CHAPTER 7

A Secure Europe? Internal Security Policies

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Chapter Overview

The expansion of EU Justice and Home Affairs (JHA) policy has been rapid and remarkable. This chapter examines the origins, development, and key features of JHA policy, focusing on crime-fighting, counter-terrorism, and border management issues, as well as associated institutional changes. EU policy has sparked significant changes to national laws designed to help fight cross-border crime and terrorism, and manage external borders. Competing, and not always compatible concerns for sovereignty, internal security, civil liberties, and human rights have shaped institutional developments, the harmonization of national laws, and relations with non-EU countries. Cooperation on JHA, especially since 2001, has been driven by crises related to terrorism and illegal immigration, yet the implementation of EU legislation at the national level has been uneven and contentious.

Introduction

EU policy-making on Justice and Home Affairs (JHA) is aimed primarily at facilitating international cooperation on border management, migration, crime-fighting, counter-terrorism, and other issues linked to internal security. It also extends to the promotion of judicial cooperation on civil law, or the body of law dealing with the rights of citizens, such as family law. The goal of the 'four freedoms' (free movement for people, goods, services, and money) is as old as the EU itself and has always posed challenges to internal security and cross-border justice. Yet, it was not until the creation of the so-called third pillar in 1993 by the Maastricht Treaty that JHA became a formal policy area of the EU. Progress on JHA was slow until 1999, when the Amsterdam Treaty took effect, thus empowering the Commission to initiate legislation. Member states agreed to prioritize internal security goals the same year.

In some ways, Europe's most fundamental security challenges have changed little over time. Land, sea, and air borders have always required protection from cross-border crime and illegal immigrants, while the needs of refugees continue to challenge notions of human rights and the limits of national resources. Likewise, organized crime and drug trafficking have been pressing concerns for decades. Yet, JHA policy has expanded rapidly in response to the demise of the Soviet bloc (which, if nothing else, offered managed borders), post-Cold War military conflict (in ex-Yugoslavia, Somalia, Afghanistan, and so on), and extreme poverty, particularly in Africa. The threat of terrorism has endured over time as well, although extreme left- and right-wing organizations have been overshadowed by cells orchestrated or motivated by Al Qaeda.

In a context of both continuity and change, JHA is now a major growth area for EU policy-making. Beginning in the mid-1990s but especially since 2001, a series of crises has prompted a significant extension of cooperation in JHA. Numerous institutions, instruments, and databases have been developed to help national authorities coordinate their efforts and share information and best practices. Cooperation has been facilitated by EU legislation harmonizing national visa and asylum policy (see Box 7.1), as well as some aspects of criminal law. By 2006, 17 per cent of all the legislative proposals made by the Commission were in the area of JHA (*European Report*, 29 June 2006), making it the most prolific area of EU law-making in recent times. Moreover, the EU planned to spend about twice as much on JHA between 2007 and 2013 as it did during the previous budgetary period (*European Report*, 18 February 2006).

The key dynamic in the evolution of JHA has been the EU's response to internal security challenges that arise from the embrace of the four freedoms. A negative side effect of these freedoms has been greater mobility for organized crime groups and their contraband. The extension of free movement to new and future member states, especially the planned widening of the passport-free 'Schengen zone' (see Box 2.2), has provided further impetus for legislation at the EU level. Borders both within the Schengen area and at its external frontiers are quite porous, meaning that organized crime and terrorism are frequently transnational in nature, thus necessitating

BOX 7.1 Key concepts and terms

Asylum is protection under the terms of the Geneva Convention that is provided by a government to a foreigner who is unable to stay in his/her country of citizenship/residence for fear of persecution due to political views, race, religion, nationality, or membership of a particular social group. Asylum is not afforded to 'economic refugees'.

Biometric technology allows measurements of unique physical characteristics, such as fingerprints, eye retinas, and facial features, to be taken and stored digitally in passports, visas, or databases. Biometric measurements of travellers at border checkpoints can be used to authenticate biometric travel documents or search computer records.

Framework Decisions (FDs) are legislative 'blueprints' used to harmonize national criminal law. They specify how national laws must be changed but leave the specifics of this 'transposition' to each EU country.

Human trafficking is the criminal enterprise of transporting people (mainly women and children), who are often enslaved for profitable exploitation, such as forced prostitution or labour. Human trafficking is linked to human smuggling; in these cases would-be immigrants voluntarily pay criminal organizations for illegal passage into a country but may unwittingly become victims of human trafficking.

Transposition is the act of changing national law to meet the specifications of EU directives or framework decisions. JHA legislation typically includes deadlines for transposition and a legal measure is not considered to be implemented until it has been 'transposed', although the gap between legal transposition and substantive implementation is sometimes wide.

a multinational approach. However, progress at the EU level has been inhibited by member states' concerns for their sovereignty in this sensitive area. Moreover, JHA policy has been shaped by the competing imperatives of national security, civil liberties, and human rights.

This chapter begins by explaining the origins and development of JHA as a key area of EU policy. It then examines crime-fighting and counter-terrorism policies. Finally, it turns to conflicts and cooperation surrounding issues of border management, including immigration, visas, and asylum.

Development of the Third Pillar

Early Years

As with the birth of the EU's second (foreign policy) pillar, events in the 1970s helped foster the political pressures and policy demands to make JHA an official EU policy

area. The earliest steps in this direction were instigated by the terrorist attack at the 1972 Olympic Games in Munich and the burgeoning problem of domestic terrorism in Europe. Interior and justice ministers of the then nine EC members initiated a series of meetings in 1976 designed to facilitate information sharing and coordination on terrorism. The 'Trevi Group', as it became known, created intergovernmental working groups on several internal security topics, but lacked a developed treaty base or institutional infrastructure.

