

**DEVELOPMENTS IN MUTUAL LEGAL ASSISTANCE AND
EXTRADITION AT THE INTERNATIONAL LEVEL**

Hans G. Nilsson *



I. INTRODUCTION

Over the past 20 years, if not more, crime has evolved exponentially in the Member States of the United Nations and at the regional level. The nature of crime has also changed: from being confined only to one country or region, crime has become international in its planning, perpetration and detection. The level of seriousness of the crime has also increased and a number of committed offences can today be qualified as truly international in their very nature (drugs trafficking, terrorism, trafficking in human beings, illicit arms trafficking, and crime on the Internet etc.).

This development has required that the “international legislator”¹ take all necessary measures to enable international judicial cooperation to progress and become more efficient. Although many countries have the possibility, under their Constitutions, to cooperate against crime on the basis of reciprocity, experience has shown that a sound legal basis in a Convention is conducive to efficient cooperation against crime. This is particularly true in the field of extradition but also to a large degree in mutual legal assistance.

This development has led to a number of initiatives to be taken in the past 15-20 years within the United Nations or in regional organisations such as the Council of Europe, the OAS or, more recently, in the European Union.

I propose in this paper to examine some of the developments that have taken place during this period, both in the field of extradition and in mutual legal assistance. In order to limit the paper, I will restrict it to an examination of the most important developments and trends at the UN level, namely as regards the two “flagships” of international cooperation that have been agreed at international level: the 1988 UN Convention against trafficking in narcotic drugs and psychotropic substances, concluded on 19 December 1988 and the 2000 UN Convention against transnational organised crime. As regards the third flagship, which has experienced so far the fate of the flying Dutchman, namely the draft UN Convention against corruption, at the time of writing not yet concluded but where it may reasonably be presumed that it will be concluded in December of this year, there is in principle no need to examine this draft, as it largely, into the most minute detail, contains the same provisions as the Palermo Convention.

* Head of Division, Judicial Cooperation, Council of the European Union, Brussels. The opinions expressed are those of the author and not necessarily those of the Institution for which he works.

¹ By this term, I am not only referring to the work of international or supranational organisations but also to the work carried out at a bilateral level between two or more States.

I will further examine some recent developments within the European Union, which may not be so well known to an international audience as these developments concern only the 15 Member States of the EU, soon to become 25 as from 1 May 2004. But before explaining the set up of the EU in criminal matters, I should first mention some matters concerning the Council of Europe - the oldest organisation that has been dealing with cooperation in criminal matters in Europe since 1957².

II. COUNCIL OF EUROPE

At regional level in Europe, many important developments have taken place within the Council of Europe, the Strasbourg based organisation with its now 45 Member States. Since 1957 it has developed international instruments in the field of international cooperation in criminal matters, including the 1957 European Convention on Extradition, the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and the 1990 Convention³ on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime⁴.

The Council of Europe had until 1989 21 Member States, i.e. Western Europe. With the fall of the Berlin Wall, its membership has gradually evolved until its most recent Member State- Croatia.

Since the membership includes both large States (with very different levels of development of Human Rights and the Rule of Law) such as Germany, France, Russia and Ukraine, and small States (also with different levels of development in certain aspects) such as Luxembourg, Malta, Liechtenstein and Andorra, the criminal law cooperation within this framework tends to become intergovernmental, and sometimes also "a la carte" with a number of possibilities of grounds for refusal and reservations in the conventions that have been drafted under its auspices.

A further complication, from this point of view, has been the recent tendency to allow States such as the United States, to assist in the deliberations of the expert Committees drafting new instruments. At least to my mind, although it must be welcomed in general that international cooperation in particular in the field of cyber crime has a vocation to fight crime at a universal level, this has sometimes not facilitated the difficult search for solutions that may be found between like minded-countries having similar legal traditions or close ties in international cooperation. A particularly striking example has been the previously mentioned 1990 Laundering Convention where large concessions were made to one non-European country that participated in its drafting but which today, 13 years after its conclusion, has not yet ratified this Convention. One may wonder whether it would not have been wiser to seek "European" solutions to these problems and seek separate solutions instead with some non-European countries.

² The Organisation was founded in 1949.

³ This Convention is not European since it is in principle also open to States that are not European as from its beginning - the USA, Canada and Australia participated in its drafting, although only Australia has signed the Convention that has now 38 ratifications.

⁴ The Council of Europe has in total elaborated more than 20 international conventions in criminal matters and in total nearly 200 Conventions. Its most important achievement is the European Convention on Human Rights, setting up the unique system of protection of human rights in Europe by the European Court of Human Rights.

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In this context, the recently concluded Convention on cyber crime must be mentioned as a particularly interesting example of a development that may have a real impact on international cooperation in the fight against crime in the particular area of computer crime and investigations into cyberspace.

From the Council of Europe experience, one must however also conclude that extradition and mutual legal assistance remain the main tools in international cooperation; transfer of criminal proceedings and the recognition and enforcement of criminal sanctions⁵ remain to a large extent theoretical possibilities without any follow up in practice, even among countries that have close relations in criminal cooperation such as the Benelux countries or the Scandinavian countries. However, cooperation for purposes of allowing the transfer of sentenced persons⁶ with a view to permitting them to reinsert in their own societies has been more successful, although it has proven problematic with some countries, in particular outside Europe that have been permitted to join this Convention.

III. EUROPEAN UNION

The developments within the European Union are much less well known than those within the Council of Europe by the international community. There are several reasons for this, but in particular it should be mentioned that these developments are relatively recent (the Treaty of Maastricht entered into force on 1 November 1993), they are unique to the world (a system of semi-supranational competencies have been gradually put in place; the instruments drafted are binding on the Member States) and they concern only the Member States of the EU which form part of an ever closer and integrated Union that de facto has its own legal personality⁷.

In view of these developments, it may be justified to describe in more detail to an international audience these developments within the EU, since they have an impact on the most developed part of Europe (the candidate States to the European Union have an obligation to implement the entirety of the Union *acquis*), thus the 25 States and since they also have a potential to have an impact on other States in Europe that have aspirations to become Member States of the European Union.

With the entry into force of the Treaty of Maastricht, the Union declared that judicial cooperation in criminal matters was an area of “common interest” for the Member States. This means already that the machinery of the EU could be used for purposes of developing criminal law within the framework of the Institutions of the EU. The European Commission participated in the drafting of the new instruments, and had even a right of initiative when it came to those relating to fraud (it took the initiative to what was to become the 1995 Convention of the fight against fraud for purposes of protecting the financial interests of the European Communities. The European Parliament was heard by the Council of Ministers that took all the final decisions. The European Court of Justice had a limited role to interpret the instruments drafted under the regime of the Treaty of Maastricht. Under this Treaty regime were however drafted a number of

⁵ See the European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters and the European Convention of 28 May 1970 on the International Validity of Criminal Judgments.

⁶ See the Convention of 23 March 1983 on the Transfer of Sentenced Persons.

⁷ Viz. the recently signed, and binding on the Member States when concluded, treaties with the United States on extradition and on mutual legal assistance where the contracting parties are the United States of America and the European Union (and not its Member States).

Conventions (14) and so-called Joint Actions (instruments in principle binding on the governments but which could have a somewhat weak legal status depending on the Member State concerned) on a number of important topics: definition of the offence of participation in a criminal organisation, private corruption, confiscation of the proceeds from crime, etc. In addition, the Council adopted so-called Common Positions, instruments that define a position that the Member States are required to defend during negotiations within international fora, such as the United Nations or the OECD.

