



## Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats

**Thierry Balzacq, Didier Bigo, Sergio Carrera and Elspeth Guild**

### Abstract

On 27 May 2005, seven Member States signed the Prüm Convention to step up cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration. Named after the German city in which it was signed, the Treaty's main advantage is that it enables the signatories to speed up the exchange of information. However, this paper argues that the Treaty produces negative externalities for the European Union's area of freedom, security and justice by circumventing the EU framework. First, by keeping the Convention under a multilateral umbrella, the signatories create a hierarchy within the EU. Second, by reverting to an intergovernmental arena, the European Parliament is ignored precisely at a time when it is achieving an increasingly central role in law-making in this field. As a result, Prüm weakens the EU more than it strengthens it, and under many circumstances, it simply cannot provide the way forward to the establishment of a manageable area of freedom, security and justice.

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# SECURITY AND THE TWO-LEVEL GAME: THE TREATY OF PRÜM, THE EU AND THE MANAGEMENT OF THREATS

THIERRY BALZACQ, DIDIER BIGO, SERGIO CARRERA & ELSPETH GUILD

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## 1. Introduction

A certain tension prevails between the EU and intergovernmental processes in the area of security policy,<sup>1</sup> which is primarily manifested by challenges ‘from below’ by the Member States to the EU level. An excellent illustration of this phenomenon is the Treaty of Prüm,<sup>2</sup> signed by seven EU Member States on 27 May 2005, in the German city of Prüm. The signatory states are Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria. The objective of the Prüm Treaty<sup>3</sup> is to “further development of European cooperation, to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal migration, while leaving participation in such cooperation open to all other Member States of the European Union.”<sup>4</sup>

The method of Prüm is resolutely intergovernmental. Is this method useful to EU security as a whole? If not, is it the best way to enhance security? The main advantage, the signatories hold, is that Prüm will enable them to speed up the exchange of information. This paper argues, however, that Prüm is not a mere technical attempt to accelerate the flow of information among signatories. It is, fundamentally, a significant countervailing political force against the European Union’s area of freedom, security and justice. It weakens the EU more than it strengthens it, and under many circumstances, it simply cannot provide the way forward. For the most part much is lost and very little is gained by curtailing the EU framework.

First, Prüm creates a hierarchy within the EU. In a word, if some Member States can decide to create a new structure that will apply to all, this produces a multiple-level game within the EU that will vitiate its credibility.

Second, by focusing on data exchange, the Convention potentially creates competition with the ‘principle of availability’ promoted by the Commission and foreseen in the Hague Programme of October 2005. In that initiative, the Commission proposed to substitute the principle that data belong to state authorities (subject of the law to protect the data subject) and can only be transmitted to another Member State on the conditions established by the state that holds the

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<sup>1</sup> See Thierry Balzacq and Sergio Carrera, *Migration, Borders, Asylum: Trends and Vulnerabilities in EU Policy*, Centre for European Policy Studies, Brussels, 2005; Joanna Apap and Malcolm Anderson, *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union*, Centre for European Policy Studies, Brussels, 2002.

<sup>2</sup> Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration, Prüm (Germany), 27 May 2005, Council Secretariat, Brussels, 7 July 2005, 10900/05.

<sup>3</sup> Throughout this paper, the terms Prüm Convention, Convention, Treaty of Prüm, Treaty and Schengen III are used interchangeably.

<sup>4</sup> Preamble to the Treaty of Prüm, p. 3.

information with the ‘principle of availability’.<sup>5</sup> Under the latter principle, the authorities of any Member State would have the same right of access to information held by any other authority in the Union as applies to state authorities within the state where the data are held. Thus the element of the national settlement on the collection, retention and manipulation of data expressed in national constitutions is transformed into an EU-wide right of use of data. The national border is removed from the principle of data collection, retention and use.<sup>6</sup> By contrast, Prüm creates a database whose use is restricted to the seven signatories. Prüm institutionalising a new electronic border between the seven and the eighteen, the Treaty provokes a relapse of EU integration.

The purpose of this working document therefore is to examine the extent to which Prüm undermines the process of Europeanisation, focusing on its goals and instruments. It is organised in three sections. The first of these draws upon the concept of Europeanisation to highlight the problems raised by the Treaty of Prüm. The Convention, we posit, adversely affects Europeanisation in so far as it curtails the power of EU institutions and restricts the development of security policy to some Member States. Section 2 examines the two axes around which the Treaty endeavours to organise cross-border action: terrorism and illegal migration.<sup>7</sup> This section culminates in an investigation of the political and legal implications of data exchange, which is the core instrument of cooperation among signatories. It argues that the essential element of the Prüm Treaty is that it counters the principle of availability and provides that data remains the property of the state where it is collected. State authorities in other Member States have therefore no right to the data, only the right to request access. In this sense, Prüm recalibrates the relationship between the three actors involved in the transnational transmission of data, namely: the state that holds the data, the state that requests the data and the data subject. Finally, section 3 seeks to excavate the rationale of the Treaty through a contrasted approach to the transformation of the Schengen Convention.<sup>8</sup>

## 2. Security and Europeanisation: Critical Reflections

The initial aim of this section is to take stock of the problems raised by an approach to security outside of the EU framework. At the core of the Prüm Treaty is an opposition to the view, held by many, that the European level should be predominant in security-related debates.<sup>9</sup> We argue in this paper that the Convention of Prüm produces a political rift in the construction of the EU area of freedom, security and justice. Indeed, the fracturing of the legal framework of EU objectives and their pursuit through agreements that elude the EU and engage only a subset of

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<sup>5</sup> Proposal for a Council Framework Decision on the exchange of information under the principle of availability, COM(2005) 490 final, Brussels, 12.10.2005.

<sup>6</sup> Proposal for a Council Framework Decision on the exchange of information under the principle of availability, COM(2005) 490 final, Brussels, 12.10.2005.

<sup>7</sup> We do not deal with cross-border crime because Prüm itself has no title on this issue, although it includes a general chapter on “Other forms of cooperation” that addresses joint operation, measures in the event of imminent danger. None of these measures is fully developed, however. The only noteworthy measure is the possibility for officers to cross the border. Art. 25(1) states: “In urgent situations, officers from one Contracting Party may, without another Contracting Party’s prior consent, cross the border between the two so that, within an area of the other Contracting Party’s territory close to the border, in compliance with the host State’s national law, they can take any provisional measures necessary to avert imminent danger to the physical integrity of individuals.”

<sup>8</sup> Convention implementing the Schengen agreements of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. O.J. of the EC, 22.09.2000.

<sup>9</sup> See, for instance, Balzacq and Carrera, *op. cit.* and Anderson and Apap, *op. cit.*

the parties is detrimental to EU integration. Thus, in order to understand the dynamics of the Prüm Convention, which as will be apparent covers a wide variety of heterogeneous subjects, it is critical to start with an investigation of the extent to which it affects the process of Europeanisation.<sup>10</sup>

The concept of Europeanisation provides a useful way to summarise the relationship between Member States and the EU level of policy-making. In general terms, Europeanisation is often taken to include how the policy business of EU impacts on the political system of Member States. In this context, Europeanisation is an intervening variable that describes: “Processes of (a) construction, (b) diffusion and (c) institutionalisation of formal and informal rules. Procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms which are first defined and consolidated in the making of the EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policy.”<sup>11</sup> In short, the emphasis on the ‘incorporation’ of EU decisions suggests an essentially top-down approach to Europeanisation. Yet by failing to account for bottom-up practices, the top-down approach has made insufficient efforts to explicate how and when Europeanisation is effective. In fact, the real test of Europeanisation comes from specifying, empirically, how the internalisation of the EU’s ‘way of doing things’ enables and constrains Member States to act in accordance with EU patterns of governance.