By the 1980s it was evident that eliminating internal borders among EU members would create criminal justice challenges that necessitated going beyond the weak and loosely organized Trevi Group. The Single European Act of 1986 sought to eliminate barriers to the free movement of goods, services, and capital, and was aspirational (rather than substantive) on the removal of barriers to the free movement of persons. However, plans for the removal of physical barriers at borders were set in motion by the **Schengen Agreement** of 1985, which was agreed entirely outside any EU context by five states: France, Germany, and the Benelux states. Schengen's founders agreed a trade-off: no systematic border controls (as opposed to checks or internal controls over persons) between signatories but strengthened external borders vis-à-vis non-Schengen countries. The enactment of Schengen was obviously problematic for the rest of the EU and neighbouring countries. Meanwhile, within the Schengen zone, law-abiding citizens, but also illegal immigrants, organized crime groups, and terrorists could enjoy free movement across national borders. At the same time, cooperation between member states' criminal justice and border management authorities was impeded by jurisdictional limitations and competing legal structures. In short, the need for policy cooperation was clear, but the EU's institutional capacity was lacking.

This mismatch between scope and capacity (see Chapter 1) encouraged European leaders to agree that JHA should be established as one of the three pillars of the new EU as established by the Maastricht Treaty. As explained in Chapter 1 (see Box 1.2), almost all decision-making in the new third JHA pillar was originally intergovernmental because member states were reluctant to share much sovereignty in this area. The Maastricht Treaty provisions for this pillar dictated that proposals could be made only by member states, not the Commission, and decision-making in the Council was by unanimity. The Commission, but also the European Parliament and the European Court of Justice were largely shut out. Under these arrangements, the third pillar produced only modest achievements.

This situation began to change in the mid-1990s once the EU began to feel the effects of the Cold War's end. The conflict in the Balkans led to a European refugee crisis and the need for international cooperation to deal with it. Meanwhile, doubts about the quality of border controls maintained by central and eastern European countries and the growth of organized crime in southeastern Europe created new source- and transit-states for a variety of illicit trafficking enterprises targeting the EU. The impact of these problems was soon magnified by the implementation of the passport-free Schengen zone in 1995. By this time it was also evident that many central and east European states would someday become EU members and participate in that passport-free zone.

This realization contributed to a growing sense of urgency amongst existing member states. The result was agreement on the need to speed up progress on JHA at the EU level and to pressure the applicant states to institute reforms in line with the EU's evolving body of legislation in this area (see, for example, Henderson 2005).

The Amsterdam Era

The development of JHA policy was a major topic at the 1996–7 intergovernmental conference that produced the Amsterdam Treaty. The Treaty established the goal of an 'Area of Freedom, Security and Justice' and empowered the Commission to share in the right to initiate legislative proposals. In October 1999, a special European Council held at Tampere, Finland established a list of general 'milestones' and specific objectives that served as the EU's JHA agenda until 2004.

The Amsterdam Treaty also changed the nature of JHA policy-making by shifting the legal basis of cooperation on civil law, immigration, and asylum from the third to the first pillar. Doing so meant employing the **Community method** of decision-making for these policies, with the Commission as main initiator, unanimity not required, and the EP and ECJ given a bigger role. The shift to the Community method was meant to address a perceived **democratic deficit** on JHA by giving more power to elected Members of the European Parliament (MEPs; see Chapter 8). The introduction of **qualified majority voting** (QMV) was designed to mitigate the gridlock that some feared would follow enlargement.

Although the Amsterdam Treaty included several provisions designed to streamline decision-making, not all of them were implemented, or were implemented only after significant delay. For instance, the agreement to subject some JHA matters to the Community method did not happen on schedule, as some member states were unwilling to relinquish their veto power until work on sensitive legislation on border issues was completed. Similarly, a new so-called *passarelle* (literally, in French, 'footbridge') clause allowed for the transfer of certain JHA measures into the first pillar on the basis of unanimous votes, but it was never used. With the entry into force of the Nice Treaty in 2003, the Community method was applied to some civil law, but the other changes foreseen in the Treaty only came much later. Not until 2005 did the Council decide to apply the Community method to some aspects of border management, such as burden sharing for refugees. Even then, other areas (such as asylum policy) were still handled by the intergovernmental method into 2006. The result is that today JHA policy-making consists of a complicated mix of different rules across pillars and policies (see Box 7.2).

Another noteworthy development since enactment of the Amsterdam Treaty has been the EU's increasing attention to the external dimensions of its internal security. Hoping to deal with a broad range of security problems closer to their source, and in response to the shifting of its own borders, the EU has forged new partnerships with a variety of non-EU countries, especially those covered by the European Neighbourhood

BOX 7.2 How it really works

Policy-making in JHA

In many respects, JHA policy is characterized by anomalous rules and dynamics. For those JHA policies based in the first pillar, such as civil law and many aspects of border management, the Community method of decision-making is used. However, on third-pillar matters the EP and ECJ are largely sidelined and the Commission must share its right of initiative with member states themselves. JHAs are especially hard to track because of the combination of opt-out/in provisions in both the Amsterdam Treaty and 2007 Reform Treaty. The so-called *passerelle* (bridging) provisions mean that the management of specific JHA matters moves over time between procedures and pillars. Moreover, the membership of individual JHA regimes changes over time as states are admitted to Schengen or accede to the Prüm Convention (see p. 145).

The legislative outputs of the third pillar have not been the traditional directives that make up the bulk of EU legislation in economic and related affairs (as discussed in Chapter 6). Rather, they have taken the form of either 'decisions' (such as the decision to establish a new agency), and **Framework Decisions** (FDs), as defined in Box 7.1. Framework decisions are reached not by the Community method but by the Council working intergovernmentally.

The preparation of JHA legislation is also anomalous. The JHA Council's work is largely prepared not by Coreper, but by one of two bodies of national specialists. Third-pillar matters have been considered by the Article 36 Committee (named after a paragraph of the Maastricht Treaty and commonly known as 'CATS'), while border management issues are handled by the Strategic Committee on Immigration, Frontiers, and Asylum (SCIFA). The EP's standing committee on Civil Liberties, Justice and Home Affairs prepares Parliament's opinions on JHA proposals and often raises concerns linked to civil liberties.