Of particular importance were the two Conventions that were concluded on extradition in 1995 and 1996 - see below. In the field of mutual legal assistance, an evaluation was undertaken on how mutual legal assistance works in practice⁸ in the Member States, the European Judicial Network was set up and a Joint Action was adopted on good practice in mutual legal assistance.

It turned out however that the legal instruments at the disposal of the EU did not match the objectives of the political leaders of the Union. During the revision of the Treaty of Maastricht, the so-called "third pillar"⁹ became one of the areas where change was most radical. The Joint Actions were abolished and replaced by Framework Decisions and Decisions, which are both binding on the Member States and are also liable to be interpreted by the European Court of Justice under certain conditions. Framework Decisions are used to harmonise substantive and procedural criminal law and Decisions for any other purpose. The European Commission has been given a full right of initiative in the same vein as the Member States and was also the body that took the formal initiative, after a decision by the Heads of State and Government, to the European Arrest Warrant that abolishes extradition among the Member States - see below.

One of the reasons for these radical changes was that for the first time in matters of judicial and police cooperation the Union had set itself an objective: the creation of a high level of safety within an Area of freedom, security and justice. It should be remembered that in principle, among the Member States, there are no more internal borders so that people may travel freely from one country to another. Law enforcement and criminal law cooperation had however remained within the realm of sovereignty and the borders remained for this kind of cooperation. It could however now be said that the first steps towards the creation of a single Area in certain matters have been taken since the entry into force of the revised Treaty of Amsterdam on 1 May 1999.

Another reason for the radical changes was the widespread dissatisfaction with the unwieldy system of slow negotiation and uncertain implementation of international conventions - an instrument that is used for intergovernmental cooperation and not adapted to the closer ties that the Union is seeking to achieve. Experience of the Union is that conventions take too long before they are implemented (the 1995 and 1996 Conventions on extradition mentioned below have not yet been ratified by all Member States; only by 13 of them) and the role of Union Institutions, in particular that of the Court of Justice, has not been developed enough.

⁸ The reports are published on the Council's website at <http://www.eu.ue.int>.

⁹ Judicial cooperation in criminal and police matters; the second pillar is the Common Foreign and Security Policy of the Union and the first pillar is the supranational part of the Union (i.e. the European Community) where the European Commission has the sole right of initiative (e.g. environment policy, transport, telecommunications, etc).

As regards Framework Decisions and Decisions therefore, the Council can prescribe a specific period of implementation and does also do that in practice - usually 18 months is taken as a normal period for implementation and adaptation in legislation. The Member State that does not implement a Decision or a Framework Decision within the prescribed period will be in breach of the Treaty (and of the Framework/Decision which is binding). In practice, it could be said that the Union has abandoned the instruments of conventions and will now only resort to these types of instruments which are more powerful¹¹.

After these brief explanations which are necessary to understand the institutional set up and the nature of the cooperation, I will now turn to the main topic of the paper.

IV. EXTRADITION/SURRENDER

A. At the level of the United Nations

When the 1988 UN drugs Convention was concluded, it was considered that this was an achievement at international level which made extradition progress considerably. And this assessment must be considered to be true, although one could also be somewhat more critical to some of the provisions of the 1988 Convention. In particular, the 1988 Convention, like a number of its predecessors, does not contain real obligations to extradite - it is not a mini extradition convention which could be read as an extradition treaty like, for instance, the 1957 Council of Europe Convention or the 1996 EU extradition Convention. Only Article 6:2 creates certain indirect extradition obligations for the Parties in that a number of the offences included in the Convention are deemed to be included in the extradition treaties applicable between the Parties. Perhaps the real difference is that the level of cooperation internationally was so low, and was only limited to certain crimes (hijacking, kidnapping of internationally protected persons, taking of hostages, protection of nuclear material, torture and suppression of offences against maritime navigation, etc.) that any progress on a more common crime such as drugs trafficking could be considered to be real progress.

If one looks then at the Palermo Convention, which was concluded some twelve years after the 1988 Convention, when the international community had further understood the threat of serious crime, when trafficking in human beings was rife and when illicit arms smuggling had become a phenomenon to combat at the international level, one may note that surprisingly little progress has been made in the field of extradition - progress in this case meaning that the provisions on international cooperation should have been strengthened. In certain respects however, there is undeniably some progress, for instance in that the protections of the individuals have been reinforced. A comparison will be carried out hereinafter.

The main achievement of the 1988 Convention is of course that it exists and that it has been widely ratified by the international community of States. It was the first worldwide multilateral convention in which all existing instruments of international legal cooperation were recognised. Through Article 6 of the Convention is established the legal basis for extradition in all kinds of serious drugs offences as well as for money laundering where the predicate offence is drugs trafficking. A worldwide standard has thus been established in this important field of law enforcement cooperation. As previously noted, drugs offences are deemed to be included as extraditable offences in already existing treaties and the

¹⁰ It should be noted that the new draft for a European Constitution, submitted to the European Council meeting in Thessaloniki on 20 June 2003, suggests that these instruments should be replaced by European laws and European Framework laws. These instruments will be equivalent to the current Directives and Regulations and will have direct effect.

Convention may, in certain circumstances, be considered as a free standing legal basis for extradition even where there is no treaty relation.

Article 6:2 is particularly relevant to countries which still have a list of offences in their treaties whereas it has no relevance to those countries operating a threshold approach. This article is retaken in the Palermo Convention, Article 16:3. It is the same text that one finds there. However, the Palermo Convention deals also with accessory extradition, which the 1988 Convention does not cover.

Extradition is not covered by the offences mentioned in Article 3:2 of the 1988 Convention, i.e. the Convention does not create extradition relations for the intentional illegal possession, purchase or cultivation of narcotic drugs for personal consumption, but it does cover all drugs trafficking offences and ancillary offences such as preparatory or supportive acts, laundering of or dealing in the proceeds of drugs offences and acts of instigation. The Palermo Convention goes further as to the scope of the offences as it covers all the offences under the Convention and offences involving an organised criminal group and the person who is the subject of the extradition request is located in the territory of the requested State, provided that there is double criminality.

Although the 1988 Convention harmonises to a certain extent the concept of drugs trafficking, it should be noted that extradition is still subject to the concept of double criminality under article 6:5, which provides that extradition remains subject to the conditions provided for by domestic law and applicable extradition treaties. No doubt, such law will necessarily provide for the upholding of double criminality principles which have been a cornerstone of extradition law for decades. The Palermo Convention repeats in Article 16:7 these requirements and represents to some extent a step back in that it makes a specific reference not only to the grounds of refusal mentioned in Article 6:5 of the 1988 Convention but also includes a specific reference to the minimum penalty requirement for extradition. Interestingly, in the not yet concluded Corruption Convention, the Africa Group has insisted on abolishing double criminality for mutual legal assistance¹¹, thus making the final attempt to end the negotiations in August of 2003, but without success. New negotiations will have to be carried out at the end of September 2003 but it is expected that the draft Convention will still be able to be finished by the end of this year and signed in Mexico.

Article 6:5 specifies that extradition remains subject to the conditions provided by the law of the requested Party or by applicable extradition treaties, including the grounds on which extradition may be refused. This paragraph should not be understood as allowing Parties to the Convention to invoke grounds for refusal which may be provided for under domestic law, but which have not been included in the applicable extradition treaties. In these cases, the Treaty will have to be applied fully, in accordance with its text, notwithstanding provisions of the domestic law of the country concerned.

Article 6:6 contains a provision which could be considered to be *jus cogens* in extradition law, under Article 53 of the Vienna Convention; namely that extradition may be refused where there are substantial grounds for believing that compliance with the request would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any of the persons affected by the request.