This assumption plays a crucial role in real world cases. For example, in the Prüm Convention the degree of Europeanisation impacts on deciding whether to act ‘in’ or ‘out’ of the EU framework. In this sense, the signatories do not value the EU as the primary unit for the production of security. The effect is to concentrate the decision power in the hands of a restricted number of Member States and sap the action of EU authorities that otherwise would be relevant. This happens as follows.

The first and most paradoxical aspect of the preamble of the Treaty is how closely it is tied to the European Union. The very first line of the Treaty states: “the High Contracting Parties to this convention, being Member States of the European Union...” The qualifying characteristic of the parties is not their sovereign right to enter into treaties with other sovereign states but rather the limitation that they have voluntarily accepted to that sovereignty by virtue of their membership of the European Union. As Member States of the European Union, under the doctrine of the EC/EU treaties, the pursuit of objectives of the treaties, including and most importantly, in this context, the completion of the internal market and the area of freedom, security and justice, must take place within the treaties. Art. 10 EC requires the Member States to act in good faith to achieve the objectives of the treaty (and by extension all the EC/EU

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<sup>10</sup> The literature on Europeanisation is vast. A sample includes Jeffrey T. Checkel, “The Europeanization of Citizenship?”, in M.G. Cowles, J. Caporaso and T. Risse (eds), *Transforming Europe: Europeanization and Domestic Change*, Ithaca, NY: Cornell University Press, 2001; Klaus H. Goetz, “National Governance and the European Integration: Inter-governmental Relations in Germany”, *Journal of Common Market Studies*, Vol. 33, No. 1, 1995, pp. 91-116; Beate Kohler-Koch, “Catching up with Change: The Transformation of Governance in the European Union”, *Journal of European Public Policy*, Vol. 3, No. 3, 1996, pp. 359-380; Beate Kohler-Koch and Rainer Eising (eds), *The Transformation of Governance in the European Union*, London: Routledge, 1999; Robert Ladrech, “Europeanization of Domestic Politics and Institutions: The Case of France”, *Journal of Common Market Studies*, Vol. 32, No. 1, 1994, pp. 69-88.

<sup>11</sup> Claudio M. Radaelli, “Whither Europeanization? Concept Stretching and Substantive Change”, *European Integration Online Papers*, Vol. 4, No. 8, 2004 (retrieved from <http://eiop.or.at/eiop/texte/2000.008a.htm>).

treaties).<sup>12</sup> Thus, the room for manoeuvre as regards the conclusion of treaties among a small group of Member States or with third countries is highly circumscribed by the obligations to the EU that the Member States have accepted.

The third preamble of the Treaty reinforces this impression stating “endeavouring, without prejudice to the provisions of the [EU and EC treaties], for the further development of European cooperation to play a pioneering role...” Thus it is apparent that the participating Member States are fully aware that the action they are taking by adopting the Prüm Treaty may be considered by some (including potentially the European Court of Justice) as inconsistent with their duties under the treaties.

The preamble goes on to tell the reader that the treaty is intended “to play a pioneering role in establishing the highest possible standard of cooperation, especially by means of improved exchange of information” particularly in three fields, all of which are covered by provisions of the EU Treaty: combating terrorism, cross-border crime and illegal immigration. Because the signatories do not want to see their action dismissed, the preamble ensures that the treaty leaves ‘participation in such cooperation open to all other Member States of the European Union.’ In effect, the treaty proposes that this group of seven states will adopt the rules and practices for cooperation in these three fields and it will be open to other Member States to join in and follow the rules established by the seven if they so wish. In other words, the feeling that seven Member States wish to establish among themselves the rules and practices in the three fields without interference by the democratic and institutional structures of the EU or by other Member States is reinforced by the next preamble, which states “Seeking to have the provisions of this convention brought within the legal framework of the European Union”, and in Art. 1(4) Basic Principles of the Convention, which states “within three years at the most following entry into force of this convention, on the basis of an assessment of experience of its implementation, an initiative shall be submitted, in consultation with or on a proposal from the European Commission, in compliance with the provisions of the [EU/EC treaties], with the aim of incorporating the provisions of this Convention into the legal framework of the European Union”.

### 3. The Security Landscape of the Treaty of Prüm

The Prüm Convention endorses the view that terrorism, cross-border crime and illegal migration are the central threats to the security of the signatories.<sup>13</sup> Threats faced by the seven Member States are thus assumed to be objective.<sup>14</sup> Positing objective threats is a political shortcut that introduces a dangerous simplification into the complexity of what constitutes a threat. Who decides, for instance, that a social problem is a terrorist act and what type of threat legitimates specific practices?<sup>15</sup> To put it differently, Prüm begins with the existence of security threats and seeks to model the response of signatories in explicit tools. In this section, we examine the political responses tailored to the problems identified. As we shall see, optimal security seems to depend on the level of density in the exchange of various kinds of data. This exchange, in

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<sup>12</sup> In the field of judicial cooperation and criminal matters, this demand hinges on the separation of powers and responsibilities between the First and Third Pillars. See for instance Case C-176/03, *Commission v. Council* of 13 September 2005.

<sup>13</sup> For a similar position, see European Council, *A Secure Europe in a Better World: European Security Strategy*, Brussels, 12 December 2003.

<sup>14</sup> On the distinction between objective and subjective threats, see, *inter alia*, Thierry Balzacq, “Qu’est-ce que la sécurité nationale?,” *La revue internationale et stratégique*, Vol. 52, hiver 2003-2004, pp. 33-50.

<sup>15</sup> See *ibid.* and David A. Baldwin, “The Concept of Security”, *Review of International Studies*, Vol. 23, No. 1, 1997, pp. 5-26.

turn, creates the need to address the question of the interoperability of databases and data protection.<sup>16</sup>

### 3.1 Terrorism

The ‘subjectivity’ inherent to the concept of terrorism has been often raised. And yet the Prüm Convention conflates categories (terrorism, organised crime and illegal immigration) whose definition and demarcations are contentious.<sup>17</sup>

The ‘prevention’ and ‘combating’ of acts qualified as terrorist offences are presented by the Prüm Convention as the justification to adopt “the highest possible standard of cooperation by means of improved exchange of information”. The Convention provides the package of security measures in order “to prevent terrorist offences”. We highlighted two measures in particular: first, the supply of information in order to prevent terrorist offences and second, the deployment of air marshals.

As regards the supply of information to prevent terrorist offences, Art. 16 of the Convention states that “for the prevention of terrorist offences” the Contracting Parties have the possibility to supply the other parties’ National Contact Points (NCPs) with the personal data and other information necessary because “*particular circumstances give reason to believe that the data subjects will commit criminal offences*”. Prüm offers the possibility to the States involved to carry out this activity even without being requested to do so by the other Contracting Parties.

This logic of collecting information is not new. Indeed, a similar system of exchange of information aimed at combating terrorism took place within the context of the former ‘TREVI group’. Since 1976, this intergovernmental group managed to bring together Member State’s Ministers of Justice and Interior under each rotating Presidency to discuss terrorism. The fields covered by the different working groups expanded considerably during the 1980s to also cover organised crime, drugs and illegal immigration.

The TREVI group represented the roots for the creation of the current and more sophisticated BdL (bureau de liaison) network.<sup>18</sup> The BdL network is at present the European Union’s official communication system connecting officials of the Member States in the Working Group on Terrorism. It was built in 1977 and since the mid-1990s it has been operated as crypto-email, designed for the transmission of information up to the ‘classified’ category. All 25 Member States are currently connected to the BdL system.<sup>19</sup>

The origins of this network may be found in the period following the summer of 2001, a time when the agenda of the Belgian Presidency of the EU was dominated by the security rationale. In effect, the Belgian Presidency reintroduced a procedure for rapid information exchange after acts of political violence.<sup>20</sup> On 17 September 2001, the Working Party Group on Terrorism at

<sup>16</sup> This question was raised in Balzacq and Carrera, op. cit.