QMV is permitted for an increasing number of first-pillar JHA issues, but the need for unanimity in the Council has endured in the third pillar. The Parliament has the power of co-decision on most first-pillar JHA items that are covered by QMV, but the Council can largely ignore the Parliament's opinion on third-pillar matters. Indeed it has often reached its informal decisions before receiving Parliament's suggested amendments.

The ECJ's role is much weaker than in most other policy areas, but it is growing. On first-pillar JHA issues, the Treaties state that the ECJ is barred from hearing cases 'relating to the maintenance of law and order and the safeguarding of internal security'. For the third-pillar issues, the Court's power is even more limited. Member states must declare their willingness to allow the ECJ to make preliminary rulings. By 2006, only fourteen governments had done so. However, in its landmark preliminary ruling of 2005 in the Pupino case, the ECJ specified that governments had to apply national laws in close accord with FDs. This ruling implied that FDs enjoyed a kind of direct effect—similar to directives under the first pillar. Thus, while policy-making rules have differed significantly between pillars 1 and 3, they have become more similar over time. The Reform Treaty (like the Constitutional Treaty) proposed to scrap the pillar system but did not implement a uniform decision-making process for all JHA matters.

Policy (ENP; see Chapter 9 and Occhipinti 2007). The EU has also concluded a number of key security agreements with the US following the terrorist attacks of 9/11 (see Box 7.3; Occhipinti 2005).

Currently, the EU's policy agenda for JHA is specified in the so-called Hague Programme (see Box 7.4), which was developed during the Dutch EU Presidency of

BOX 7.3 Transatlantic cooperation

Despite the appearance of a souring of transatlantic relations, the post-9/11 era can actually be viewed as a period of greater, not lesser, EU–US cooperation on JHA. In fact, a regular process of consultation begun in 2004 has helped improve relations in the following areas:

- **Europol**: agreements reached with the US in 2001–2 allow the exchange of liaison officers and the sharing of criminal intelligence. To date, however, this link has not been used much.
- Mutual Legal Assistance: a 2003 agreement modernizes member states' bilateral arrangements with the US on joint investigation teams, banking secrecy, and the sharing of evidence for prosecution.
- Extradition: a 2003 agreement obliges the US not to impose the death penalty on suspects transferred from the EU, while American extradition requests to an EU member state will not necessarily be trumped by a European Arrest Warrant (EAW) issued by another EU country.
- Shipping Security: America's Container Security Initiative obliges foreign ports to establish terminals dedicated to US-bound shipping; these are to be staffed by American customs inspectors. The Initiative requires further that shipping manifests (listing what is to be shipped) be provided to US officials 24 hours before a container is loaded onto a freighter. By 2007, 23 ports in ten EU countries were participating.
- Airline Security: a 2004 agreement specified that European carriers must meet the US requirement to share passenger name record (PNR) data with American authorities prior to take-off. The EP argued that this agreement violated EU data protection rules. In May 2006, the ECJ annulled the pact, though on technical rather than substantive grounds. The ECJ's decision necessitated new negotiations, with compromises made by both sides. Overall, however, American authorities used the new negotiations in 2006–7 to press for terms more favourable to the US. At issue was how and which European PNR data could be accessed, stored, and shared.
- Travel Documents: the Bush administration won a series of extensions for Europeans when the US Congress threatened that EU citizens carrying newly issued non-biometric passports would no longer qualify for the US Visa Waiver Program (VWP). Eventually, all the affected EU member states agreed to issue the new **biometric** passports. However, the EU continued to protest at America's delay in including most of the newer EU member states in the VWP. The matter was to be reconsidered by the US Congress in 2008.

BOX 7.4 Hague Programme

Approved by the European Council in late 2004, the Hague Programme identifies several specific goals under the headings 'Strengthening Freedom', 'Strengthening Security', and 'Strengthening Justice'. The agenda also calls for attention to fundamental rights, constrained financial resources, and the external dimensions of JHA. In May 2005, the Commission transformed the Hague Programme into an action plan of specific tasks. One key priority identified in the Hague Programme is the creation of a common asylum area, with the goal of implementing a common application procedure and a uniform status for refugees throughout the EU by 2010. These aims are ambitious, but they need not be decided by unanimity; much of the legislation for the new asylum system will be subject to the Community method.

2004 as the successor to the Tampere agenda. This plan will guide the EU on JHA until 2010. It entails a mix of new initiatives and attention to the implementation and effectiveness of existing measures. However, a number of its goals are likely to prove difficult to realize, at least until the proposed 2007 Reform Treaty is fully implemented. Of the 40 new areas to which the Treaty extended QMV, most related to police and judicial cooperation.

Crime-Fighting and Counter-Terrorism

Progress on JHA is often (justly) criticized for slow decision-making at the EU level and delayed implementation in the member states. Developments in the area of crime-fighting and counter-terrorism, however, are remarkable when viewed in the context of the relatively short history of the third pillar. A network of criminal justice bodies now exists at the EU level to promote the sharing of criminal intelligence, evidence for prosecution, and best practices for training. These initiatives are supported by a variety of databases and funding programmes. Similarly ambitious is the 2005 Prüm Convention on criminal justice cooperation, which (again) began life as a non-EU agreement (built on a bilateral arrangement between Luxembourg and Germany), but which snowballed to include seven signatories. It allows the automatic sharing of national fingerprint and DNA data and 'mixed' patrols of police officers operating on foreign soil. By 2007, sixteen states had indicated their desire to sign on to the treaty, and some of its provisions were in the process of being folded into EU law. In addition, through the approximation (harmonization) of national substantive and procedural criminal law, a legal infrastructure of crime-fighting was being developed to facilitate greater cooperation and coordination among the member states and prevent criminals from escaping justice simply by moving from one state to another.

Institutions

From the beginning, the European Police Office—Europol (see Box 7.5)—has been at the centre of the EU's institutional infrastructure for crime-fighting. Its primary role is to maintain a network of liaison officers and a database of criminal intelligence that are available to support and coordinate the investigations of national criminal police authorities. The 1992 Maastricht Treaty provided the legal basis for Europol, but its creation was delayed by subsequent disputes in and among member states. Europol finally became operational in July 1999 (see Occhipinti 2003).