¹¹ Proposed Article 53 (9): "Without prejudice to the fundamental principles of their domestic law, States Parties shall [to the greatest extent possible] render mutual legal assistance in respect of offences covered by this convention, notwithstanding the absence of dual criminality."

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The Palermo Convention has taken a different approach than the 1988 Convention which contains a specific ground for refusal. Since it has to be recognised that the refusal would in any case have to be made on the basis of *jus cogens*, the approach of the Palermo Convention in Article 16:14, which in my opinion is more legally correct, is to state that nothing in the Convention shall be interpreted as imposing an obligation to extradite if the requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

It is here first of interest to note that there are new references in the Palermo Convention to a person's sex and ethnic origin, a clear sign that society has developed since the 1980s, sometimes unfortunately not in the right direction¹². Moreover, the Palermo Convention now contains a specific reference also to the right of a person against whom proceedings are being carried out to be guaranteed fair treatment at all stages of the proceedings (see Article 16:13). It may thus be noted that significant progress has been made in the Palermo Convention as regards the protection of individual liberties - something which was not in principle so high up on the agenda in the 1980s.

There are also certain efforts made in the 1988 Convention to introduce exceptions to traditional treaty law obligations exceptions in extradition. For instance, Article 3:10 of the Convention provides that offences established in accordance with the Convention shall not be considered as fiscal offences, political offences or regarded as politically motivated, without prejudice to constitutional limitations and fundamental domestic law of the Parties. This article may be particularly relevant to laundering offences under Article 3 of the Convention.

One may wonder however, whether this could be considered to be a real achievement, as such exceptions are usually contained in Constitutions or are considered to be part of fundamental domestic legal principles. In any case, the mere fact of putting the issue on the table in an international convention is already an achievement at the international level.

One may also note that during the negotiations of the 1988 Convention, attempts were made to address the problem of extradition of nationals. As is well known, common law countries extradite their own nationals whereas civil law countries do not normally (except under certain circumstances, such as when the enforcement of a possible sentence may be made in the extraditing country). However, the attempt to address the issue of extradition of nationals was not successful. Extradition of nationals is a matter of constitutional law in a number of countries and, as is well known, to change the constitution is a tall order in several States. There is however a provision (article 6:10) that deals with the extradition of nationals for purposes of enforcement of sentences. A similar provision is found in the Palermo Convention, Article 16:12. The Palermo Convention however goes further in that it provides for a more stringent legal regime than the 1988 Convention in relation to nationals whose cases have been submitted to a competent national authority (see Article 16:10). Moreover, the Palermo Convention also contains new provisions relating to those countries that may surrender persons only on condition that the person will be returned to the surrendering State (Article 16:11).

One of the more innovative provisions of the 1988 Convention is article 6:7 which provides for a certain standard in relation to speeding up of extradition procedures or simplifying evidentiary requirements. The paragraph in itself, however, is not very constraining upon the Parties. It merely

¹² Viz. ethnic cleansing in former Yugoslavia.

requires to “endeavour” to speed up and simplify. However, since this is a most unusual clause even in bilateral extradition treaties, it may be seen as a recognition that extradition procedures are too long and unwieldy, and that evidentiary requirements, in particular prima facie and probable cause requirements are to be simplified. Rather disappointedly, the Palermo Convention subjects the requirement of speed also to the domestic law of the Party, which of course waters down the provision to nullity (see Article 16:8). It is unfortunate that the States do not consider the importance of reasonable speed in extradition as an objective worthy to pursue. Negotiators of international instruments should consider that “justice delayed is justice denied”. It is for such reasons in particular that the European Union adopted its Arrest Warrant (see below).

Paragraph 8 concerning provisional arrest is relevant to those States that can extradite only on the basis of a Treaty, and which may be willing to regard the 1988 Convention as the necessary legal basis for that purpose. The paragraph gives such a legal basis, but makes a reference to domestic law which no doubt will have to contain further specific rules as to the length of detention, etc. The Palermo Convention contains similar language.

Paragraphs 9 and 10 of the 1988 Convention deal with the concept of *aut dedere aut iudicare*, either extradite or try the person. Without going into the rather complicated scheme which must also be read in conjunction with Article 4 on jurisdiction, one may note that these paragraphs, which were the result of lengthy negotiations, are a compromise between those that prioritise that fugitives shall not be able to escape justice by fleeing abroad, and those that place the emphasis rather on the prevention of possible conflicts of jurisdiction. In principle, the result of the negotiations were that, when extradition is refused to another Party to the Convention because the offence was committed within its own jurisdiction or by one of its nationals, the “Refusing Party” has an obligation to exercise jurisdiction (i.e. to submit the case to its competent authorities for the purpose of prosecution) over the (Article 3:1) offence.

The Palermo Convention contains new provisions also relating to fiscal matters and on a consultation mechanism (Article 16:15 and 16).

Finally, Article 6 of the 1988 Convention contains an exhortation that the Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition and on transfer of sentenced persons. These paragraphs are very weak and it is doubtful in my mind whether the mere fact of writing such language into a convention will contribute to the further drafting of such agreements. They are however a recognition that the 1988 Convention is not a free standing convention creating extradition obligations on its own. These articles are in principle retaken in the Palermo Convention.

As a general evaluation, thus, it may be said that international extradition law has not moved much further in the past 12 - 15 years except in the areas of protection of the individual. That must however be seen to be an achievement. There remain still problems concerning double criminality, the political offence exception and extradition of nationals. Moreover, it seems difficult to achieve something on the issue of speed - extradition proceedings are slow, unwieldy and do not meet the needs of a modern criminal justice system, which has become more and more globalised and where crime is truly international by nature and where criminals can easily travel and escape justice in any country.

B. At the Level of the European Union

It is no doubt to my mind that the issue of mutual recognition in criminal matters may have an enormous significance for the development of future policy-making of the EU in the field of criminal law and it may well represent a real change in policies in criminal matters. As the EU has become a very

important player internationally also in criminal matters, it is possible that these new instruments and events may have side effects in other parts of the world.

The former United Kingdom Home Secretary and current Minister of Foreign Affairs, Mr. Jack Straw, launched the idea of mutual recognition among his colleagues at a lunch during the UK Presidency of the European Union in 1998. Many wondered really what the Minister was aiming at. Was it only a question of ratification of the 1970 Convention of the Council of Europe or the 1991 Convention drafted within European political cooperation or was it something else? The European Council¹³ later confirmed, when they met at Cardiff in June 1998, that further work needed to be carried out on mutual recognition. It further decided at its subsequent meeting in Tampere¹⁴ in 1999 that mutual recognition should become the “cornerstone” of future judicial cooperation in the European Union.

C. The Concept of Mutual Recognition

In order to understand what is happening in the European Union in the development of new means of cooperation in criminal matters, it may be of some interest to examine what is meant by mutual recognition.

In fact, the concept is not new in the Union. It has been in particular used in the context of setting up the Single Market within the Union and also in the field of civil law. It is often referred to as an alternative of harmonisation, but the matter is somewhat more complicated than that. Using the concept in criminal law is however in principle new.

It is true that until today, the concept of mutual recognition has not been well defined. Some consider it a “revolution” whereas others consider that it is only another form of judicial cooperation, something similar to standard mutual legal assistance, perhaps a little bit more efficient. The question is who is right?

If one looks at the “Revised Convention for the Navigation on the Rhine of 17 October 1868 one may read ¹⁵:

“The decisions of the courts for navigation on the Rhine in each State on the board of the Rhine will be enforced in all the other States by observing the forms provided for in the law of the executing State.”

