

Fordham International Law Journal

Volume 19, Issue 1

1995

Article 9

Europol: The Culmination of the European Union's International Police Cooperation Efforts

Francis R. Monaco*

*

Copyright ©1995 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Europol: The Culmination of the European Union's International Police Cooperation Efforts

Francis R. Monaco

Abstract

This Comments argues that the Europol Convention will be an effective and workable mechanism for countering international crime within the European Union, and therefore should be ratified by Member States. Part I discusses the theoretical basis for international police cooperation, and analyzes the agreements and initiatives among EU Member States which predate Europol. Part II examines the obstacles that have delayed the completion of the Europol Convention, as well as the particular aspects of the Convention that may delay or prevent its ratification. Part III argues that existing EU Member States' agreements permit Europol to contribute substantially to EU police investigations and prosecutions.

EUROPOL: THE CULMINATION OF THE EUROPEAN UNION'S INTERNATIONAL POLICE COOPERATION EFFORTS

Francis R. Monaco*

INTRODUCTION

The formation of a single financial market within the European Union¹ ("EU") entailed the abolition of border controls between all Member States² and created new opportunities for international crime.³ Recognizing that international crime could only be countered through international police cooperation,⁴ the Council of the European Union recently finalized the

* J.D. Candidate, 1996, Fordham University.

1. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmnd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). Until 1995, the twelve EU Member States were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. TEU, *supra*, pmb. O.J. C. 224/1, at 2 (1992), [1992] 1 C.M.L.R. at 725-26. On January 1, 1995, Austria, Finland, and Sweden became Member States of the European Union. *Sweden, Finland and Austria Join European Union*, S.F. CHRON., Jan. 2, 1995, at A8. The enlarged Union does not include Norway, which rejected membership in the Union in November 1994. John Harton, *Vote in Norway Blocks Joining Europe's Union*, N.Y. TIMES, Nov. 29, 1994, at A1.

2. SEA, *supra* note 1, art. 13, O.J. L 169/1, at 7 (1987), [1987] 2 C.M.L.R. at 747. Article 13 states:

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. . . . The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of [the Treaty of Rome].

Id. art. 13, O.J. L 169/1, at 7 (1987), [1987] 2 C.M.L.R. at 747. See *supra* note 1 and accompanying text (explaining European Union comprised of fifteen Member States).

3. See Joel S. Solomon, *Forming a More Secure Union: The Growing Problem of Organized Crime in Europe as a Challenge to National Sovereignty*, 13 DICK. J. INT'L L. 623, 623 (1995) (noting that crime within European Union is growing at exponential rate since loosening of internal border controls); Jennifer Parmelee, *European Unity: An Offer the Mafia Can't Refuse*, WASH. POST, May 19, 1989, at F1 [hereinafter *European Unity: An Offer the Mafia Can't Refuse*] (discussing increased opportunity for money laundering resulting from unification).

4. See Scott Carlson & Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551, 552-33

text of a convention establishing the European Police Office ("Europol").⁵ The Europol Convention represents the European Union's latest attempt to counter international crime through international police cooperation.⁶

The European Union's formation of a single financial market removed obstacles to the free movement of goods, services, and workers among Member States.⁷ The Single European Act ("SEA"), focusing primarily on European economic unity, did not directly address the impact of unification on Member States' substantive criminal law and internal security.⁸ While Member States have benefitted from a free market economy, therefore, the removal of institutional barriers has created new opportunities for illegal activity, such as illicit narcotics trafficking, money laundering,⁹ and organized crime.¹⁰ Furthermore, the final lift-

(1991) (noting that international cooperation is powerful tool for countering international crime).

5. Convention Based on Article K.3 of the Treaty of European Union, on the Establishment of a European Police Office (Europol Convention), July 20, 1995, Europol 54, Rev. 5, Annex (1995), *opened for signature* July 26, 1995 [hereinafter Europol Convention] (on file with *Fordham International Law Journal*); see *Europol Convention Signed but Still to Be Ratified*, Agence France Presse, July 26, 1995, available in LEXIS, World Library, Allwld File (noting Europol Convention completed); *EU: Member States Discreetly Proceed with Signing Europol Convention*, Agence Europe, July 27, 1995, available in LEXIS, World Library, Allwld File (noting Council of Ministers finalized text of Europol Convention).

6. TEU, *supra* note 1, art. K.1(9), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 735. The TEU requires that:

Member States shall regard . . . as [a] matter[] of common interest . . . (9) police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

Id.