Since 2002, Europol has been paired in The Hague with Eurojust, which provides a network for criminal prosecutors and judges to share information and evidence concerning investigations and trials. With a permanent staff of around 70, Eurojust also provides legal analysis for prosecutions and serves as the conduit for making requests for extradition, or the delivery of a person, suspected or convicted of a crime, from the state where they have taken refuge to the state that claims jurisdiction. As with Europol, Eurojust may use its analyses to request that a member state launch a criminal investigation, but it has no way of compelling national authorities to do so.

In recent years, national authorities have made greater use of Europol and Eurojust in their criminal investigations. Both bodies have experienced significant increases in their caseloads and the volume of information shared through their channels. The directors of Europol and Eurojust continue to bemoan the lack of cooperation across member states and have implored national authorities to share more and better-quality criminal intelligence with and through their respective organizations. But there is no doubt that both of these EU-level institutions are far more active and engaged than ever before.

Along with facilitating cooperation, the EU's evolving institutional infrastructure of crime-fighting promotes the sharing of best practices and police training. At the forefront, in some respects, is the European Police College, known as CEPOL, which is the EU's 'virtual' police academy for high-level police officials. Created in 2000, CEPOL aims to develop a distinctive European approach to crime-fighting by helping to fund and coordinate training programmes hosted by the member states. For example, CEPOL has developed common training curricula for national police academies to 'train the trainers' who serve there. However, CEPOL is not without problems, including difficulties in recruiting staff to its UK headquarters in Bramshill (about 70 miles from London on an inferior train-line).

Yet another institution for crime-fighting is the Police Chiefs Task Force (PCTF), launched in 2000. It meets once per EU presidency, bringing together high-ranking police officers to share best practices and consult on strategic planning. While the PCTF, along with other recently-minted JHA institutions, is not central to operational matters, its launch illustrates the EU's rapidly developing and expanding cooperation in the area of JHA.

BOX 7.5 Compared to what?

Europol and the Federal Bureau of Investigation (FBI)

Europol remains a far a cry from a European FBI, yet it has grown steadily since its inception. Created as the Europol Drugs Unit in 1994 and operating out of a portable trailer in Strasbourg, Europol's crime-fight remit has been gradually expanded to cover all forms of serious transnational organized crime. After years of delay, Europol's computerized database became fully operational, allowing 24-hour access to criminal intelligence in any official EU language. Europol also maintains liaison relationships with Interpol (an international crime-fighting network) and several non-EU states, such as those in the Schengen zone, the US, and Canada. Europol's effectiveness in actual police operations has been questioned, but it is being increasingly used by member states. In 2006, Europol published its first annual Organized Crime Threat Assessment, intended to guide strategic planning on crime-fighting in the EU.

As the table illustrates, the FBI dwarfs Europol in nearly every regard, although it should be noted that numerous EU states invest significant national resources in FBI-type activites. The key question for European states concerns what resources to pool, and thus Europol's history has been radically different from that of the FBI. However, the FBI, too, grew out of humble beginnings. The forerunner of the FBI was a small corps of agents founded by the US Attorney General in 1908 to replace private detectives and officers borrowed from other agencies. It was not until 1934 that FBI agents were empowered to carry guns and make arrests. As with Europol, the FBI's growth was initially inhibited by a lack of federal criminal statutes and scepticism about impinging on state and local authorities. Counter-terrorism became the FBI's primary mission after 11 September amid reform of its information technology and the assignment to it of a new role in the restructured US intelligence community (see Box 7.6). In sum, despite important differences between them, both Europol and FBI started small and grew incrementally into important crime-fighting bodies.

	EUROPOL	FBI
Budget	€67.9 million (2007)	$6 billion (2007)
Personnel	590 (including 90 liaison officers)	31,000 (including 12,500 special agents)
Locations	Headquarters in The Hague with contact points to national authorities through its liaison officers	Headquarters in Washington, DC and 56 field offices
Powers	May not conduct independent investigations or make arrests	Full policing powers

FBI website: www.fbi.gov/quickfacts.htm
Europol website: www.europol.europa.eu/index.asp?page=facts

Criminal Law and Counter-Terrorism

Cooperation on criminal law, the body of law that deals with crimes and their punishments, has advanced rapidly in recent years. Criminal law includes both substantive and procedural components. Substantive criminal law defines crimes and related sanctions, while procedural criminal law governs the execution of law enforcement and defendants' rights. Compared to the very limited operational powers given to the EU's new crime-fighting bodies, the approximation of substantive and procedural criminal law goes to the very heart of national sovereignty.

The harmonization of criminal law has occurred primarily through framework decisions (FDs) (see Box 7.1): legislative blueprints specifying how and when national laws must be changed, but leaving the specifics of that change to each member state. The Council has approved several framework decisions on substantive criminal law, specifying definitions and ranges of criminal sanctions for crimes such as counterfeiting the euro, **human trafficking**, child sexual exploitation, environmental crime, cyber crime, drug trafficking, and terrorism.

The passage of the framework decision on terrorism illustrates how JHA cooperation is often driven by crises. Within two weeks of 11 September 2001, the Commission pushed the terrorism framework decision from the drawing board of the Tampere programme to consideration by the Council. This legislation established common definitions for particular terrorist offences and minimum thresholds for criminal sanctions associated with these crimes. At the time, only Germany, Spain, France, Italy, Portugal, and the UK had specific anti-terrorism laws in their penal codes.

By October 2001, a few member states, notably Italy and Ireland, had expressed opposition to the framework decision's definition of terrorism. They echoed fears expressed by some MEPs and civil liberties groups that the framework decision would permit member states to suppress legitimate forms of public protest. Given these concerns and the overall sensitivity of the issue, it is likely that the debate on the decision could have lasted months, if not years. Yet the political push of 9/11 helped the Belgian Presidency, aided by the Commission, to forge an agreement in the Council by December 2001.