This text is applicable to financial penalties among the members of the Rhine Commission and was drafted 135 years ago. It bears, however, a striking resemblance with Article 4 of a UK initiative on mutual recognition as regards financial penalties which is currently being discussed in the Council. Did we then not reach any further in 135 years?

It has been argued that the difference between “classical cooperation” and mutual recognition is that in mutual recognition, State A takes the decision and this decision is recognised and enforced in State B. Traditional judicial cooperation is about State A requesting assistance from State B and the decision is

¹³ This is the Heads of State and Government of the EU.

¹⁴ A town in Finland.

¹⁵ Quoted from : Council of Europe, Aspects de la valeur internationale des jugements repressifs, Strasbourg 1968.

being taken in State B. Although clarifying from the point of view of bringing some order into the system, I do not consider, however, that the situation is as clearly cut as that. An arrest warrant in State A for purposes of extradition is already under the 1957 Extradition Convention enforceable abroad and an insertion, under Article 95 of the Schengen Convention, of information relating to an arrest warrant will have immediate effects/consequences for any person found on the Schengen territory and will lead to his immediate arrest. Moreover, Article 13 of the 1990 Council of Europe Money Laundering Convention¹⁶, in the same manner as the 1988 Drugs Convention, provides for a dual system of recognition: either “direct” enforcement of the decision or a submission to competent authorities for them to take decisions.

It cannot be said to be only a question of terminology, although the chosen terminology is important as it has both a psychological and a symbolic value. Terminology may also have an impact on practice as, if one in building a system of mutual recognition is creating autonomous concepts¹⁷, Member States will have to examine whether these concepts fit in with their legal system or if they have to create new legal concepts. But mutual recognition is not only about admitting that we will accept a foreign decision as if it were our own, it is also about admitting that it might not fit in with our own legal system. This is also what the European Court of Justice has noted in a landmark case “Gozutok” (case 187/01), where the principle was applied to a case of *ne bis in idem*.

In two proposals on freezing of assets and on financial penalties that the Council has been examining during 2002 and 2003, this is shown by the use of the terms “issuing State” and “executing State”. I believe that the use of those terms is important as they clearly demonstrate that we are no longer in a scheme of cooperation between States but in a system of mutual recognition.

In fact, the concepts are different: in traditional judicial cooperation it is State sovereignty that is the key element. One sovereign Member State cooperates with another sovereign Member State, fully in respect of its national law. In mutual recognition the starting point is completely different. It is first and foremost a question of accepting a foreign decision as if it were made by a national judicial authority. The key issue is: do we have trust and confidence in that decision?

The difference between traditional cooperation and mutual recognition should also have legal consequences. In principle it should no longer be possible to refuse a foreign enforcement order, it must be executed. There are, in a full blown scheme of mutual recognition, no longer any rights of refusal, at the very most rights of non-execution.

If one draws out the consequences of a genuine system of mutual recognition, it should not be possible to refuse to enforce a decision even if statutory limitations under the national law could apply, even if the highest penalty for an offence does not exist under the national law, etc. This raises very delicate issues and it will have to be examined in the future whether one can accept all the consequences of a pure mutual recognition system, not the least in the light of protection of fundamental rights.

Mutual recognition is not about turning a blind eye to a foreign judicial authority but it is about placing full faith and trust in the foreign legal system and in their judges. Therefore, real mutual

¹⁶ European Treaty Series No 141.

¹⁷ It should be remembered that in the European Union, the Court of Justice might be called to pronounce itself on these concepts.

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recognition is only possible among States that are very close to each other and have similar legal systems or have a high level of trust in each other.

One of the problems in exercising a control of the decision in a foreign State, including a control in the light of the provisions of the European Convention on Human Rights, is that the foreign State is in almost all cases never apprised of the entire procedure carried out in the issuing State. The case law of the European Court of Human Rights is clear on this point; the Court examines the entire procedure and sees whether it, taken as a whole, is considered to be fair. Of course serious mistakes may not be made by the judge but the question is whether it is a judge in another country that should control that question or a judge in the country where the main question is examined? For my part I believe that in principle there should not be any possibility for the judge of another country to control such mistakes unless they are clearly brought to his attention and in such cases they will probably in any case be considered null and void under general rules, for instance of constitutional emergency, that could always be applied. Therefore, in principle, full faith and trust needs to be placed in the foreign judicial authority of another Member State.

The question of harmonisation and mutual recognition has been debated intensively within the European Union since the Tampere European Council. It seems clear from the debate that harmonisation actually favours mutual recognition and that the two go hand in hand. Harmonisation is not an alternative to mutual recognition and, in the same manner, mutual recognition is not an alternative to harmonisation. However, the very concept of mutual recognition means also that there might be differences between Member States' legislation, but that should not in itself be an obstacle to mutual recognition.

In my opinion, double criminality is against the concept of mutual recognition - it should therefore not apply. This is also born out to a large extent by the Framework Decision on the European Arrest Warrant.

D. The European Arrest Warrant

The concept of a European Arrest Warrant (EAW) is a concept which, along the lines of mutual recognition described above, will abolish extradition between the Member states of the European Union and instead institute a system of surrender. The EAW must be recognised by the judicial authorities of every Member State of the EU. Intervention of the Ministries of Justice is abolished and the EAW is circulated directly between judicial authorities, sometimes via a computerized system which has existed inside the EU since 1990, the so called Schengen Information System. The EAW serves as a request for location, arrest, detention and surrender of the fugitive.

Viewed from the perspective of cooperation in criminal justice matters there can be no doubt that the Framework Decision on the European Arrest warrant does not amount to an automatic extradition or surrender on demand. On the other hand the changes to which it gives effect are, in their nature and potential effect, unprecedented for a multilateral instrument in this area of concern. It is, in fact, the first instrument seeking to implement the principle of mutual recognition in international criminal law.

To many the European Arrest Warrant is closely associated with the formulation, by the Extraordinary European Council of 21 September 2001, of an action plan to combat terrorism. While it is true that it constitutes a key ingredient of that plan and that the terrorist attacks on the U.S. of 11 September produced the necessary political momentum for its timely conclusion, it is necessary to recall that the origins of the initiative predate those tragic events.

The perceived need to improve the efficiency and effectiveness of extradition among the Member States of the EU dates back over twenty years and for prolonged periods it had a position of prominence

on the agenda of the Judicial Cooperation Working Group operating in the framework of European political cooperation. The concept of the creation of a “European Judicial Area” can even be traced back to the mid 1970 when, the then French President, Valérie Giscard d’Estaing coined the expression.

Inter-governmental interest in extradition was, however, revitalised by the entry into force of the Treaty on the European Union on 1 November 1993. Indeed, at its first meeting later the same month, the Council of Interior and Justice Ministers stressed the importance of judicial cooperation and adopted a statement requesting that possible improvements in both extradition requirements and procedures be examined. This set in train a process which was to result in, among other achievements, the conclusion of the EU Extradition Conventions of March 1995 and September 1996. Both embodied significant modernising features and thus constitute an appropriate point of reference in any assessment of the changes brought about by the arrest warrant.

The 1995 Convention institutes a system of simplified extradition between the Member States of the EU. The consent of the person and the surrendering State is needed and the conditions for obtaining such consent are specified in the Convention. So far, thirteen of the fifteen Member States have ratified this Convention.

The 1996 Convention on extradition between the Member States of the EU seeks to deal with some of the problematic issues in international extradition law. It lowers the threshold for extradition to six months in the requested member State, it attacks the problems of double criminality in relation to conspiracy and association to commit offences, it abolishes the political offences exception between the Member States (however with some exceptions), it deals with fiscal offences and with extradition of nationals, without however reaching radical solutions and it contains provisions with respect to lapse of time and amnesty.