7. See *supra* note 2 and accompanying text (discussing creation of internal market with European Union).

8. Carlson & Zagaris, *supra* note 4, at 558.

9. See Scott E. Mortman, Note, *Putting Starch in European Efforts to Combat Money Laundering*, 60 FORDHAM L. REV. S429, S429 (1992).

By transferring the proceeds derived from criminal activities, such as drug trafficking or terrorism, through financial and credit institutions in different European nations, criminals can make these proceeds appear to be the result of legitimate business activities. This process of using legitimate institutions to conceal the source of illegitimate gains is commonly known as money laundering.

Id. (citations omitted).

10. See Padrig Flynn, *An Address to the World Ministerial Conference on Organised Trans-*

ing of restrictions on capital movements within the European Union permitted criminals to manipulate the international financial system and launder the proceeds of criminal activity.¹¹ Lifting these barriers allowed drug traffickers to move their operations and capital from country to country more easily,¹² and to disguise the sources of their proceeds within the integrated financial system.¹³

The European Union is responding to the increased opportunities for criminal activity, created by the single financial market, by constructing international police cooperation initiatives.¹⁴ Although Member States have not yet ratified the Europol Convention,¹⁵ an embryonic version, known as the Europol Drugs Unit ("EDU"), is currently in force.¹⁶ The EDU has been instrumental in coordinating numerous successful drug seizures within the European Union.¹⁷

This Comment argues that the Europol Convention will be an effective and workable mechanism for countering international crime within the European Union, and therefore should be ratified by Member States. Part I discusses the theoretical basis for international police cooperation, and analyzes the agree-

national Crime, European Commission Press Release, Nov. 21 1994, at 2, available in LEXIS, World Library, Allwld File (discussing danger organized crime posed to European Community).

11. *EC to Take Action Against Money Laundering*, Xinhua Gen. Overseas News Serv., Jan. 11, 1990, available in LEXIS, World Library, Allwld File.

12. Carlson & Zagaris, *supra* note 4, at 555.

13. Mortman, *supra* note 9, at S429; see *European Unity: An Offer the Mafia Can't Refuse*, *supra* note 3, at F1 (discussing opportunity unification of Europe presents for money laundering).

14. See Europol Convention, *supra* note 5, pmbl., 54 Europol, Rev. 5, Annex. The Europol Convention states that "there is a need for progress in solidarity and co-operation between the Member States of the European Union, particularly through an improvement in police cooperation between Member States." *Id.*

15. See *EU: Criticism of Cannes Focuses on Europol*, Reuters Textline, June 30, 1995, available in LEXIS, World Library, Allwld File (explaining that Europol Convention is complete but requires ratification by EU Member States).

16. Joint Action of 10 March 1995 Adopted by the Council on the Basis of Article K.3 of the Treaty on European Union Concerning the Europol Drugs Unit, O.J. L 62/1 (1995) [hereinafter Council's Joint Action]. The Council's Joint Action replaced the June 2, 1993, Ministerial Agreement on the establishment of the Europol Drugs Unit. *Id.* art. 8, O.J. L 62/1, at 3 (1995).

17. See Tyler Marshall, *Jurgen Storbeck*, L.A. TIMES, June 13, 1995, at 5 (discussing successful international crime investigation operations); *Europol Spans Frontiers in War on Crime*, FIN. TIMES, May 19, 1994, at 2 (reporting that Europol Drugs Unit ("EDU") involvement in numerous international criminal investigations).

ments and initiatives among EU Member States which predate Europol. Part I also examines the EDU's current activities. Finally, Part I presents the provisions of the current version of the Europol Convention. Part II examines the obstacles that have delayed the completion of the Europol Convention, as well as the particular aspects of the Convention that may delay or prevent its ratification. Part III argues that existing EU Member States' agreements permit Europol to contribute substantially to EU police investigations and prosecutions. This Comment concludes that Member States should reconsider the Convention's provisions on data protection and citizens' rights to privacy, in order to ensure that the Europol Convention strikes the necessary balance between facilitating effective law enforcement and protecting the rights of citizens.