Agreement is one thing, implementation another. Several EU members missed the FD's original deadline of December 2002 for transposing the decision into national law, and the same was true for the updated target of June 2004, even after the terrorist attacks in Madrid earlier that year. By 2007, transposition (see Box 7.1) of the FD was still incomplete in a few member states, though finished in most. Moreover, legal **transposition** is the 'easy part' and it by no means guarantees effective implementation or enforcement. In sum, terrorist attacks have certainly provided impetus for change in the EU on counter-terrorism, but these reforms continue to fall short in important respects (see Box 7.6).

In contrast to the rapid agreements on counter-terrorism, the drug-trafficking FD illustrates how progress can be slow without a crisis to provide momentum. The framework decision is designed to combat and prevent illegal drug-trafficking. An

BOX 7.6 Compared to what?

Counter-terrorism: the EU and US

Counter-terrorism efforts in both the EU and US have focused on legal and institutional reforms designed to promote greater coordination among key actors and the sharing of intelligence among them. However, institutional change has been more dramatic in the US, which began from a standing start and without much prior experience of domestic terrorism (unlike the UK, Germany, Italy, Spain, and France). A total of 28 federal agencies were merged to create the US Department of Homeland Security. The intelligence community was overhauled and put under the authority of a new Director of National Intelligence. The USA Patriot Act, rapidly approved after 9/11, eliminated the so-called 'wall' between the FBI and Central Intelligence Agency (CIA). It allowed the two agencies to share intelligence through bodies such as the Joint Terrorism Task Forces composed of law enforcement officers from all levels of government. As the immediate memory of 9/11 faded, civil liberties concerns complicated the Bush administration's efforts to make permanent the more controversial aspects of the Patriot Act.

In the EU, the 9/11 attacks hastened a variety of measures, including the creation of a counter-terrorism task force in Europol, a framework decision on terrorism, the European Arrest Warrant, and initiatives to fight the financing of terrorism. The 2004 terrorist attacks in Madrid restored a sense of urgency in fighting terrorism, and the EU responded by creating the post of counter-terrorism coordinator, a post held until March 2007 by Gijs de Vries of the Netherlands. Lacking the operational or budgetary authority of his American counterpart, the European Union's coordinator (or 'Mr Terror' as he was dubbed) was charged with pressuring governments to implement EU-level counter-terrorism initiatives and encouraging better international intelligence-sharing. To promote this goal, national officials from *domestic* intelligence services have been allowed to join their counterparts from *foreign* intelligence services at the EU's Situation Center (SitCen), housed in the Council Secretariat.

Progress here, as elsewhere, has been crisis-driven. Following the London bombings of July 2005, the UK successfully pressed for the adoption of a data-retention directive requiring telecoms firms to make customers' communications records available for counter-terrorism purposes. In the absence of crisis, however, action on counter-terrorism tends to stall. In 2007, the naming of a new counter-terrorism coordinator was delayed as the EU reconsidered the power and influence of this post, highlighting the tension between the member states' desire for more effective counter-terrorism measures and their reluctance to grant EU-level actors greater operational authority in this area.

initial version of the measure, proposed by the Commission in May 2001, was first amended to meet several states' concerns on various issues. However, further progress was held up by the Dutch, who feared the earlier amendments would criminalize the possession of small amounts of drugs for personal use and thus force the closure of their popular drug 'coffee houses'. After months of delay, the other member states

finally dropped the amendments opposed by the Dutch and the measure passed in October 2004. Drug trafficking is a serious problem in the EU and is linked to other forms of trafficking, such as tobacco or human trafficking. However, in the absence of a serious crisis that might induce consensus, the concerns of individual states have proven hard to overcome.

Political crises have also spurred EU legislation on criminal procedure. By far the most significant achievement in this field has been the framework decision establishing the European Arrest Warrant (EAW). The warrant is aimed at simplifying and hastening extradition of suspected criminals. As with the terrorism framework decision, the EAW was proposed by the Commission and rapidly approved by the Council just weeks after 9/11, overcoming disputes among the member states on several issues that would otherwise have delayed its passage (see Kaunert 2007).

The EAW has changed extradition from an often politicized judicial process to a simplified administrative transfer. By implementing the principle of 'mutual recognition' for a list of 32 crimes, the arrest warrant eliminated a traditional rationale for refusing an extradition request, namely the principle of double-criminality, according to which an offender cannot be transferred across borders unless the offence is a crime in both the transferring and receiving countries. It also lifted the traditional ban in some member states on extraditing one's own nationals. However, soon after Italy became the last EU member state to implement (belatedly) the EAW in April 2005, legal questions arose in Cyprus, Poland, Germany, and Belgium, mostly concerning its compatibility with national constitutions in these countries (see Box 8.4). In 2005 the domestic federal constitutional court voided Germany's original legislation implementing the warrant because it violated Germany's constitutional protection of its own nationals regarding extradition and trials abroad. Nevertheless, the EAW is already being widely used by the states that have implemented it, and has reduced the average time for handing over suspects from nine months to just 43 days. In the summer of 2005, for example, the UK used the EAW to win the return of one of the unsuccessful London bombers less than two months after his arrest in Italy.

Constitutional concerns raised by the EAW extended beyond this particular decision. For instance, the fundamental legal issues arising from the arrest warrant contributed to delays to a second procedural measure, the European Evidence Warrant (EEW), which was first proposed by the Commission in November 2003. Covering the same list of 32 crimes noted in the arrest warrant, the evidence warrant is designed to limit delays in a member state's reaction to requests to exercise search warrants on its territory. However, several governments became concerned that the EU had acted too hastily on the arrest warrant and were determined not to repeat the mistake. In particular, the Dutch threatened to veto the evidence warrant until they could ensure that they would not be overrun with requests related to drug-trafficking cases. Meanwhile, the Germans, mindful of their constitutional court's negative ruling on the arrest warrant, wanted to opt out of obligations under the evidence warrant for six crimes which they argued were poorly defined. Not until June 2006 was a deal reached that addressed the Dutch and German concerns. Collectively, these illustrations show that crises can help promote the passage of controversial framework decisions on matters of criminal law, but they will not guarantee their timely transposition or help them resist subsequent legal challenges.