<sup>17</sup> For an analysis of how the conflation of categories may lead to human rights abuses, see ELISE Final synthesis report, November 2005.

<sup>18</sup> Didier Bigo, “Liaison Officers in Europe: New Actors in the European Security Field”, in James E. Sheptycki (ed.), *Issues in Transnational Policing*, London: Routledge, 2000, pp. 67-100.

<sup>19</sup> See Council of the European Union, “Revised Action Plan on Terrorism”, 10694/05, Brussels 27 June 2005.

<sup>20</sup> Council of the European Union, Rapid information exchanges on terrorist attacks, 10524/01, Brussels, 17 September 2001. See also Council of the European Union, Initiative by the Kingdom of Spain for the adoption of a Council Decision introducing a standard form for exchanging information on incidents caused by violent radical groups with terrorist links, 5712/02, Brussels, 13 February 2002.

the Council agreed that after the attacks in the US a “rapid information exchange on terrorist attacks” was highly necessary.<sup>21</sup> A standard form (a special bulleting form) to be sent through the BdL network was also agreed. The bulleting form is sent via the network of liaison offices, marked either ‘urgent’ or ‘flash’, as appropriate. The new rapid information exchange procedure aimed to have rapid and reliable information on terrorist attacks which occur in other Member States so that they can integrate this information in their respective assessment of the level of threat.

The BdL network is of different nature and has different functions than the NCP system, as provided by the Prüm Convention. Indeed, under the new regime presented inside the Convention, the information and data exchange is about ‘suspects’ who may commit criminal offences. The BdL regime however mainly consists, at least formally, of exchange of information about ‘terrorist attacks’ which have already occurred in a particular Member State. Prüm goes further. It rearticulates and promotes this existing inter-exchange mechanism of transnational cooperation in the field of security. In fact, Art. 16 presents a number of problematic assumptions. To start with, this provision does not at all clarify how the contracting parties’ NCPs are going to generate ‘the knowledge’ that a particular person (i.e. suspect) will actually commit criminal offences in the future. Regardless, Prüm gives these new security authorities the right to transfer personal data and other wide information should they unilaterally decide that ‘somebody may become a terrorist’.

More specifically, Art. 16 provides a detailed explanation of the kind of information that will be supplied. It rearticulates this provision and provides a more specific regime for the exchange of information relating the prevention of terrorist offences making reference to the EU legal framework. This substantially amplifies the provisions contained in the Schengen Convention which stipulates in Art. 46.1: “each Contracting Party may, in compliance with its national law and without being so requested, send the Contracting Party concerned any information which may be important in helping it combat future crime and prevent offences against or threats to public policy and public security.”<sup>22</sup> The Prüm Treaty adds more concrete reference to the exchange of “personal data and other information” and “in so far as is necessary because particular circumstances give reason to believe that the data subjects will commit criminal offences as referred to in the EU Council Framework Decision 2002/475).”

Prüm therefore puts greater emphasis on the ‘prevention and visionary aspect’ exercised by the NCPs in the ‘fight against terrorism’. In this context, it comes as no surprise that the Convention makes reference to one of the core legal acts of the EU framework on the fight against terrorism, i.e. Framework Decision 2002/475 on combating terrorism of 13 June 2002. This legal act calls for all the Member States to take the necessary measures at national level to ensure that the acts referred to in its Art. 1.1 are considered as ‘terrorist offences’. It is interesting to recall that in the decision-making process leading up to this Framework Decision, it was extremely complicated to reach a consensus among the Member States on a common definition of what ‘terrorism’ is. As a consequence, the Member States defined this category in very broad terms including ‘causes’ as well as ‘intentions’ (i.e. threatening to commit any of the acts causing ‘terrorism’). As Emmanuel-Pierre Guittet observes, the consequences of this definition and the inclusion of such an open-ended list of criminal offences which are incorrectly linked to

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<sup>21</sup> Council of the European Union, Working Party on Terrorism, Presentation of a Presidency initiative for the introduction of a standard form for exchanging information on terrorist incidents, 5712/02, Brussels, 29 January 2002.

<sup>22</sup> Convention implementing the Schengen agreements of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. O.J. of the EC, 22.09.2000.



‘terrorism’ are quite clear: any dissidence by any opposition group can be considered an ‘act of terrorism’ inside the European Union.<sup>23</sup>

The Convention endorses the controversial principles enshrined in the Council Resolution on security at European Council meetings and other comparable events.<sup>24</sup> Although Prüm does not refer to the resolution as such, Arts 13 and 14 of the Prüm Treaty are, we believe, firmly grounded on it. There, it discusses two ways in which Contracting Parties may prevent criminal offences and maintain public order and security in major international events: via the supply of non-personal and personal data. In effect, the data are supplied on the same weak grounds, i.e. under the terms of the Directive, “if there are substantial grounds for believing that they intend to enter the Member State with the aim of disrupting public order and security” or, expressed in the parlance of the Convention, Contracting Parties shall “supply one another with personal data if any final conviction or other circumstances give reason to believe that the data subject...poses a threat to public order and security.”<sup>25</sup>

Thus, with this emphasis on ‘beliefs’ and ‘intentions’, the Convention considers suspicion a legitimate rationale for transferring non-personal and personal data among the signatories. In short, what constitutes a ‘threat to public order’ is left unspecified. Furthermore, despite assertions to the contrary, what is being targeted here are individuals with identifiable behaviour associated, in turn, with identifiable political opinions. In other words, those who will be included in the databases are likely to be, as the 2002 Genoa demonstrations testify, political activists.<sup>26</sup> The legitimacy of such action is disputable.

This calls attention to the implications of the creation of NCPs by the Contracting parties. The introduction of this network at the European level seems to follow the continuous demands made on several occasions by the Council. As a matter of fact, this was recommended in the Action Plan to Combat Organised Crime of 1997,<sup>27</sup> which stressed the need to establish NCPs in order to optimise transnational cooperation in the field of security. Further, the European Commission has stressed that “the national contact points should bring together, ideally in one office, the Europol National Units, the Sirene offices, customs, the Interpol NCB and representatives from the judicial authorities.”<sup>28</sup> In our view, the NCP should be subject to democratic control while carrying out the transnational competences conferred by the Prüm Convention. Otherwise, by implementing the provisions established in the Convention, each Contracting Party will have the possibility to create a national ‘oracle’ which will be in charge

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<sup>23</sup> Pierre-Emmanuel Guittet, “European Political Identity and Democratic Solidarity after 9/11: The Spanish Case”, *Alternatives*, Vol. 29, No. 4, 2004.

<sup>24</sup> See Council Resolution on security at European Council meetings and other comparable events, 29 April 2004. 2004/C 116/06.

<sup>25</sup> Prüm, Art. 14 (1). Compare this with Art. 4 of the Council Resolution 2004/C 116/06: “The information supplied may concern names of individuals in respect of whom there are substantial grounds for believing that they intend to enter the Member State with the aim of disrupting public order and security at the event or committing offences relating to the event...”

<sup>26</sup> For a discussion of provisions on how suspicion affects the right of free movement in the EU, see Joanna Apap and Sergio Carrera, *Maintaining Security within Borders: Towards a Permanent State of Emergency in the EU?*, CEPS Policy Brief No. 41, CEPS, Brussels, November 2003, pp. 6-7. For a detailed discussion of the effects of suspicion on politics and social relations, see Didier Bigo, “Suspicion et exception”, *Cultures & Conflits. Sociologie politique de l'international*, Paris: L’Harmattan, 2005.