I. *INTERNATIONAL POLICE COOPERATION WITHIN THE EUROPEAN UNION AND THE EDU'S CURRENT ACTIVITIES*

Incidents of transnational crime, such as drug trafficking, money laundering, and illegal arms sales, have become particularly acute in Europe.¹⁸ Independent domestic law enforcement organizations have been ineffective in countering such crime.¹⁹ EU Member States, recognizing the need for international cooperation,²⁰ engage in global initiatives, such as anti-drug trafficking conventions²¹ and the International Criminal Police Organization ("Interpol").²² Member States have also constructed re-

18. See Monica den Boer, *Paper Presented at Cyprus Police Academy Seminar 3* (Dec. 1994) (copy on file with the *Fordham International Law Journal*) (noting European law enforcement organizations' belief that abolition of EU border controls will provide criminals with increased mobility and opportunity); Rory Watson, *Combating Drug Trafficking Across the Single Market*, *BRIT. MED. J.*, Mar. 12, 1994, available in LEXIS, World Library, Allwld File (discussing recent efforts within European Union to combat growing drug epidemic).

19. Carlson & Zagaris, *supra* note 4, at 557-59 (noting limited influence of domestic criminal justice institutions in combatting crime against Member States' interests); den Boer, *supra* note 18, at 1. "Territorial restrictions caused by jurisdictional fragmentation [were seen as] a handicap in the fight against international criminality. Criminals could escape prosecution by crossing [borders]. Definitions of crime varied between states and no proper extradition agreements were available." *Id.*

20. Carlson & Zagaris, *supra* note 4, at 552.

21. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 1992 Gr. Brit. T.S. No. 26 (Cmd. 1927), 28 I.L.M. 493 (1989) [hereinafter Vienna U.N. Drug Convention].

22. INTERPOL, *THE CONSTITUTION AND GENERAL REGULATIONS OF THE ICPO-INTERPOL* (1956) [hereinafter INTERPOL CONSTITUTION]. See generally, MALCOLM ANDER-

gional initiatives²³ intended to counter international drug trafficking and money laundering.²⁴ Member States also have established regional intergovernmental organizations to respond to the effects of international crime.²⁵ Based upon informal, nonbinding international agreements, rather than formal treaties, organizations such as the Pompidou Group²⁶ and the Trevi Group²⁷ operate outside the framework of EU institutions.²⁸ The SEA's abolition of internal borders, in conjunction with the provisions of the Maastricht Treaty on Political Union²⁹ ("Maastricht Treaty" or "Maastricht"), created the impetus for more formal and sophisticated cooperation among EU Member States.³⁰ Consequently, Member States established the Schengen Convention,³¹ and Europol's predecessor, the EDU.³²

SON, POLICING THE WORLD, INTERPOL AND THE POLITICS OF INTERNATIONAL POLICE COOPERATION (1989) (discussing history and activities of Interpol).

23. See den Boer, *supra* note 18, at 4-6 (discussing EU regional initiatives); see generally POLICING ACROSS NATIONAL BOUNDARIES (Malcolm Anderson & Monica den Boer eds., 1994) (discussing background and evolution of European international police cooperation).

24. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, Europ. T.S. No. 141, 30 I.L.M. 148 (1991) [hereinafter ELC]; Council Directive No. 91/308/EEC, O.J. L 166/77 (1991) [hereinafter EC Money Laundering Directive]. The TEU states: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." TEU, *supra* note 1, art. 189, O.J. C 224/1, at 65 (1992), [1992] 1 C.M.L.R. at 693-94.

25. Carlson & Zagaris, *supra* note 4, at 554-55.

26. See *id.* at 565 (noting that Pompidou Group was formed in 1971 to examine problems of drug trafficking and abuse within European Union).

27. See Julian J.E. Schutte, *The European Market of 1993: Test for a Regional Model of Supernational Criminal Justice or of Interregional Cooperation in Criminal Law*, 3 CRIM. L.F. 55, 75-76 (1991) (noting that Trevi Group was formed in 1975 to provide forum for Member States to discuss common police and national security concerns).

28. See Carlson & Zagaris, *supra* note 4, at 554-55 (discussing emergence of informal regimes to counter international crime).

29. TEU, *supra* note 1, art. K.1(9), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 735 (enumerating police cooperation as matter of common interest to Member States).

30. de Boer, *supra* note 18, at 3, 8.

31. Schengen Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Controls at the Common Frontiers, June 14, 1985, 30 I.L.M. 68, 73. Convention Applying the Schengen Agreement of June 14, 1985 on the Gradual Abolition of Checks at their Common Borders Among Belgium, France, Federal Republic of Germany, Luxembourg and the Netherlands, June 19, 1990, 30 I.L.M. 84 [hereinafter Schengen Convention].