Border Management

Border management in the EU involves visa policy, the fight against illegal immigration, and policies on refugees and asylum. In addressing these issues, the EU has attempted to balance several competing concerns. First is the principle of 'free movement', including movement of persons, which numerous member states have hesitated to extend to non-EU or new EU members, leading to fears of an emergent 'fortress Europe'. Secondly, border management is viewed as a crime control matter, entailing the fight against a variety of transnational criminal activity, but especially human trafficking and human smuggling (see Box 7.1). Thirdly, policies related to border management must be attentive to human rights, including the legitimate needs of refugees escaping wars and natural disasters, asylum seekers fearing persecution, and the victims of trafficking fleeing their captors. Finally, EU border management has been shaped by concerns for financial burden-sharing regarding the costs associated with refugees, asylum applicants, illegal immigrants, and the need to patrol long coastlines and land borders.

Immigration and Schengen

As with its crime-fighting initiatives, most of the EU's progress on border management has occurred since the Amsterdam Treaty. One of its key innovations was bringing the Schengen agreement and its established **acquis** into the EU's treaty framework. Yet this development has led to the anomalous situation whereby not all EU members participate in the free travel Schengen area, but some non-EU countries do. For instance, the UK and Ireland have their own free-travel zone and do not belong to the Schengen area. However, they do participate in the sharing of criminal data facilitated by the Schengen Information System (SIS), which helps manage comings and goings into the passport-free zone and can flag wanted criminals. Moreover, the UK, Ireland, and Denmark have opt-outs from some EU border management issues through protocols attached to the Amsterdam Treaty. On the other hand, Norway and Iceland do not belong to the EU, but participate in the Schengen area because of their pre-existing free-travel agreement with the Nordic members of the EU. Similarly, non-EU member Switzerland signed the Schengen agreement in 2004 but is unlikely to implement passport-free travel until 2009.

Since their **accession**, the EU's new member states have been legally committed to joining the Schengen zone. However, a specific date was not specified until after

the EU could determine that their external land, sea, and air borders were sufficiently secure. Originally, the expansion of the Schengen zone was not to occur until the implementation of an updated computer system (SIS II). But when this system was delayed, a deal was brokered to allow passport-free land travel by the start of 2008 and air travel by March 2009.

Schengen's anomalies co-exist with, and perhaps encourage, pragmatic flexibility. Schengen rules allow participating states to reinstate border controls temporarily for security reasons, as France did following the London bombings on July 2005. Several states have done the same for major international sporting events in an effort to prevent terrorist attacks or limit the influx of football (soccer) hooligans.

Visa Policy

Unlike other JHA policies, the legal basis of visa policy has always been located in the first pillar ever since the Maastricht Treaty was agreed. The approximation of national visa policies has been a goal of the EU since then, but the establishment of the Schengen zone made this step a necessity rather than mere aspiration. Consequently, the JHA Council has established and periodically updated a common 'white list' of countries whose citizens do not need visas to visit the EU for less than three months. Other states are on the much longer 'black list', which means their citizens need an appropriate visa (see Box 7.7). Since 1996 the JHA Council's amendments to the white and black visa lists have been decided using QMV, although not via **co-decision** with the European Parliament. These lists do not apply to the UK and Ireland, which exercise their opt-outs in these areas. Denmark, as a member of the Schengen zone, does apply them.

As well as inhibiting the free movement of organized criminals or the victims of human trafficking, the EU's black list is intended to prevent citizens of 'at-risk' countries from gaining entry to the EU on tourist visas when it is likely that their actual intention is to work or reside illegally in a member state. In 2006, the JHA Council finalized legislation for the Visa Information System (VIS), which will allow national consular officials to collect and share biometric data on visa applicants (see Box 7.1). The intention of VIS is to prevent forgeries of travel documents and inhibit those denied a Schengen visa by one member state from applying again through another (a process known as 'visa shopping').

Illegal Immigration

EU member states will be challenged by illegal immigration as long as they restrict legal immigration (and most are becoming more, not less, restrictive) and remain bastions of political freedom and economic prosperity relative to the developing world (see, for example, Guiraudon and Jileva 2006). In general, those who attempt to enter the EU illegally do so because they cannot afford the cost of a visa, have had their application

BOX 7.7 White and black visa lists

The JHA Council decides which third countries' citizens require special visas to enter the EU. The original white list of exempted countries (not requiring special visas) was agreed upon by member states in 2001 and included 43 states, as well as holders of passports issued by the administrative districts of Hong Kong and Macao. The only substantive change to this list came in 2003, when Ecuador was moved to the black list after it was determined that too many of its citizens were staying illegally in the EU after entering legally. The first white list also contained Switzerland until its free movement agreement with the EU took effect in 2002, which allowed it to be removed from all lists.

The white list includes:

- Europe: the twelve newest EU members plus Croatia, Andorra, Monaco, San Marino, and the Holy See (Vatican City)
- Central America: all countries except Belize
- South America: all countries aside from Guyana, Suriname, French Guiana, and Ecuador
- Middle East: only Israel
- Asia: only Brunei, Japan, Malaysia, Singapore, and South Korea
- Others: US, Canada, Australia, and New Zealand

The black list includes:

- Africa: all countries
- Middle East: all countries leaving aside Brunei and Israel
- Central Asia: all countries
- Asia: all countries except those noted above
- Former Soviet Union: all countries besides the Baltic (EU) states
- Caribbean: all countries
- Former Yugoslavia: all countries aside from Slovenia and Croatia
- Turkey

denied, or expect denial if they were to apply. Smugglers sell illegal immigrants forged travel documents, passage on ships bound for the EU, or hiding places in shipping containers. Routes are adjusted frequently to stay one step ahead of border officials. In 2004, the flashpoint for illegal immigration was Italy's southernmost island of Lampedusa, but by late 2005, the hotspots were Malta and the Spanish enclaves of Ceuta and Melilla in Morocco. In 2006, shiploads of African illegal immigrants created unprecedented crises in Spain's Canary Islands.