It is however true to note that these two Conventions are classical intergovernmental instruments which do not correspond to the level of ambition which started to take shape within governments of the European Union and which has led to the creation of the concepts of an Area of Freedom, Security and Justice in the Amsterdam Treaty and abolishing the internal borders of the Union. This was one of the main reasons why the concept of an EAW was created.

While there has thus been a long established recognition of the need for the modernisation of the law and practice of extradition within the EU, the nature and focus of that debate was to be transformed in a radical fashion by the Tampere European Council of October 1999. When the Council reaffirmed the importance of developing the Union as an area of freedom, security and justice it sought at the same time to ensure that the subject remained at the “very top of the political agenda” and to provide “policy orientations and priorities” to guide subsequent developments.

Of these the most innovative and demanding, from a criminal justice perspective, relates to mutual recognition of judicial decisions. In the words of the conclusions (the so-called Tampere Milestones):

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

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The Tampere conclusions also called for specific action to be taken in the sphere of extradition:

35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

Finally the Council called for a Programme of measures to be adopted by the end of 2000 to implement the principle of mutual recognition. This has since been accomplished. Two initiatives relate to the extradition sphere (measures 8 and 15); as with Tampere they distinguish between pre and post conviction cases. In the final event, however, the European Arrest Warrant, like classical extradition law, was formulated so as to embrace both elements.

Interestingly in the original Programme of measures neither was afforded the highest priority (2 and 3 respectively). In another programme of the Union, the so-called Millennium Strategy against organized crime, the creation of a system of surrender was considered to be a long term objective (to be realised within ten years). That the European Arrest Warrant was to become the first mutual recognition measure upon which provisional agreement was to be reached was the result of the change of emphasis and perception brought about by the events of 11 September.

As has been pointed out in the above mentioned Programme of measures 2000:

“Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others’ criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for Human Rights, Fundamental Freedoms and the Rule of Law”.

The recitals to the Framework Decision on the EAW explicitly re-affirm that high level of confidence. From that base it goes on to articulate a scheme designed to “remove the complexity and potential for delay inherent in the present procedures of extradition”. That classical system of inter-state cooperation is abolished: replaced “by a system of surrender between judicial authorities”.

Indeed, it is the decision to remove the executive from its previously central role in the process of surrender which constitutes perhaps the most innovative feature of the new regime. As the UK Home Office has noted:

The warrant can only be executed by a judicial authority in the executing state, and there is virtually no involvement for the executive in the decision-making process. The Central Authority ... may have a small role to play in transmitting documents, requests for additional information and facilitating translations and may be involved in some limited elements of the decision making process.

The “judicialisation” of the process of surrender is to be warmly welcomed. Over the years - and particularly in high profile cases - the propensity for politicians to intervene to prevent extradition, where it was otherwise legally possible, has often been a source of friction and concern.

While the new process is to be overwhelmingly judicial in character it is not to be automatic. It may be based on the notion of mutual trust but it also acknowledges that there remain limits to the consequences which flow from such trust. Consequently the Framework Decision contains both mandatory and discretionary grounds for non-execution (see especially Articles 3-5) as well as a range of other limits and guarantees as regards the nature and scope of the process.

That said there is no doubt that impressive strides have been taken towards the removal of some of the traditional barriers to cooperation, traditionally found in extradition instruments. By way of illustration let us take what were perhaps the three most controversial and difficult issues in the lengthy EU engagement with extradition, namely:

- 1) non-extradition of nationals;
- 2) the political offence exception ; and
- 3) the requirement of double criminality.

1. Non-Extradition of Nationals

As has been noted above, many States, particularly those from the civil law tradition, have been precluded by constitutional or statutory provisions from extraditing their own nationals. For this reason it has become commonplace for extradition arrangements to include nationality as an optional ground for refusal. This is, for instance, the stance taken in Article 6 of the 1957 European Convention, drafted under the auspices of the Council of Europe, though it is associated with a requirement to submit the case for domestic prosecution when this ground is invoked (As many practitioners know, this possibility is often hardly worth the paper on which it is written.).

As noted above, the 1996 EU Convention recorded only modest movement in this area. Article 7 established the basic principle that extradition must not be refused on this basis (a principle subsequently acted upon by Germany that made a change to its Constitution and allowed extradition of nationals with the EU). However, the same article contained an opt-out or derogation provision which, in effect, permits Member States to maintain this barrier on an indefinite basis.

By way of contrast the Framework Decision on the European Arrest Warrant does not include nationality (in its pure form) as either a mandatory or discretionary ground for non-execution (save in respect of Austria where a special, though limited, transitional provision applies until 31 December 2008 - Art. 26). That said, the EAW stops short of negating nationality as a relevant factor. This is well illustrated by the inclusion, in Article 5(3), of the option of making execution conditional on a guarantee that, upon conviction, the individual is returned to his or her state of nationality to serve the sentence there (This is commonly called the “Dutch solution” as it has been advocated by the Netherlands in international fora for a number of years since the Netherlands found this solution in extradition cases with the USA where the death penalty could ensue.). This approach is complemented by an option, in respect of convicted persons, to execute the sentence in the state of nationality rather than return the offender to the state of conviction (Art. 4(6)). A similar philosophy is also evident in the treatment of the transit of nationals (Art. 20(1)).

From this it may be fairly concluded that the Framework Decision has made significant strides in eliminating a major barrier to extradition while remaining sensitive to some of the underlying issues of principle.

2. The Political Offence Exception

The EAW performs even more radical surgery on the so-called political offence exception to extradition. Over many years the Member States of the Council of Europe have played a key role in promoting the incremental abolition of this controversial barrier to extradition: a process commenced in the 1957 Convention, and carried forward by Protocol I in 1975 (Crimes against Humanity and War Crimes), and, more significantly, by the 1977 European Convention on the Suppression of Terrorism. In so doing the Council of Europe has also pioneered a substitute form of protection for the individuals concerned; namely, the so-called fair trial or asylum clause (1977: Art. 5). The major defect in this approach was the continued ability and willingness of countries (including the Member States of the EU) to undermine the effectiveness of these developments by having (frequent and extensive) recourse to limiting reservations and declarations.

The 1996 EU Convention recorded some progress in this sphere by establishing both a new general principle or goal and a new minimum standard. Article 5(1) set as the general principle that no offence may be regarded as political *inter-se*. Departures from this may, however, be effected by State declaration. However, Article 5 also sets a limit to this process in the form of a common minimum standard; that no EU Member can regard the offences covered by the European Convention on the Suppression of Terrorism as political. By way of compensation the fair trial or asylum provision would, however, continue to apply.

The EAW has taken this process an important stage further: namely, the abolition of the political offence exception as such. This major achievement is not, however, specifically proclaimed in the text. Rather it flows from the fact that political offences are not enumerated as mandatory or optional grounds for non-execution. The sole remaining element of the treatment of this subject is confined to the recitals and takes the form of a modernised version of the fair trial or asylum provision.

In this sphere also it may properly be concluded that the EAW will give effect to substantial change - at least (given the limited number of cases) symbolically.

3. Double Criminality

The feature of the EAW scheme which has attracted perhaps the greatest public attention to date is the exceptions which it creates to the traditional requirement of double criminality; i.e., the rule which, in essence, provides that there shall be no surrender for acts which are not categorised as criminal by the law of the State of refuge. As previously noted, this traditional barrier to extradition, it should be noted, was left largely intact by the 1996 EU Convention (though relaxed by Article 3 for conspiracy and association to commit terrorist, organised crime and drugs trafficking offences).