<sup>27</sup> Council Decision of 28 April 1997, OJ C 251/01.

<sup>28</sup> See Commission Communication “Enhancing Police and Customs Cooperation in the European Union: Report on Achievements since the entry into force of the Treaty of Amsterdam,” COM(2004) 376 final, Brussels, 18.5.2004.

of foreseeing if an individual will become a ‘terrorist’, and then transfer to the other Contracting parties all the information in relation to this ‘suspect’.

Who is going to be the NCP in each Member State? Art. 16.3 establishes that “Each Contracting Party shall designate a national contact point for exchange of information with other Contracting Parties’ contact points. The powers of the national contact point shall be governed by the national law applicable.” Art. 19 further provides that “each Contracting Party shall designate a national contact and coordination point.” It will therefore be under the complete discretion of the states to decide the authority or authorities who will mutate into the category of NCP. There is more. The Convention is ambiguous as to whether, as under the principle of availability, there will be thematic NCPs (i.e. each dealing with one single issue) or a single NCP that deals with all types of data collected under the terms of Prüm.<sup>29</sup> Moreover, the nature of these agencies is not established. Here, too, the Treaty departs from the methodology chosen by the ‘principle of availability’ which requires Member States to restrict the use of data exchange to law enforcement authorities as well as for Europol officers, i.e. in theory, to police and custom services.<sup>30</sup> The fact that Prüm does not address this question makes us speculate that it will extend, as a general rule and not as an exception, the use of data exchange to secret services of signatories.

As regards the sort of ‘data’ transferred, Art. 16 states quite clearly that it will comprise personal data and other information, such as surname, first names, data and place of birth and a description of the circumstances giving reason for the ‘belief’ that the person involved may commit a criminal act. Here the national contact points will have the possibility to give reasons why they fear that a particular individual is threatening, but this will not take place for the sake of accountability but as complementary information deemed necessary for ‘preventive purposes’.

Moreover, the Convention does not specify the existence of conditions, limitations or requirements for the inclusion of a person/suspect (and his/her personal data plus other information) in this transnational system of data exchange. The only two requirements for the supply of personal information are that it has to be in compliance with national law and provided in individual cases. Further, the Convention states that “the supplying authority may, also having as basis national law, restrict or impose conditions to the use made of such data by the receiving authority”. The latter will be bound by these conditions.

Here, the underlying assumption is that whatever circumstances are used to justify the transfer of personal data and information, they will be taken as ‘real’, i.e. unquestionable. This is disputable in a field rife with human rights concerns. Actually, the Explanatory Memorandum expressly mentions the observance (though not compliance) of the Convention with the rights provided by the Charter of Fundamental Rights of the Union (which continues to be non-legally

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<sup>29</sup> COM(2005)490, Art. 4.1(b). Belgium has decided to use thematic NCPs, which does not necessarily mean that the other signatories will do the same. The Institut national de criminalistique et de criminologie, for example, which is under the jurisdiction of the Ministry of Justice, will be the Belgian NCP for DNA data, and the Federal Police, under the jurisdiction of the Ministry of Interior, will be the NCP for collecting and exchanging fingerprints, personal and non-personal data. See “Demande d’explications de M. Berni Collas au vice-premier ministre de l’Intérieur” sur ‘Le Traité de Prüm relatif à l’approfondissement de la coopération transfrontalière, notamment en vue de lutter contre le terrorisme, la criminalité transfrontalière et la migration illégale’ (n° 3-1246) (retrieved from [http://www.senate.be/crv/3-145.html#\\_Toc125279214](http://www.senate.be/crv/3-145.html#_Toc125279214)).

<sup>30</sup> COM(2005)490 final, Explanatory Memorandum, p. 2. Further, the Explanatory Memorandum provides that “The purpose of the action is to empower national law enforcement authorities and Europol to obtain necessary law enforcement relevant information that is accessible in one of the Member States”.

binding)<sup>31</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>32</sup> In practice, however, human rights disputes might arise in relation to:

1. The right to respect private life (data protection), as recognised by Art. 8 of the ECHR and, equally protected by the Council Directive 95/46 on the protection of individuals with regard to the processing of personal data.<sup>33</sup>
2. The possibility “for measures under this Convention to remain subject to suitable judicial review” – right to an effective remedy as stipulated by Art. 13 of the ECHR.

The protection of personal data processed in the framework of police and judicial cooperation in criminal matters has been the subject to a Commission Proposal for a Framework Decision published in October this year. This initiative acknowledges the lack of adequate safeguards and effective legal remedies for the transfer of data in the EU Third Pillar, and the need to ensure the strict observance of data protection in these areas of cooperation.<sup>34</sup> Prüm, however, weakens this initiative. Further, the power granted to the NCPs (‘security services’) may often lead to cases where their imagination, creativity and self-perception of threat may take predominance and lead to human rights disputes. This system does not offer any guarantees whatsoever that while the exchange of information takes place, data protection, as provided in the EU and European legal framework, will be respected. One question strengthens this concern: What is the democratic and judicial accountability against which these domestic authorities are subject? A minimalist answer is found in Art. 16: “the powers of the national contact point shall be governed by the national law applicable.” Thus, it will be for each Contracting Party to determine the conditions under which control and review of their actions will be undertaken.

The second area covered by Chapter 3 of the Prüm Convention is the so-called ‘Air or sky marshals’. By ‘air marshals’, the Convention means “police officers or other suitably trained officials responsible for maintaining security on board aircraft”. The phrase “or other suitably trained officials responsible for maintaining security” is too broad and grants a wide room for action to the Contracting parties. This leaves a door open for the states to decide the authority that will carry out these functions. The possibility for the military or the private sector to get involved in this task is also critical regarding the accountability and democratic control of these armed security agents in planes. Art. 17 gives the power to the contracting States to decide for themselves to deploy ‘air marshals’ or ‘security escorts’ on aircraft registered in a contracting party. After 9/11, the US demands to arrange for armed air marshals to accompany some flights from the EU are well known. The introduction of this initiative was the subject of long discussions and raised serious concerns on grounds of liberty. It has also raised concerns as to the role of the ICAO (International Civil Aviation Organisation) and questions of competence as regards the deployment of air marshals.<sup>35</sup>

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<sup>31</sup> The Charter of Fundamental Rights of the Union, 2000, OJ C-364/1, 7 December 2000.

<sup>32</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950

<sup>33</sup> European Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal* L 281, 23 December 1995, pp. 0031-50.

<sup>34</sup> Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, COM(2005) 475 final, Brussels, 4.10.2005.

<sup>35</sup> For a detailed analysis of the different actors involved in “security and air transport”, see Yann Poincignon, “Aviation civile et terrorisme: naissance et enjeux d’une politique européenne de sûreté des transports aériens,” *Cultures et Conflits*. Retrieved from <http://www.conflits.org/document.php?id=1632>.

Although the Scandinavian EU Member States in particular have been clearly opposed to this security measure, the Prüm signatories have taken this opportunity to provide a positive response to transatlantic security demands. Developing an air marshal programme among the seven Contracting states may have been considered the best solution in order to prevent the cancellation or disruption of flights to the US.<sup>36</sup> The Convention therefore provides, outside the EU dimension, a general agreement on ‘transport and aviation security’. Once again, this opens serious questions regarding the compatibility of the Convention with the principle of solidarity and good faith as inserted in the EC Treaty. It seems that the seven privileged States have chosen to disregard the current disagreement about this contested topic at EU level. It shows, too, how this sort of intergovernmental cooperation tends to be (mis)used to easily pass and agree on a series of policy measures that would be very difficult to reach agreement on under the EU framework.