The gradually widening Schengen zone means that one country's inability to prevent illegal immigration can become a problem for another. This spillover provides the main

rationale for a common EU approach. Initially, the EU's response was limited to the efforts of Europol, framework decisions on human trafficking and human smuggling, and co-financing for training and cooperation on border management. Responding to a series of illegal immigration crises, the Seville European Council of June 2002 provided a much-needed boost to several initiatives that had languished after being introduced in the Tampere programme years earlier. European leaders could not agree in Seville on bold plans for an EU border patrol, but they did endorse the creation of a unit composed of the heads of the national border services to promote coordination and a common curriculum for training border guards. Within a year, the Commission proposed moving beyond this informal coordination by creating an EU border management agency. Following Council approval, the new agency, known as Frontex (*Frontières extérieures*) and sited in Warsaw, became operational in April 2005.

With a small staff of about 50, the Frontex agency promotes operational cooperation by developing common standards and procedures among the member states and supporting them with training, risk-analyses, and technical assistance. Frontex has helped to coordinate member states' joint sea and air patrols of trouble spots, as it did in summer 2006 when it was called upon to organize the EU's aerial and marine support to Spain, Malta, and Italy to help them address their illegal immigration crises. In this context, the Commission also proposed the creation of standing, rapid-reaction teams of border guards drawn from the member states that could be used to respond to future incidents. Frontex would play the lead role in selecting and training personnel for these units and oversee their operations when deployed. However, it was not until 2007 that member states started to deliver on commitments to endow Frontex with adequate resources, including ships and helicopters. Even then, after international patrols coordinated by Frontex enjoyed some success in intercepting boat-loads of illegal immigrants in EU waters, the member states could not agree who was responsible for receiving and deporting them.

In addition to creating Frontex, the EU has also intensified cooperation with non-EU countries in its fight against illegal immigration. Readmission (deportation) agreements are an important part of this effort, hastening the return of illegal immigrants or unsuccessful asylum applicants to the state from which they came, no matter what their nationality. States that agree to deportation agreements typically want something in return, such as a simplified or less expensive means for their citizens to obtain a Schengen visa. By 2006, the EU had achieved readmission agreements with Russia, Hong Kong, Macau, Sri Lanka, Albania, and Ukraine. Talks with Morocco had stalled on the issue of returning illegal immigrants who transit through that country but are not its citizens, thus reflecting the increasing tendency of north African and eastern Mediterranean countries to be transit countries for illegal immigration, rather than sources.

Readmission agreements are also prominent goals of the EU's European Neighbourhood Policy (ENP) (see Chapter 9). In December 2005, with illegal immigration crises flaring in Malta and the Canaries, the European Council announced that the EU would allocate 3 per cent of its future ENP funding to **third countries** to support joint patrols

and other improved interdiction methods, especially in the priority countries of Morocco, Algeria, and Libya. In an attempt to address the problem at its source, the heads of governments also agreed to contribute EU funds towards economic development in sub-Saharan Africa.

Asylum and Refugee Policy

All EU members offer asylum under the terms of the Geneva Convention of 1951 and the 1967 protocol on the status of refugees. The overarching goal of EU asylum policy is to eliminate discrepancies between member states in the implementation of these accords. For example, an asylum seeker may find it much easier to obtain refugee status in Sweden as compared to Greece. One specific objective is to guarantee a minimum level of protection for refugees. Another is to ensure an equitable sharing of the burden of providing asylum among EU members. A common asylum policy would help to achieve this goal by reducing incentives for 'asylum shopping', which occurs when a would-be refugee applies for asylum in several states simultaneously, looking for the most favourable conditions.

Asylum policy has been in the EU's purview since the Maastricht Treaty, but there was little progress until the Tampere programme. In the wake of the 1990s Balkans' refugee crises, most European countries developed national schemes to provide 'temporary protection' for sudden, mass influxes of people displaced by wars and natural disasters when time or resources were insufficient for the normal asylum process. In 2001, the JHA Council passed a directive specifying minimum standards for temporary protection; these standards were designed to reduce disparities in reception conditions among EU countries and consequently promote burden-sharing. Financial 'solidarity' for sudden influxes of refugees is also provided to member states by the European Refugee Fund (ERF), which has been in place since 2000.

Meanwhile, the EU has continued its attempt to limit asylum shopping through the implementation of the Eurodac database. In operation since 2003, Eurodac is a centralized system for collecting, storing, and sharing biometric data (mainly digital fingerprint images) on asylum applicants. Its initial years of operation confirmed what border management officials had long suspected, namely that thousands of refugees shuttle throughout the EU to lodge multiple asylum applications. Eurodac enables authorities to reject these applications and return applicants to their original country of application. Ultimately, the EU hopes that refugees will realize that asylum shopping is no longer worthwhile, although the experiences of ex-Yugoslavia, Afghanistan, and Iraq all suggest that local conditions, far more than EU policy, determine the flow of refugees.

In contrast to its progress on Eurodac, the JHA Council for many years was unable to agree on how to harmonize asylum policy. Momentum was provided in 2002 by a series of immigration-related crises that prompted EU leaders to rededicate themselves to immigration reform. At the 2002 Seville summit leaders agreed and eventually approved a package of measures establishing minimum rules and standards on asylum.

These measures are important in themselves, but their cumulative effect was to pave the way for the harmonization of asylum policy as outlined in the Hague Programme (see Box 7.4)

Conclusion

The constant change and experimentation endemic to the EU generally (see Chapter 1) is nowhere more apparent than in the area of JHA. Since 2001 JHA policy has experienced a remarkable period of development. Many changes have come in the form of new agencies and shared resources such as databases, as well as legislation aimed at harmonizing member states' laws on crime-fighting, counter-terrorism, and border management. In addition, a variety of liaison networks and training initiatives have been created.