32. See *supra* note 16 and accompanying text (discussing EDU).

A. *An Overview of the Institutional Framework of the European Union*

The European Union consists of four main institutions.³³ The Council, acting through its Ministers,³⁴ is the primary legislative and decision-making body.³⁵ Each Member State holds the Presidency of the Council for a six month term.³⁶ The Maastricht Treaty³⁷ created the Council of Ministers of Justice and Home Affairs.³⁸

The Commission³⁹ serves as an executive body that implements and enforces EU legislation.⁴⁰ The Commission also initiates EU policy and initiates legislation to the Council.⁴¹ The Commission consists of EU civil servants who represent the general interests of the European Union, rather than a particular Member State.⁴² As such, while the members of the Commission must be citizens of the European Union, and they must operate independently from any Member States' influence,⁴³ the European Parliament may review and make recommendations to the legislative proposals initiated by the Commission.⁴⁴ The Euro-

33. DAVID MEDHURST, *A BRIEF AND PRACTICAL GUIDE TO EC LAW 17* (1994) (explaining that four main institutions of European Union include: European Parliament, Commission, European Court of Justice, and Council of Ministers).

34. *Id.* at 18.

35. A.G. TOTH, *THE OXFORD ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW 137-38* (1990) [hereinafter *ENCYCLOPAEDIA OF EC LAW*]; see generally MEDHURST, *supra* note 33, at 18 (stating that Council "is as near as the Community comes to a legislative body").

36. *ENCYCLOPAEDIA OF EC LAW*, *supra* note 35, at 136.

37. TEU, *supra* note 1, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719.

38. TEU, *supra* note 1, arts. K.1-9, O.J. C 224/1, at 97-98 (1992), [1992] 1 C.M.L.R. at 735-38. "The Treaties do not specify which member of a Government should be delegated to the Council. This depends on the particular subject-matter to be discussed" *ENCYCLOPAEDIA OF EC LAW*, *supra* note 35, at 135.

39. *ENCYCLOPAEDIA OF EC LAW*, *supra* note 35, at 70.

40. *Id.*

41. *Id.* In most cases, the Council may not act upon its own initiative, but must act on a proposal from the Commission. *Id.* at 72.

42. MEDHURST, *supra* note 33, at 20.

43. *ENCYCLOPAEDIA OF EC LAW*, *supra* note 35, at 66.

44. MEDHURST, *supra* note 33, at 17-18. The Maastricht Treaty has strengthened Parliament's role in the legislative process in three respects:

[T]he establishment of a new "negative assent" procedure, widely and not wholly accurately described as the "co-decision procedure", the upgrading of parliamentary participation, generally from consultation to co-operation, for decision-making in certain areas, and the conferral of consultation and information rights in new areas of Community or Union jurisdiction. Parliament may also request the Commission to take legislative initiatives.

Kieran St Clair Bradley, "Better Rusty Than Missin"?: *The Institutional Reforms of the Maas-*

pean Court of Justice interprets EU legislation.⁴⁵

The European Council is closely associated⁴⁶ with the Council of Ministers.⁴⁷ The European Council is comprised of Member States' heads of state and the President of the Commission.⁴⁸ Unlike the Council of Ministers, the European Council acts as a guiding body and is not formally involved in legislation.⁴⁹

B. *The Theoretical Underpinnings of European Police Cooperation*

In order to produce information, evidence, and ultimately, the criminal, criminal investigations remaining solely within the borders of one nation must operate within the constraints of that nation's political and legal system.⁵⁰ Two potential obstacles confront domestic law enforcement.⁵¹ First, disharmony and conflict between a nation's multiple layers of government, such as disagreements between federal and state officials, can impede rapid response to crime.⁵² Second, legal tensions may exist, involving issues such as the proper balance between a citizen's civil liberties and the government's need to obtain information.⁵³

Global interdependence, however, is a defining characteristic of the modern world,⁵⁴ and, increasingly, criminal activity does not recognize national boundaries.⁵⁵ Crime often arises in the context of international networks, operating beyond the

tricht Treaty and the European Parliament, in LEGAL ISSUES OF THE MAASTRICHT TREATY 193, 194 (David O'Keeffe & Patrick M. Twomey eds., 1994) (citations omitted).