The only condition stated by the Convention for deployment of air marshals is to enact a written notice of their deployment at least three days before the flight in question. According to Annex 1 of the Convention, the notice shall contain the following information: 1) Period of deployment, showing the planned length of stay, 2) flight details, 3) number of members of the air marshal team, 4) full names of all members, 5) passport numbers, 6) make, type and serial number of arms, 7) amount and type of ammunition and 8) equipment carried by the team for the purposes of its duties.

The exception to that norm has been also inserted in Art. 17. The argument runs thus: “in the event of imminent danger, notice must be given without any further delay, as a rule before the aircraft lands”. But the concrete meaning and scope of ‘imminent danger’ is not explained by the Convention. We are now familiar with the political and media discourse which call for a ‘permanent state of danger or emergency’. This argument may, in the future, provide the justification for a permanent deployment of air marshals. As we have witnessed in many other areas, the possibility for the ‘exception’ to become the norm is higher than some would have us agree.

Finally, the Convention establishes a common training mechanism of assistance by which the contracting parties will assist one another in the training of air marshals. They will also cooperate closely on matters concerning ‘air marshals’ equipment’. In this regard, Art. 18 sets out the conditions for granting air marshals the permission to carry arms, ammunition and equipment. In particular, it provides that “the Contracting parties shall, upon request, grant air marshals deployed by other Contracting Parties general permission to carry arms, ammunition and equipment of flights to or from airports in Contracting Parties”. Some restrictions are nonetheless inserted in Paragraph 2. It specifies the conditions against which the carrying of arms and ammunition shall be subject to:

1. Those carrying arms and ammunition “may not” disembark with them from aircraft at airports or enter restricted-access security areas at an airport;

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<sup>36</sup> A similar critical response to the American pressure has been recently witnessed by the Passenger Name Record (PNR) and the introduction of biometric technologies in passports of EU citizens. The ECJ has ruled that the EU handover of passenger data to US authorities should be annulled. Opinion of Advocate general Leger *Affaire 317/04 Parlement européen contre Conseil de l’Union européenne*. On PNR, see Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data. On Biometric identifiers, see Proposal for a Council Regulation amending Regulation (EC) No. 1683/95 laying down a uniform format for visas and Regulation (EC) COM(2003) 0558 final-CNS 2003/0218, and the Proposal for Council Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2003) 0558 final-CNS 2003/0218, 24.9.2003.

2. The arms and ammunition “must” be deposited for supervised safekeeping in a place designated by the competent national authority.

### 3.2 Illegal Immigration

One of the key fields of cooperation of the Prüm Treaty is illegal migration. Chapter 4 of the Treaty, entitled Measures to combat illegal migration, provides the nuts and bolts which Prüm is intended to add to the existing EU *acquis* in the field.

One of the key problems with EU action in this field is the lack of a definition that is not handicapped by complete circularity.<sup>37</sup> Thus when the EU comes to define illegal migration, the definitions invariably have recourse to national law. It is for national law to define who is illegal and what illegal migration is and those definitions, however formulated at the national level, are aggregated into a definition at the EU level. This way of arriving at a definition of illegal migration is highly unsatisfactory as it means that there is no common or external reference point against which the status of a particular individual can be determined to be regularly or irregularly present at any given time.

This unsatisfactory state of affairs is compounded by an unfortunate tendency of EU institutions to make reference to illegal migration towards the EU, thus giving rise to the idea that one can determine illegal migration before an individual has arrived at a border. This is hard to embrace unless border officials are posted abroad and determining admission to the EU before the individual leaves a third country. Even then, the individual who is refused admission is not an illegal migrant as he or she has never even come close to the EU border which is central to the definition.

The Prüm Treaty does not take us any further towards a viable definition of illegal migration. Yet it does seek to build on EU law regarding the operation of border officials outside the territory of the EU. Art. 20(1) provides that “on the basis of joint situation assessments and in compliance with the relevant provisions of [...] Regulation 377/2004 [...] on the creation of immigration liaison officers network, the Contracting Parties shall agree on the seconding of document advisers to States regarded as source or transit countries for illegal migration”. Three aspects of this provision bear reflection. First, in light of Art. 10 EC, the good faith obligation of the Member States, is it not questionable whether a small group of Member States can seek to act under the auspices of an EC Regulation but outside its scope? We think this constitutes: a) exclusion of the guardian of the treaties, the European Commission; b) disbarment of the European Court of Justice, which is responsible for interpreting EU law; d) circumvention of the European Parliament, which is entitled to co-decision in the adoption of legislation in this field and has battled long and hard to ensure that delegated powers even to the Council do not interfere with its prerogatives; and e) rather impractical in that the liaison officers of non-Prüm states are participating in the network and it would be rather difficult to determine when a liaison officer is acting under Prüm and when under the Regulation and thus engaging all the other liaison officers of the Member States or only those of the Prüm parties.

Art. 20(3) provides that in seconding document advisers, the parties may entrust one of their number with specific coordination tasks. This is both legally and practically problematic as regards the liaison officers of the 25 and their entitlement to information under the Regulation

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<sup>37</sup> At best, there is a minimalist definition of who is illegally staying in the EU. The Proposal for a Directive of the European Parliament and the Council COM(2005) 391 final of 1.9.2005 on common standards and procedures in Member States for returning illegally staying third-country nationals defines ‘illegal stay’ as “the presence on the territory of a Member State, of a third country national who does not fulfil, or no longer fulfils the conditions for stay or residence in that Member State.” Art. 3(b).

against the exclusivity that is at the heart of Prüm, reserving extra information for only the participating few.

The Treaty is quite specific about the role of the document advisers. Art. 21 provides that they have three main tasks: a) advising a party's representatives abroad on passport and visa matters. b) advising and training carriers on detection of false documents and c) advising and training host country border control authorities and institutions. The intention that the contracting parties will develop a useful knowledge base that they will share only among themselves and exclude the other 18 Member States is rather offensive to the others. It is also clearly self-defeating. As five Member States are also full participants in the Schengen *acquis* (and it is expected that the new Member States, all of whom are excluded from Prüm, will be joining Schengen in 2007) but outside Prüm, their officials (who are not privy to the additional useful information) will continue to admit third country nationals whom the Prüm participants might consider to be an illegal migration risk. Once in the Union, these third country nationals will be entitled under EU law to free access to the whole of the territory of the Schengen 12, including all the Prüm states. Thus, it seems ambiguous to proceed down this route of privilege for some when the consequences of privilege are exactly zero because of the success of the completion of the internal market.

Art. 23 provides for assistance with repatriation measures. Again, this area is the subject of a Council Decision (2004/573) and a Directive (2003/110).<sup>38</sup> Thus, all of the concerns expressed above about overlapping competence and lack of respect for Art. 10 EC are also valid as regards this article. The provision calls for the Prüm parties to assist one another with repatriation measures, including assistance in cases of transit. Participants shall inform one another of planned repatriation measures in good time and give the others a chance to participate. Arrangements for escort and security are to be agreed separately. Also repatriation via another party's territory is to be resolved by negotiation in compliance with the law of the state through whose territory the repatriation is to take place. A working group is being established to assess results of operations and resolve problems.

A new element arises in this section which is important – that is, the reference to the national law of the state through whose territory action is taken. The principle that is being inserted is that of retention of sovereignty by the Prüm states over activities of repatriation occurring on their territory. Contrary to some of the moves under consideration at the EU level to ensure that decisions of repatriation should have consequences across the common territory. This provision breaks up the common EU territory into its national constituent blocs once again for the purpose of determining the legality of repatriation. While this may be beneficial for a third country national who is being repatriated via a number of states – as he or she may counter the repatriation under the national law of each of them separately – it does not take EU integration much further. If anything, it will discourage any Member State planning repatriation via the territory of another party from pursuing such a route, as this is likely to be time consuming and fraught with difficulty.