How can the development of JHA policy be best understood and examined? Different theoretical paradigms of **European integration** can help. For example, neo-functional analysis focuses our attention on how agreements on free movement of goods 'spilled over' into cooperation on free movement of people and issues arising from that phenomenon. Historical institutionalism's emphasis on 'path dependence' can explain how informal cooperation (such as the Trevi Group) put the EU on a path leading to JHA cooperation later on. What began as the informal exchange of ideas cultivated shared norms and practices that made possible more formal treaty changes. Studies of **Europeanization** (see Chapter 4) also help us examine how incremental or informal small steps—the harmonization of border management standards or EU-level training initiatives—can lead to normative or policy-related changes in the member states. Meanwhile, **liberal intergovernmentalism** draws our attention to the tenacious endurance of national interests, the clashing interests of asymmetrically powerful states, and the resulting bargains struck at IGCs. The development of JHA is resistant to simple or singular theoretical explanations because it is driven by competing phenomena: the need for European states to upgrade their national capacities in response to events such as the wars in ex-Yugoslvia or 9/11, the imperative to cooperate to deal with quintessentially cross-border problems, and the need to address sovereignty and civil liberty concerns.

What now? Looking ahead, the EU faces two key challenges on JHA. The first is how to make progress on new third-pillar initiatives in the face of national vetoes in the Council. While some member states insist that significant progress has been made on numerous matters even with unanimity, others complain about decision-making delays or the need to water down legislation to achieve unanimity. The second task is to improve the nature and pace of transposition of agreements into national law. When (and if) implemented, the Reform Treaty is likely to help on both fronts because it retains most of the substantive changes on JHA envisioned in the original Constitutional Treaty. For instance, the Reform Treaty will apply the Community method to decision-making

on the structure and powers of Europol and Eurojust, eliminating national vetoes and giving the EP the influence over these bodies that it has long sought.

More dramatically, the Reform Treaty will encourage the transposition of JHA legislation into national law by allowing the ECJ to rule on infringement cases (which seek to oblige member states to fulfil their legal obligations as EU members). Under existing treaties, the ECJ enjoyed this power on first-pillar JHA policies (such as many asylum matters), but not on third-pillar policies. The Court's (and Commission's) weaker enforcement role helps to explain why the EU's implementation record on JHA has been the worst of any policy domain.

Although the new treaty will empower the ECJ in some areas of JHA decision-making, it will not replace the existing patchwork of JHA decision-making methods with a single approach. For example, EU decisions on family law will still be made intergovernmentally, and the extension of the Community method to this area of civil law will now be subject to approval of national parliaments. The Reform Treaty will apply the Community method to most remaining aspects of border management, but measures concerning passports and other immigration documents will be handled intergovernmentally. The sensitive area of legal immigration quotas will be left in the hands of the individual member states (as now). Despite the Reform Treaty's promise to eliminate the pillar system, one could interpret the survival of multiple decision-making mechanisms (even with their single legal basis) as effectively the survival of the pillars. Moreover, the UK's opt-out on the new Treaty's JHA provisions only adds to the complexity of this policy area.

The handling of JHA in the Reform Treaty reveals that consensus is unlikely to emerge soon regarding how, and how fast, to develop EU policies and powers in this area. Progress in an EU of 27 may rely on smaller groups of states taking the lead and bringing other countries along later. One variation of this approach is provided by the so-called 'G-6', which periodically brings together the largest EU members to discuss ways of promoting cooperation on issues such as JHA. In addition, the Schengen zone, Prüm Convention, and related EU legislation together have established a precedent for cooperation to begin with just a few member states and to involve others after it has proven its value.

In sum, making JHA policies work has always been and will continue to be a major challenge for the EU. The benefits of closer cooperation are clear and widely acknowledged. But so too are the concerns raised by this remarkable area of EU policy, which touches directly on fundamental issues of national sovereignty, security, and civil liberties.

DISCUSSION QUESTIONS

1. How has the Schengen zone influenced the development of JHA?
2. Which EU institution is most important for JHA?

3. In what ways has JHA become important in the EU's relations with non-EU members?
4. In which areas of JHA should the EU pursue closer integration in the future?

FURTHER READING

JHA remains an under-researched area of the EU but scholarship is expanding and improving. Monar's (2006) work remains essential reading and Geddes (2006) offers a helpful overview. Henderson's useful volume (2005) focuses on the new member states. Occhipinti (2007) examines the interface between JHA and European Neighbourhood Policy. Sasse and Thielemann (2005) compile the work of leading experts on EU border management issues. Rees (2006) makes a timely and valuable general contribution; Peers has updated his seminal work on JHA law (2006).

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Rees, W. (2006), *Transatlantic Counter-terrorism Cooperation: The New Imperative* (London and New York: Routledge).

Sasse, G, and Thielemann E. (eds.) (2005), 'Migrants and Minorities in Europe', Special Issue of *Journal of Common Market Studies,* 43/4.

WEB LINKS

The Commission DG Justice, Freedom and Security maintains a nice website on all aspects of JHA at ec.europa.eu/justice_home/index_en.htm. Europol's various publications on organized crime can be found at www.europol.europa.eu/. The website of the Eurojust network of criminal prosecutors and judges can be found at: http://eurojust.europa.eu/

For critical perspective on JHA, see the publications of Statewatch, a civil liberties NGO: www.statewatch.org/.

Visit the Online Resource Centre that accompanies this book for additional material: www.oxfordtextbooks.co.uk/orc/bomberg2e/

CHAPTER 8

Constitutionalism and Democracy in the EU

Neil MacCormick

Chapter Overview

Democracy flourishes in polities that have a constitution and a sense of common citizenship that leads citizens to respect it. But the European Union has so far failed to adopt a formal constitution. Is the EU undemocratic, then? Constitutions may be functional (as in the United Kingdom) or explicit texts (as in most European countries), and the EU has a kind of functional constitution. Moreover, the EU is a Union of democratic states. The question is: are these enough to characterize the EU as democratic by extension? Or does the Union require direct democratic credentials? Does this multistate, multilingual union have a sufficient sense of common citizenship to make genuine democracy possible? This chapter examines the nature of constitutionalism and democracy in the EU and how they work.