These limited exceptions to the double criminality rule are significantly widened by Article 2(2) of the framework decision. In respect of a very broad list of thirty two generic types of offences, it abolishes the possibility of examination of double criminality. If a foreign judge certifies that he is investigating a particular offence which is punishable by imprisonment in his country of at least three years and if that offence is on the list of thirty two offences, the judge in the executing state shall not examine the facts of the case and control double criminality. It is very important to note that for the purposes of the EAW it is the act as defined by the law of the issuing State which governs the matter. Therefore, in principle, an executing judge is not allowed, under the Framework Decision, to examine whether double criminality exists. If the foreign judge has certified in the EAW that the offences which he is investigating are on the list, the case is closed.

Moreover, the list of offences contained in Article 2(2) is not restricted to terrorist offences. Indeed its very broad coverage has been heavily influenced by the Europol Convention Annex. Crimes such as racketeering, money laundering, computer-related crime, fraud and swindling are on the list, so there is ample room for manoeuvre for the judges who want to use the EAW. The list can be added to by the Council, acting unanimously, following consultation with the European Parliament. For crimes which are not on the list or which have a penalty level of less than three years in the issuing State, double criminality will continue to apply.

While this approach constitutes a radical departure from pre-existing European and international precedents it is of importance to stress that the requirement of double criminality has not been abolished completely, although it may be assumed that most cases of what was previous extradition among the Member States will now be covered by the list.

Also relevant in this context is the fact that the Framework Decision leaves intact the traditional rule of extradition law in relation to extraterritorial offences; namely that there is no obligation to surrender when the arrest warrant envisages offences which “have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State” (Art. 4(7)). As a consequence the difficulties encountered by Spain on this basis in the Pinochet affair could arise again in the future. Importantly this permissive restriction applies to all offences including those listed in Article 2(2).

Whilst there has again clearly been significant progress in reducing the impact of a traditional obstacle to extradition, the treatment of double criminality and related matters also serves to underline that the system provided for in the Framework Decision falls some way short of extradition on demand. In my opinion, the Council has reached a fair balance between efficiency and protection of individual rights.

Among the other notable features contained in the Framework Decision and designed to modernise and expedite the process of surrender one might mention the following:

- (i) A significant relaxation of the requirement of speciality - albeit along the lines trailed in the 1995 and 1996 EU Conventions.
- (ii) It makes provision for Eurojust to play a limited though constructive role by:- the provision of advice (upon request) in cases of multiple requests for surrender (Art. 16(2));- requiring states to inform Eurojust of the reasons for failure to observe the stringent time limits for surrender (Art. 17(7)).
- (iii) In principle the system should consign the frequent and lengthy delays (often counted in years) associated with extradition to the dustbin of history. Under the Arrest Warrant the process should take place very rapidly: in principle not more than 60 days which however in exceptional cases may be extended to 90 days (Art. 17). Where surrender is made upon consent, the process will take 10 days.

The EAW is, without doubt, the most important development to emerge from a quarter of a century of EU engagement with the issue of enhanced cooperation between Member States in the administration of criminal justice. If one thinks of the law and practice of extradition as involving or reflecting some sort of balance between its cooperative and protective purposes there has, through this measure, been a decisive shift towards cooperation and even towards recognition of each others systems.

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This is not to say, however, that protections for the individual have no role to play in this new system; far from it. By way of illustration, the provisions on such matters as double jeopardy, right to a lawyer, amnesty, and in absentia convictions all have a protective purpose.

At the root of some concern over the EAW expressed by human rights organisations is the view that the mere fact of participation by all Member States in the ECHR, with the associated right of individual petition, is not a sufficient guarantee for the appropriate treatment of the individual whose surrender has been sought. Furthermore, it is argued that the relatively few ECHR inspired references in the text of the framework decision do not adequately address this issue. In my opinion, such concerns are not founded.

There is one substantive provision in the operative part of the text which makes a reference to the protection of human rights - namely Article 1(3). This provision states that the decision shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU (which refers to the ECHR and the constitutional traditions of the Member States). The question here is whether there was a need to state the obvious - of course the Member States of the EU are bound by the European Convention of Human Rights and their constitutions.

The Preamble also contains three further relevant recitals; namely:

- (i) Paragraph 10 - On suspension of the arrest warrant in the case of a severe breach of the principles set out in Article 6(1) TEU (which includes Human Rights and Fundamental Freedoms);
- (ii) Paragraph 12 - Which, inter alia, embodies the fair trial or asylum provision to compensate - in effect - for the abolition of the political offence exceptions; and
- (iii) Paragraph 12a. Due process, freedom of the press, etc.

It is argued by some that this is insufficient; that the text must be supplemented by the inclusion of substantive grounds for refusal where the individual faces a violation of Article 6 or Article 5 rights upon return.

The Home Secretary in the UK has noted:

It is conceivable that there may be a wholly exceptional case in which the UK courts may judge that there is a risk of treatment, on return ... that is incompatible with the ECHR. Under those circumstances, the District Judge could refuse to execute a request for a European Arrest Warrant.

The basis for this view is clearly Article 1(3). It should, however, be noted that the Strasbourg case law indicates that the circumstances triggering such protection are set at a relatively high level (See, e.g. Soering Case).

It would, as the work of the International Law Association has demonstrated, have been possible to formulate an explicit general human rights clause to reflect this restricted reality (though with a high threshold; e.g. "a real risk of a serious violation"). However this is seemingly implicit in Article 1(3) - that this could actually happen in the context of the development of the EU today is however rather improbable, to say the least. Those seeking broader protections than this might be best thought of as looking for measures to compensate for the removal of those principles of extradition which were of direct benefit to the individual. This says something fairly fundamental about the reality of the existing levels of mutual trust on which mutual recognition is based.

E. Mutual Legal Assistance

1. At the Level of the United Nations

Mutual legal assistance has, in the same manner as extradition, for decades been characterized by concepts of sovereignty and protection of the essential interests and the *ordre public* of the requested State. It has in fact become a tool for diplomats and not for law enforcement, scarcely meeting the needs of a modern society which is open to attack from terrorists and organized criminals engaged in trafficking in all sorts of goods or of human beings.

However, the trend was broken to some extent when the 1988 Convention for the first time in a world wide instrument incorporated provisions on international cooperation, taking into account in particular experiences of a number of countries belonging to the common law tradition, in the conclusion of bilateral treaties on the subject.

In Europe, the mutual legal assistance until 1990 was founded on the 1959 Council of Europe Convention on mutual legal assistance in criminal matters and, for some countries, on the 1962 Benelux Convention. Within the Nordic countries, a regional cooperation had been developed which was largely based on uniform laws and on trust (and common language) between those countries.

But at the worldwide level, it was clear that the ever increasing drugs trafficking phenomenon had to be met - the drafting of the 1988 Convention provided a golden opportunity. Moreover, the Convention allowed for provisions on transfer of criminal proceedings, transfer of enforcement of sentences, transfer of sentenced persons and the transfer of the enforcement of confiscation orders, to be incorporated. However, in relation to such latter cooperation, the drafters deliberately refrained from elaborating detailed provisions as it was considered that such cooperation for the time being would be more appropriate for regional or bilateral conventions.

It would not be possible to examine in detail all the provisions of the 1988 Convention and the significant progress that was made at the time. Such an examination would make this paper too long and unwieldy. I will therefore concentrate the following analysis on some of the more significant improvements between the 1988 Convention and the Palermo Convention.