#### **4. The Logic and Implications of Data Exchange**

In the previous section, we have outlined the main threats that Prüm poses. We also alluded to the instruments (data exchanges) used by the signatories. We now turn our attention to the implications of these exchanges.

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<sup>38</sup> Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders; Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air.

Member States have increasingly become advocates of data exchange to combat illegal migration, organised crime and international terrorism.<sup>39</sup> The Prüm Convention takes a similar approach. There are three principal actors involved in the transnational transmission of data: 1) The state that holds the data and which may or may not transmit them; for this state, the key is ownership of the data and the right to transmit to another state or not and under what conditions. 2) The state that seeks data: under what conditions may the state require another state to provide data and what type of data can it require another state to provide? 3) The data subject: on what basis is the collection, retention and manipulation of data permissible (i.e. lawful); on what basis are the rights of the data subject regarding collection, retention and manipulation protected if data on him or her are transmitted to another state?

The relationship of these three actors has been under increasing strain over the past few years in the material fields under consideration in the Prüm Treaty – terrorism, cross-border crime and illegal immigration. This is due, in part, to the fact the exponential development of technical capacities in respect of data has created possibilities that were not even dreamt of ten years ago. Data held by states on individuals have mushroomed in all these fields. As a consequence, states are intent on acquiring access to national data of their neighbours where it might aid their work against terrorism, cross-border crime committed by illegal migrants.

These developments rest on the belief that data represent a form of knowledge that increases a state's power. Thus, authorities that hold data are anxious to retain control over that data. However, in liberal democracies there is deep concern about the holding of personal data on citizens, which is expressed in the constitutions of many Member States as a right of the individual against the collection, retention or manipulation of personal data by state authorities except in those situations where specifically authorised. Thus, states are not only anxious to ensure that their own authorities correctly apply national rules on data but also that data on their citizens do not escape their control and risk being abused by other states.

The interest of the Prüm Convention in data exchange constitutes an important element of its architecture. In other words, signatories partake of the view that data exchange will bring greater security to all. In practice, it aims to facilitate the trade of the following types of data: DNA profiles, fingerprints, vehicle registration, non-personal and personal data. The supply of these is carried out by a national contact point whose powers are governed by the national law of contracting parties. Rather than addressing all these instruments, let us spell out probably the most contested, namely: the transferring of DNA profiles.

Clearly, Prüm pays special attention to the role of biometric identifiers in the transferring of data.<sup>40</sup> Among biometric identifiers, DNA has emerged as one of the most efficient if sensitive tools in criminal investigations. This lends credence to the idea that the establishment of national DNA analysis files and the automated searching and comparing of DNA profiles advance security throughout Europe. However, under the proposed 'principle of availability', the Prüm Convention is regarded as restricted in scope and content. For example, it does not contain the possibility to request telephone numbers and other communications data or ballistics.

Indeed, the proposal for a Council Framework Decision on the exchange of information under the principle of availability widens the types of data collected.<sup>41</sup> In addition to DNA profiles,

<sup>39</sup> See the debate between Charles Clarke and Alexander Alvaro in *Parliament Magazine*, No. 212, October 2005, pp. 46-49.

<sup>40</sup> On biometric and human rights, see Jillyanne Redpath, "Biometrics and International Migration", *International Migration Law*, No. 5, 2005; Margaret L. Johnson, "Biometric and the Threat to Civil Liberties", *Computer*, Vol. 27, No. 4, April 2004, pp. 90-91.

<sup>41</sup> COM(2005)490 final, Annex 2.

fingerprints and vehicle registration information, it intends to make available the following types of information: ballistics, telephone numbers and other communications data, with the exclusion of content data and traffic data unless the latter data are controlled by the designated authority, and minimum data for the identification of persons contained in civil registers. Unlike the proposal for a Council Framework Decision, the Convention does not “entail any obligation to collect and store information...for the sole purpose of making it available to the competent authorities of other Member States.”<sup>42</sup> Rather, it stipulates that “where, in ongoing investigation or criminal proceedings, there is no DNA profile available for a particular individual present within a requested Contracting Party’s territory, the requested Contracting Party shall provide legal assistance by collecting and examining cellular material from that individual and by supplying DNA profile obtained” to the requesting state.<sup>43</sup> The table in the annex presents a comparison between the Prüm Convention and Framework Decisions 2005/490 and 2005/475. Our purpose in offering this table is not to set up a comprehensive map of data exchange and data protection in the EU, but rather to draw a contrasted picture of provisions in these fields.

Prüm introduces some safeguards for the transferring of data collected. Art. 2.2 provides that “reference data shall only include DNA profiles established from the non-coding part of DNA and a reference. Reference data must not contain data from which data subject can be directly identified.” Further, “the data subject shall be entitled to have inaccurate data corrected and unlawfully processed data deleted”. And, finally, “the Contracting Parties shall also ensure that, in the event of violation of his rights in relation to data protection, the data subject shall be able to lodge a complaint to an independent court or tribunal within the meaning of Article 6(1) of the European Convention on Human Rights or an independent supervisory authority within the meaning of Article 28 of Directive 95/46/EC”.<sup>44</sup>

Prüm amplifies the conventional wisdom in the security field that ‘more is better’ and that an increase in the number of databases increases security. However, insecurity is not acute because law enforcement authorities do not share enough information, but rather because they share it badly and in a multiplicity of different fora. This, in turn, generates concern about the omission of any reference to other existing databases and the lack of any indication of the extent to which, if any, synergies will be established between data collected by NCPs of Prüm on the one hand, and data gathered by EURODAC (system for the comparison of fingerprints of asylum applicants), the Visa Information System (VIS) and the Schengen Information System (SIS II), on the other hand. If the forthcoming Communication on enhanced synergies between SIS II, VIS and EURODAC (expected in 2006) is successfully applied, the database landscape of the EU will find itself split between two logics.<sup>45</sup> Taken individually, these two groups of databases do not seem qualitatively different. Taken together, however, they will create new patterns of action, which will inevitably overlap and eventually duplicate each other.

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<sup>42</sup> COM (2005)490 final, Art. 2(2).

<sup>43</sup> Art. 7.

<sup>44</sup> Art. 40(1).

<sup>45</sup> See the annex to the Commission’s Communication on the Hague Programme, COM(2005) 184 final, Brussels, 10.05.2005. See also the Commission’s Communication on the development of the Schengen Information System II and possible synergy with a future Visa Information System, COM(2003) 771 final, Brussels, 11.12.2003, point 1.2.2. See also Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, COM (2005) 597 final, Brussels, 24.11.2005.



## 5. Rethinking Schengen Continuity and Transformation

The Treaty of Prüm bears the marks of Schengen. Notice that all of the signatory states have participated both in the Schengen Agreement 1985 and the Schengen Implementing Agreement 1990 and played a central role in intergovernmental cooperation in fields of central interest and importance to the EU. Notice, too, that signatories are participants in the decision taken in 1997 in the context of the intergovernmental conference which led to the Amsterdam Treaty which inserted the Schengen *acquis* into the EC/EU treaties. Prüm, then, is a new form of the ‘Schengen’ process.<sup>46</sup>

The preceding comments suggest that in examining the method of Prüm, it is important to be clear about the dynamics of Schengen. The major objective of Schengen was the abolition of all border checks across Europe. The context was, however, dominated by the fear that such sub-Union agreements could institutionalise a Europe of ‘variable geometry’.<sup>47</sup> To reduce these concerns, Schengen members therefore framed the Convention as a ‘laboratory’ for Europe, the goal of which was, they claimed, to push European integration forward.<sup>48</sup>

However, the idea of Schengen as a ‘laboratory’ is not easy to endorse.<sup>49</sup> In fact, the reluctance of the EU Member States to be bound by ‘hard’ EU law in the abolition of intra-Member State border controls led to the creation of the Schengen regime through intergovernmental agreements outside EU law. Notwithstanding the Member States express commitment in the Single European Act of 1986 to undertake the dismantling of border controls among themselves within the EC Treaty, they refused to do so and kept the process in a weaker legal framework. This process of distortion of the internal market was described by the officials promoting the mechanism of Schengen as a ‘laboratory’. One actor’s attempt to legitimise the process is Charles Elsen. He states: “The Schengen founders would have not worked in vain, but they would have showed a possible and feasible way, set up a laboratory for Europe and, thus, given a remarkable push forward to the construction of Europe.”<sup>50</sup> The Commission effectively

<sup>46</sup> That is why Prüm is also called ‘Schengen III’.

