up to the reform of the third pillar through the events of September 11 and the EU's reaction to these. As noted above, the imminent widening of the EU presents three kinds of challenges to the new infrastructure of

crime fighting in the European Union. First, enlargement will test the capacity of the newly created law enforcement institutions to absorb the new member states and contribute to the fight against transnational crime over a wider area. The second task is to advance the process of the approximation of criminal law and to make full use of this new legal infrastructure to fight crime in the enlarged EU. Related to this are the additional challenges to continue the process of the Europeanization concerning the EU's emerging legal infrastructure of crime fighting, while insuring that new member states fully share in the exchange of best practices, approaches, and strategies, as well as the creation of any emergent common culture of law enforcement regarding the fight against transnational crime.

The ability of the EU to meet the internal security challenges posed by EU enlargement rests at least to some degree on the outcome of the ongoing European Convention, the subsequent Intergovernmental Conference (IGC), and the "constitutional treaty" that these will likely produce. While the preliminary draft of the new constitution includes JHA among the many policy areas in which the EU will share competence with the member states, little else is certain at this juncture in terms of the outcome of the Convention on internal security matters. The main questions are how much of the current third pillar (i.e., title VI of the TEU) will be brought under the terms of what is now referred to as the "Community method," for this will very likely be the standard "legislative procedure" in the constitutional treaty. That is, the Convention must ultimately determine how the constitutional treaty will deal with JHA matters in terms of the possibility of qualified majority in the Council, co-decision by the EP, and nature of the Commission's right of legislative initiative (i.e., exclusive or shared with member states), especially regarding policies currently found in the intergovernmental Title VI of the TEU. The alternative to a complete elimination of the third pillar is the establishment of special rules for

some aspects of police and judicial cooperation in criminal matters that would preserve the sovereignty of the member states (e.g., regarding the operational powers of Europol or those of multi-national joint investigative teams). Additional issues to be resolved including the provision of new powers for Europol and Eurojust and whether to create the legal basis for the eventual creation of a European Public Prosecutor's Office or a common EU border patrol.

In general, making progress on JHA after the accession of new states in 2004 would be facilitated by wider application of the standard legislative procedure to items presently based in the third pillar. Of course, it remains unclear how this would impact the actual effectiveness of member states and the EU to fight transnational crime. Aside from Europol, the new EU-level crime-fighting bodies are only now cutting their teeth, and most of the recently approved framework decisions are still being transposed into national law. Consequently, more time is needed to determine whether the new legal and institutional infrastructure of crime fighting will make a positive impact in practice. The accession to the EU of the new member states will not be accompanied by their immediate implementation of the Schengen *acquis*. Thus, before the present member states lift their physical and technical border restrictions with the new members, there will be additional time for the EU to prepare for the full internal security effect of enlargement will only be felt once the Schengen free travel area is widened in the enlarged EU. In the interim, the European Union must continue to make the progress on meeting passing and implementing the various components of its new legal and institutional infrastructure of crime fighting, as called for in the Tampere milestones. Otherwise, the impending addition of new member states might serve to worsen the problem of transnational crime in the EU of the future.

Notes

¹ The Schengen Implementation Convention does include provisions, with some restrictions, for hot pursuit or maintaining surveillance in pursuits by police across national boundaries by land, but not by sea, air, or rail. Police may detain, but not arrest any suspects that are apprehended in such a way.

² John D. Occhipinti, *The Politics of EU Police Cooperation: Toward a European FBI?* Boulder: Lynne Rienner Publishers, 2003, ch. 4.

³ Emek M. Uçarer, "From the Sidelines to Center Stage" Sidekick No More? The European Commission in Justice and Home Affairs," *European Integration online Papers (EIoP)*, 5 (17 May 2001).

⁴ He was replaced in 2003 by Jonathan Faull of the UK in 2003.

⁵ Ibid.

⁶ See Occhipinti, ch. 7.

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