Before doing so, it should however be noted that the two Conventions (in Article 7(1)-(6) for the 1988 Convention and in Article 18(1)-(6) for the Palermo Convention) are freestanding and not only contingent upon the existence of a Treaty between the Parties. They therefore give a solid legal basis to afford the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings relating to offences covered by the Conventions (the 1988 Convention only covers the core offences). In the following paragraphs (8-19 for the 1988 Convention and 9-29 for the Palermo Convention), the two Conventions are not freestanding but apply to requests if the Parties are not bound by a Treaty or, if they are bound by a Treaty, that Treaty will apply unless the Parties agree to apply the UN Conventions. The Palermo Convention however “strongly encourages” its own application if it facilitates cooperation.

Only from the number of paragraphs in the articles, it may be concluded that the provisions of the Palermo Convention represent significant progress and a higher level of precision than the 1988 Convention. Among the new (or more specified) measures mentioned as examples of mutual legal assistance under the Palermo Convention are freezing, providing information, evidentiary items and expert evaluations, as well as the provision of government records. The facilitation of the voluntary appearance of persons in the requested State has also been added specifically, although Article 7(4) of the 1988 Convention contains some weak treaty language that also would cover this situation.

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Provisions of so-called spontaneous information have also been added in the Palermo Convention, probably on the basis of experiences gained in the context of Article 10 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which, to my knowledge, was the first multilateral instrument on cooperation in criminal matters that contained such a provision. Paragraph (18(4)) of the Palermo Convention is however considerably weakened as it is made contingent upon not being without prejudice to domestic law, something that may mean that in practice the paragraph may not be so efficient. It is also interesting to note that the Palermo Convention in the following paragraph to a great degree of detail specifies the conditions under which the spontaneous transmission will take place and in particular contains language as regards information that is exculpatory to an accused person. This again illustrates how the modern multilateral treaties have become more protective of individual rights of persons than the previous generation.

Interestingly, the Palermo Convention goes into some detail, in its paragraph 13, also on the crucial role of the Central Authorities to ensure that requests are speedy and properly executed or transmitted to an executing authority responsible for the execution of the request (which in such a case is “encouraged” to execute speedily - an obvious reference to the independence of the judicial authorities). The Palermo Convention also contains, in paragraph 24, a specific obligation for the States to execute the request for mutual legal assistance “as soon as possible” and that it shall take “as full account as possible” of any deadlines suggested by the requesting State for which reasons are given. The information requirements have also been specified to a high level of detail in that paragraph. These provisions are probably inspired by similar provisions in the previously mentioned Joint Action of 1998 of the Council of the EU on best practices in MLA and of corresponding provisions in the EU 2000 Convention on mutual legal assistance.

The Convention also deals with the difficult problem of federal States which may have several central authorities. It also considerably alleviates the formalism concerning written requests transmitted via diplomatic channels and allows for any means capable of producing a written record under conditions allowing the establishment of authenticity. This may mean that at least faxes may be used or, with a generous interpretation, even E-mails. It will also allow a development in the future that would be technology neutral. No doubt, this could allow States to expedite the execution in particular of freezing orders where often speed is of crucial importance.

The Palermo Convention reflects also technological progress in that it allows (“wherever possible and consistent with fundamental principles of domestic law”) for the hearing of witnesses by videoconference (see paragraph 18). This possibility was first included in the Convention of 29 May 2000 of the European Union on mutual legal assistance between the Member States and has in that convention been considerably regulated in detail. The Palermo Convention has not gone into detail but provides merely for the legal framework for the decision to be made. It may be assumed that this paragraph may need some further specific agreements between the Parties, as in practice several problems have not been addressed, such as the responsibility for perjury and other delicate questions.

2. At the Level of the European Union

In a paper which I submitted to the Group training course for senior officials at UNAFEI in February 2000, I described in detail the work of the European Union as regards mutual legal assistance. It is therefore not necessary that I again go into detail on that work. It is sufficient here to note that the Convention, which I described in that paper, has now been adopted on 29 May 2000 and is so far ratified by three Member States.

In addition, an innovative Protocol to the Convention was adopted in 2001. This Protocol sets up a system whereby the Member States would be able to provide mutual legal assistance in the search for bank accounts of suspects and, when found, to block money on such accounts. This Protocol represents a great step in the fight against organised crime and constitutes a breakthrough in enhancing efficient law enforcement.

As previously mentioned, the Council, in implementing its programme concerning mutual recognition, has begun to draft a number of instruments embodying this principle. Many of these instruments have been recently adopted or are in the final stages of negotiation and will be adopted shortly.

Among these measures are Framework Decisions on:

Freezing of assets. This Framework Decision¹⁸ will enable assets to be frozen within 24 hours in the entire Union.

Financial penalties. This Framework decision will enable financial penalties to be executed in the entire EU on the basis of a very simplified system with few grounds for non-execution.

Confiscation. This Framework Decision will enable confiscation orders to be executed within the Union on the basis of a very simplified system. It is still under discussion but can be expected to be adopted within six to ten months.

In addition, the Council is expecting a new proposal from the European Commission to set up a system of mutual recognition for obtaining evidence abroad.

V. SOME NOTES ON MONEY LAUNDERING AND FINANCING OF TERRORISM

The offence of money laundering was first, in an international context, mentioned in an old Council of Europe Recommendation from 1980, but the Council of Europe was ahead of its time. When then the issue was brought up in the context of the negotiations on the 1988 Convention, things had moved ahead and the international community was prepared to deal with the issue - there was a generally shared feeling among legislators and policy makers that there was a need to “hit criminals where it hurt most - in the wallet”.

The definition of money laundering was taken up not only in the 1988 Convention but also in the 40 Recommendations of the FATF and in the 1990 Convention. This contributed to a general consensus that something had to be done, although there was (and still is) doubt in some countries about making money laundering a criminal offence across the line, and not only for proceeds from drugs trafficking.

The activities of the FATF, MONEYVAL or other international groupings have however had a great impact and there is a growing international consensus on the topic.

¹⁸ OJ L 196/45, 2.8.2003.

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In the European Union, a number of initiatives have been taken in the form of binding legislation. Among these the following can be mentioned:

- The Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering¹⁹. This Directive obliges the Member States to prohibit money laundering and lays down detailed rules on serious transaction reports and on “know your customer” requirements. This Directive was supplemented in 2001²⁰ when the obligations of the Directive were extended to certain non-financial activities and professions, including lawyers and accountants. It also broadened the prohibition of the predicate offences.
- The Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime²¹. This Joint Action deals with a number of issues such as reservations to the previously mentioned Council of Europe Convention, training and other issues.
- A Framework Decision on the same topic²² which approximates criminal law and addresses the issue of predicate offences and sanctions (at least four years imprisonment). Value confiscation is introduced throughout the EU.
- A Decision on cooperation between Financial Intelligence Units²³. The FIUs shall cooperate to assemble, analyse and investigate relevant information within the EU. It lays down rules on exchange of information and on analysis thereof.

The special European Council, held in Tampere on 15 and 16 of October 1999, was devoted to the maintenance and the development of an area of freedom, security and justice in the European Union. Among the conclusions of the Tampere European Council was a call for improved cooperation against cross border crime through the use of joint investigation teams to combat, inter alia, terrorism and for special action against money laundering. As regards financing of terrorism, the following may be noted.

In the wake of the terrorist attacks in the USA on 11 September 2001, the Justice and Home Affairs Council met on 20 September and adopted a series of measures to combat terrorism, including in the areas of judicial and police cooperation and the financing of terrorism.