<sup>47</sup> A. Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and beyond*, London: Palgrave, 2002; A. Wiener, “Forging Flexibility: The British ‘No’ to Schengen”, *European Journal of Migration and Law*, Vol. 1, No. 4, 1999.

<sup>48</sup> See Ruben Zaiotti, “Revisiting Schengen: Europe and the Emergence of a New Culture of Border Control”, paper presented at the 46<sup>th</sup> Convention of the International Studies Association (ISA), Honolulu, Hawaii, 1-5 March 2005.

<sup>49</sup> The debate is premised on the question of whether the idea of ‘laboratory’ was arrived at ex ante or ex post. The first position is shared by almost all of the contributors to the volume published by the College of Europe, entitled *Integrated Security in Europe: A Democratic Perspective*, Collegium-News of the College of Europe/Nouvelles du Collège de l’Europe, No. 22-XII.2001. Didier Bigo, by contrast, posits that Schengen was not construed by signatories as a ‘laboratory’, at least not at the beginning of the process: “Nobody has clearly discussed what was the debate of the eighties and how these norms were set up.” He continues: “Very often the propaganda of a Schengen laboratory in advance, in regards to the natural evolution of the EU, was considered as sufficient, but a more critical look shows that Schengen logic was clearly against freedom of movement of people and was conducted not only by fears about criminals but also about migrants, foreigners from third world countries.” See Didier Bigo, “Frontiers Control in Europe: Who is in Control?”, in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement into and within Europe*, London: Ashgate, pp. 66-67. See also Didier Bigo and Elspeth Guild, “La mise à l’écart des étrangers. La logique du VISA Schengen”, *Cultures & Conflits: Sociologie politique de l’international*, Paris: L’Harmattan, 2003.

<sup>50</sup> Our translation. In French: “Les bâtisseurs de Schengen n’auront pas travaillé en vain, mais ils auront montré une voie possible et réalisable, crée un laboratoire d’essai pour l’Europe et, en définitive, donné un formidable coup de main à la construction européenne.” Charles Elsen, quoted in W. van der Rijt, “Le fonctionnement des institutions Schengen: ‘Pragmatisme, toujours’”, in Monica den Boer (ed.),

echoed this idea of Schengen as a laboratory, which emerged most strongly in Jacques Delors' response to a written question on that issue: "The solutions arrived at by the Schengen group are an inspiration to Community bodies."<sup>51</sup> This support is hard to understand. One would not expect the 'guardian of the Treaties' to confer legitimacy to an initiative that, in many respects, challenges its authority.

The Treaty of Amsterdam nonetheless confirmed this process by appending a Protocol on Schengen to the EC and EU Treaties.<sup>52</sup> Art. 8 of the Protocol provides that the Schengen *acquis* must be accepted in full by all candidates for admission.<sup>53</sup> In other words, the Treaty of Amsterdam creates the possibility for a limited number of Member States to coordinate their activities on specific issue within the limits of what is called 'enhanced cooperation'. As for Schengen, the results of enhanced cooperation have become binding for all state candidates for admission.

Prüm starts off with seven members, five of which were Schengen initial signatories. Like Schengen, it excludes Italy. Unlike Schengen, France is not one of the central actors; Austria and Germany are. Indeed, Otto Schily, the former German Minister of Interior, admitted that France and Spain joined the Treaty at the very last minute. "Because of its importance for future cross-border cooperation in preventing and prosecuting crime," he said, "I am especially pleased that France and Spain were also willing to sign the agreement at such short notice."<sup>54</sup> Further, like Schengen, its avowed aim is to play a pioneering role in the integration of the EU. Moreover, the exchange of information was also a key factor of the Schengen Convention signed on 14 June 1985.<sup>55</sup> Finally, in line with the spirit of Schengen *acquis*, Prüm leaves open the possibility for the remaining 18 Member States to adhere to its rules and practices. This last point may turn out to be impracticable for two reasons. First, Prüm is just one Member State short of the number specified in the EU Treaty as necessary to trigger the provisions on enhanced cooperation. In addition, enhanced cooperation would have required an approval by a qualified majority in the Council of Ministers, and the EU Commission would have had to assess whether Prüm is compatible with other institutions governing the EU. Yet, even if these conditions were met, there will still be no guarantee that the provisions defended by Prüm will be integrated in the Union as such. In fact, under the terms of the Treaty of Nice ratified in 2003, acts and decisions resulting from enhanced cooperation "shall not form part of the Union *acquis*."<sup>56</sup>

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*Schengen's Final Days? The Incorporation of Schengen into the New TEU, External Borders and Information Systems*, European Institute of Public Administration, Maastricht, 1998, p. 65.

<sup>51</sup> Reply to Written Question 2668/90, O.J. C144/11.

<sup>52</sup> See Eric Philippart, *Optimising the Mechanism for 'Enhanced Cooperation' within the EU: Recommendations for the Constitutional Treaty*, CEPS Policy Brief No. 33, CEPS, Brussels, May 2003.

<sup>53</sup> See Didier Bigo, "Frontiers Control in the European Union: Who is in Control?", op. cit.

<sup>54</sup> "Simplified cross-border cooperation: 7-country agreement signed" (retrieved on 6 December 2005 from [http://www.bmi.bund.de/cln\\_012/nn\\_148134/Internet/Content/Nachrichten/Archiv/Pressemitteilungen/2005/05/grenzueberschreitende\\_Zusammenarbeit\\_7\\_Laender\\_Abkommen\\_en.html](http://www.bmi.bund.de/cln_012/nn_148134/Internet/Content/Nachrichten/Archiv/Pressemitteilungen/2005/05/grenzueberschreitende_Zusammenarbeit_7_Laender_Abkommen_en.html)).

<sup>55</sup> See Art. 46 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. 22.9.2000 19 Official Journal of the European Communities.

<sup>56</sup> TEU, Art. 44, §1. See also Arts. 43 and 45. For an assessment of enhanced cooperation after the Treaty of Nice, see Bribosa Hervé, "Les coopérations renforcées au lendemain du traité de Nice", *Revue du Droit de l'Union Européenne*, No. 1, 2001, pp. 111-171.

However, there are signs that the Prüm Convention may follow a similar evolution as that of Schengen, albeit with variations in membership. First, Britain is considering seriously whether it should join the Treaty. Second, the Commission has made references to Prüm as not constituting an obstacle. For instance, the Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs views Prüm as a mechanism to reduce the shortcomings in the exchange of data among Member States..<sup>57</sup> Third, the European Parliament has not raised its voice on this issue.

The foregoing discussion reveals a vortex of ambiguities which, in turn, raises the question of the benefit of the Convention for the evolution of the EU as a whole. It also seems that Prüm has prompted a race with other EU institutions, for instance, on the nature and speed of data exchanges. Moreover, if the time required before Schengen became actually operational can be taken as a norm (some 10 years), Prüm may be outdated before it enters into force, rolling ratification notwithstanding. And if it succeeded, it will have to overcome an additional hurdle: to prove that its decisions and structures could benefit all EU members and that they do not conflict with other EU institutions in the area of freedom, security and justice.