At the extraordinary European Council on 21 September 2001 it was decided that the fight against terrorism would be a priority objective of the European Union. The Council approved a plan of action dealing with enhanced police and judicial cooperation, developing international legal instruments against terrorism, preventing terrorist funding, strengthening air security and greater consistency between all the Union's policies. An informal meeting of the ECOFIN Council took place on 21 September 2001. It issued a statement on actions to combat the financing of terrorism.

The statement outlined a number of initiatives in this regard. These were:

- Rapid adoption of the second money laundering Directive (see above) and a Framework Decision on the execution in the EU of orders freezing assets or evidence.²⁴
- Paying particular attention to activities linked to terrorism in the draft Directive on insider trading.
- Reinforcing exchange of information between Financial Intelligence Units (FIUs). See above.
- Ensuring extension of the Financial Action Task Force (FATF) mandate to include terrorist financing and supporting the FATF's Non-Cooperative Countries and Territories (NCCT) exercise and review of its 40 Recommendations.
- Adopting a proactive and coordinated approach to such matters in international fora.
- Asking EU future members to be in line with EU standards.
- Ratification and implementation of relevant UN Resolutions and Conventions.

¹⁹ OJ L 166/77, 28.6.91.

²⁰ L 344/76, 28.12.01.

²¹ OJ L 333/1, 9.12.98.

²² OJ L 182/1, 5.7.01.

²³ OJ L 271/4, 24.10.00.

²⁴ OJ L 196/45, 2.8.2003.

On 19 October 2001 the European Council declared that it is determined to combat terrorism in every form throughout the world. It also indicated that it would continue its efforts to strengthen the coalition of the international community to combat terrorism in every shape and form. It called for particular attention to be given to approval of the European arrest warrant, the common definition of terrorist offences and the freezing of assets, increased cooperation between the operational services responsible for combating terrorism (Europol, Eurojust, the intelligence services, police forces and judicial authorities) and effective measures to combat the funding of terrorism by formal adoption of the second Money Laundering Directive and speedy ratification of the UN Convention for the Suppression of Terrorist Financing.

Therefore, since October 2001 a number of actions have been taken by the EU aimed at countering terrorism as well as preventing the acquisition, retention and use of funds or assets by such organisations. Taken together with the earlier actions these constitute powerful measures in the Union's arsenal to fight terrorism. Outside of what has already been mentioned above, some of the further legislative actions will be mentioned here.

- Council Decision of 6 December 2001 extending Europol's mandate to deal with serious forms of international crime listed in the Annex to the Europol Convention²⁵ The effect of this Council Decision was to enable Europol to deal with the serious forms of international crime listed in the Annex to the Europol Convention, such as murder, grievous bodily injury, kidnapping, hostage-taking, organised robbery and illicit arms trafficking. Europol's mandate now includes support for law enforcement against serious international organised crime, including terrorism.

- Council Common Position²⁶ of 27 December 2001 on combating terrorism²⁷. The Common Position sets out a number of actions to be taken to combat terrorism. The principal measures contained in the Common Position are: criminalising the financing of terrorism within the EU, freezing of financial assets or economic resources of persons or entities involved in terrorism, prohibiting the giving of financial or other assistance to such persons or entities, requiring measures to be taken to suppress any form of support for those involved in terrorist acts, taking steps to prevent terrorist acts and denying safe haven to those involved in such acts. It also calls for Member States to afford one another (and third countries) assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, better border controls to prevent the movement of terrorists, information exchange and cooperation to prevent and suppress terrorist acts. Furthermore the Common Position contains a list of international conventions and protocols against terrorism to which member states should become parties.

- Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism²⁸. The Common Position establishes the primary list of persons, groups and entities involved in terrorist acts. It sets out the criteria to be used to decide who should be considered as terrorists for inclusion on the list and the actions which constitute terrorist acts. The names on the list are to be reviewed at least once every six months. Under the Common Position the European Community is

²⁵ OJ C 362/01, 18.12.01.

²⁶ This is a binding instrument under the Common Foreign and Security Policy.

²⁷ OJ L 344/90 of 28 December 2001.

²⁸ OJ L 344/93 of 28.12.0.1.

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empowered to order the freezing of the funds and other financial assets or economic resources of, and the prohibition on the provision of financial services to, the listed persons, groups and entities. Member States are required to afford each other assistance in preventing and combating terrorist acts. In accordance with Article 6, the Common Position is to be kept under constant review. The annex to the Common Position has been up-dated several times.

- Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism²⁹. The Regulation provides for the freezing of the funds, financial assets and economic resources of certain persons, groups and entities involved in terrorism, for a prohibition on the making available of funds, financial and economic resources to such persons, groups and entities and a prohibition on the provision of financial services to them. It authorises the Council to establish and maintain a list of persons, groups and entities involved in terrorism. Provision is also made for the granting of authority for the use of funds frozen in accordance with the Regulation to meet essential human needs and for certain other payments (e.g. taxes, utility bills etc.).

- Council Decision of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism³⁰. This decision contains a list of persons, groups and entities against whom specific restrictive measures are to be applied in accordance with Council Regulation No 2580/2001. An updated list of persons, groups and entities to which the measures in the Regulation apply has been published several times.

- Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime³¹. This Decision establishes Eurojust, to be composed of seconded prosecutors, judges or police officers from each Member State. The objectives of Eurojust are to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions, to improve cooperation between the competent authorities of the Member States and to support the competent authorities of the Member States in order to render their investigations and prosecutions more effective. The Decision also provides that Eurojust shall establish and maintain close cooperation with Europol and OLAF (an EU body protecting the financial interests of the Community). It also permits Eurojust to conclude cooperation agreements with third States and international organisations and bodies. It may also establish contacts and exchange experiences of a non-operational nature with other bodies, in particular international organisations and conclude cooperation agreements with third States. Eurojust has its seat in The Hague and has already dealt with more than 500 cases of serious international crime.

- Council Framework Decision of 13 June 2002 on joint investigation teams³². The Framework Decision is intended to make the combating of international crime as effective as possible. It considered it appropriate that a specific legally binding instrument on joint investigation teams should be adopted to apply to joint investigations into drugs/human trafficking and terrorism and that they should be set up, as a matter of priority, to combat offences committed by terrorists. The Framework Decision provides that two or more Member States may establish joint investigation teams for a specific purpose and for a limited period to carry out criminal investigations in one or more of the States establishing the team.

²⁹ OJ L 344/70 of 28.12.01.

³¹ OJ L 063/1 of 6.3.2002.

³⁰ OJ L 344/1 of 28.12.01.

³² OJ L 162/1 of 20.6.02.

- Council Framework Decision of 13 June 2002 on combating terrorism³³. The Framework Decision requires Member States to adopt a common definition of terrorist offence as set out in Article 1. It also obliges Member States to criminalise certain actions related to terrorist groups or terrorism, such as directing or participating in the activities of a terrorist group as well as inciting, aiding or abetting and attempting to commit a terrorist offence.

VI. CONCLUSION

As may be seen, the legislative activity of the Council of the EU is impressive. A number of legislative proposals are under way and many acts have been adopted. The political objective of creating an Area of Freedom, Security and Justice should be realised gradually. At the same time, the Union needs to dialogue with its partners because crime does not stop at its frontiers. One interesting example of this dialogue is the recently signed Treaties on extradition and on mutual legal assistance between the EU and the United States of America, where the EU for the first time in this context acts as an entity with a legal personality.³⁴ The Union is also currently negotiating treaties in this area with Norway and Iceland and will, no doubt, in the future negotiate treaties with its partners.

³³ OJ L 164/3 of 22 June 2002.

³⁴ OJ L 181/27, 19.7.2003.