## 6. Conclusions

The Treaty of Prüm undermines the EU's ability to become an efficient policy-making body in the field of security. To start with, by setting up exclusive and competitive measures that seek to address threats that affect the EU as a whole, it blurs the coherence of EU action in these fields. Second, by developing new mechanisms of security that operate above and below the EU level, it dismantles trust among Member States. Finally, by establishing a framework whose rules are not subject to Parliamentary oversight, the Convention impacts on the EU principle of transparency. These three principles – trust, coherency and transparency – are yardsticks against which Prüm should be assessed.

**The necessity of coherence.** The provisions contained in Prüm, mainly as regards irregular migration, are incoherent. As measures that exclude third country nationals from access to the EU territory, they engage only seven of the 12 Schengen states within whose territory there is free movement of persons; thus third country nationals arriving in the EU via the five non-Prüm members avoid the extra controls of the Prüm states but have access to the territory of the Prüm states in any event. By the same token, members of Prüm have decided to set up a “technical group focusing on return issues [which] would be co-ordinated by France”.<sup>58</sup> Yet, how this group will work is not clear. For instance, would it operate in accordance with the rules set out by the Council Decision 2004/573/EC and by COM(2005) 391? More fundamentally, would it work under the supervision of or in parallel with the foreseen Special Representative for a common readmission policy?<sup>59</sup>

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<sup>57</sup> Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, COM (2005) 597 final, Brussels, 24.11.2005.

<sup>58</sup> Council of the European Union, “Outcome of Proceedings”, 12656/05, Brussels, 27 September 2005.

<sup>59</sup> Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for the removals from territory of two or more Member States, of third-country national who are subjects of individual removal orders, OJ L 261/28, 6.8.2004. On the appointment of a Special Representative for a common readmission policy, see the Presidency Conclusion of the Brussels European Council, 4-5 November 2004. See also the Hague Programme, point 1.6.4 on Return and Readmission policy.

**The necessity of trust.** As Niklas Luhman puts it, trust is the basis of cooperation.<sup>60</sup> Prüm provides a framework for the privileged group of seven State signatories to come to a multilateral agreement on key policies that have been the subject of divergent positions among the rest of the Member States. Each chapter of the Convention includes highly debated and sensitive initiatives, whose agreement inside the Council would have been difficult. This is even more acute taking into account that according to Art. 34 TEU, the unanimity rule continues to apply inside the Council of Ministers as regards third pillar-related measures. In short, the provisions developed by the Convention are negative factors to the democratic and judicial institutions of the EU since they exclude them from the development of the EU *acquis*.

**The necessity of transparency.** Opening an interparliamentary assembly, European Parliament President Josep Borrell acknowledged that he had never heard of the Prüm Treaty.<sup>61</sup> This is revealing of the way the Convention was negotiated and signed, that is, without any Parliamentary oversight. Accordingly, the European Parliament has recently proposed to move judicial cooperation on criminal matters and police to Community competence (first pillar) in order to improve transparency. This proposal should be strengthened and supported if security measures are to have any legitimacy.

The intergovernmental nature of cooperation in the field of security in the EU inhibits ‘democratic check’ where a treaty is presented, already negotiated for ratification or rejection and changes are not permitted. In this sense, we could argue that Prüm ignores the European Parliament just at a time when it is achieving a more central role in law-making in this field, as called for in the provisions of the EU Treaty. It will undoubtedly be a vexing experience for the European Parliament to see the value of its power to participate in law-making in the area diminished as the field over which it is to provide oversight is moved into an intergovernmental venue.

Furthermore, the European Court of Justice is excluded at least in so far as the measures adopted under Prüm will not be subject to its jurisdiction which is limited to EC/EU treaty provisions. The time may come when the European Court of Justice is requested to give judgment on the validity of measures taken under Prüm (or indeed the project itself) – an excluded Member State or an institutional actor could bring proceedings before the Court against the Prüm participants for failure to act in accordance with their treaty obligations – but the fruit of Prüm will not be justiciable before the ECJ unless and until it is inserted into the EU/EC treaties. As a result, the Treaty leads to less Europe and a reduced capacity in the field of freedom, security and justice.

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<sup>60</sup> See Niklas Luhman, *Trust and Power*, London: John Wiley, 1979.

<sup>61</sup> Josep Borrell Fontelles, Opening Speech by the President of the European Parliament, , Parliamentary Meeting at the initiative of the European Parliament and the UK Parliament on “Liberty and Security: Improving Parliamentary Scrutiny of Judicial and Police Cooperation in Europe,” Brussels, 17 October 2005.

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## Annex

### Comparison between the Prüm Convention and Framework Decisions 2005/1270 and 2005/1241

Title	Nature of data	Data protection initiative	Who controls the data	Who accesses/processes the data
Prüm Convention	DNA analysis (Art. 2) Fingerprint data (Art. 8) Vehicle registration data (Art. 12) Non-personal and personal data supplied in connection with major events (Arts. 13-15)	Contracting Parties (Art. 34)	Contracting Parties via their national contact points (Art. 4)	Contracting Parties' national contact points (Art. 3). Indirect access regime.
Council Framework Decision on the exchange of information under the principle of availability {SEC(2005)1270}	Annex 2 DNA profiles Fingerprint Ballistics Vehicle registration information Telephone numbers and other communications data Minimum data for the identification of persons contained in civil registers	Regulatory Committee established pursuant the Framework Decision (point 9, preamble)	Member States' designated authorities or designated parties (Art. 4 and Art. 8)	Equivalent competent authorities (i.e. police, customs and other authorities of Member States) as well as Europol (Art. 6). Direct access regime is the principle.
Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters {SEC(2005)1241}	Personal data, i.e. any information relating to an identified or identifiable natural person (Art. 2) <sup>a</sup>	Member States' supervisory authorities (Art. 30) Working Party on the protection of individuals with regard to the processing of personal data (Arts. 31-32) [Advisory status]	Member States (Art. 9, Arts. 19-26)	Member States' competent authorities (Arts. 8-12) Authorities other than competent authorities (Art. 13) <sup>b</sup> Private parties (Art. 14) <sup>c</sup> Authorities in third countries or International bodies (Art. 15) <sup>d</sup>

<sup>a</sup> Special categories of data, only if the two conditions of Art. 6, paragraph 2 apply.

<sup>b</sup> Only if the conditions indicated in Art. 13 are met.

<sup>c</sup> Only if the conditions indicated in Art. 14 are met.

<sup>d</sup> Only if the conditions indicated in Art. 15 are met.

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The objectives of the CHALLENGE project are to:

- understand the convergence of internal and external security and evaluate the changing character of the relationship between liberty and security in Europe;
- analyse the role of different institutions in charge of security and their current transformations;
- facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, political, sociological, legal and policy implications of new forms of violence and political identity; and
- bring together a new interdisciplinary network of scholars in an integrated project, focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The CHALLENGE network is composed of 21 universities and research institutes selected from across the EU. Their collective efforts are organised under four work headings:

- *Conceptual* – investigating the ways in which the contemporary re-articulation and disaggregation of borders imply a dispersal of practices of exceptionalism; analysing the changing relationship between new forms of war and defence, new procedures for policing and governance, and new threats to civil liberties and social cohesion.
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- *Governance/polity/legality* – examining the dangers to liberty in conditions of violence, when the state no longer has the last word on the monopoly of the legitimate use of force.
- *Policy* – studying the implications of the dispersal of exceptionalism for the changing relationship among government departments concerned with security, justice and home affairs, along with the securing of state borders and the policing of foreign interventions.

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