45. See ENCYCLOPAEDIA OF EC LAW, *supra* note 35, at 211-17 (discussing role of European Court of Justice).

46. See MEDHURST, *supra* note 33, at 19. "The European Council is not the same as the Council of Ministers but can be regarded as an extension of the latter." *Id.*

47. Donald Macrae, *Institutional and Decision-Making Changes*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 171, 171 (David O'Keeffe & Patrick M. Twomey eds., 1994).

48. *Id.*

49. *Id.*

50. Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 44 (1990).

51. *Id.*

52. *Id.*

53. *Id.*

54. Bruce Zagaris & Elizabeth Kingma, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 EMORY INT'L L. REV. 445, 453 (1991). The territorial state, the traditional source of power and major entity in the international forum, "is being supplanted by nonterritorial actors, such as intergovernmental organizations, transnational social movements, and multinational corporations." *Id.*

55. Carlson & Zagaris, *supra* note 4, at 552.

control of any single sovereign nation.⁵⁶ In addition to the problems encountered in domestic law enforcement, international law enforcement must overcome problems that stem from issues of sovereignty, conflicting legal systems, and political conflict between governments.⁵⁷ For example, it is not uncommon for a nation's law enforcement objectives to conflict with its foreign policy agenda.⁵⁸

In an effort to address the impact of European unification on criminal activity, the European Parliament⁵⁹ established a Committee of Enquiry ("Committee") in 1985.⁶⁰ The Committee considered the Community drug problem by examining the extent of illicit drug trafficking and drug use within the European Union.⁶¹ The results of the Committee's investigation are contained in its Enquiry Report.⁶² The Committee's Enquiry Report identified a sharp rise in drug use and an increased strength of drug traffickers and criminal organizations.⁶³ The Enquiry Report declared that these criminal organizations presented an unprecedented threat to the national and international social order.⁶⁴

The Enquiry Report noted that the wide variation among Member States' criminal laws and penalties impeded international police cooperation.⁶⁵ The Enquiry Report also observed that criminal cooperation was complicated by the fact that some Member States follow a common law⁶⁶ legal system, while others

56. *Id.*

57. Nadelmann, *supra* note 50, at 44.

58. *Id.*

59. See *supra* notes 33-49 and accompanying text (discussing role of Parliament in EU institutional framework).

60. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, COMMITTEE OF ENQUIRY INTO THE DRUG PROBLEM IN THE MEMBER STATES OF THE COMMUNITY 12 (1987) [hereinafter ENQUIRY REPORT].

61. *Id.*

62. *Id.*

63. *Id.* at 13.

64. *Id.*

65. *Id.* at 44.

66. See HARRY W. JONES ET AL., LEGAL METHOD 5 (1980).

The Anglo-American legal system, unlike the "civil law" system which prevails with variations in most of the countries of the western world, explicitly recognizes the doctrine of precedent, known also as the principle of *stare decisis*. It is the distinctive policy of a "common law" legal system that past judicial decisions are "generally binding" for the disposition of factually similar present controversies.

follow a civil code.⁶⁷ Furthermore, the constitutions of some countries restrict their ability to apply certain criminal laws beyond their borders.⁶⁸ The Committee's Enquiry Report concluded that Member States' efforts to control international crime through the traditional model of independent domestic law enforcement operations were inadequate.⁶⁹

In response to the declining importance of state sovereignty in addressing the growing strength of international crime, Member States have increased their cooperative efforts.⁷⁰ This increased cooperation produced several formal conventions which impose binding obligations upon their signatories.⁷¹ Member States have also constructed more informal intergovernmental

Id.

67. See A.G. Chloros, *Common Law, Civil Law and Socialist Law: Three Leading Legal Systems of the World*, in *COMPARATIVE LEGAL CULTURES* 83, 88-89 (Csaba Varga ed., 1992)

[I]f the Codes were different, there was an underlying unity of method and of concepts. The method was deductive, that is, the process of reasoning was from general principles to specific cases Thus, [in the case of France, for example], the French judge became a mere administrator with strictly reduced powers defined in articles 4 and 5 of the *Code civil*, judging only individual disputes between private persons and making no rules for the future.

Id.

68. ENQUIRY REPORT, *supra* note 60, at 12.

69. Carlson & Zagaris, *supra* note 4 at 551-56. Conventional European law enforcement techniques are ineffective because the basic institutions on which the citizens of Western democracies rely to "define and improve the criminal process are non-existent or extremely limited in the international sphere[. D]omestic courts and legislatures are, by definition, institutions of limited authority." *Id.* at 552.

70. See den Boer, *supra* note 18, at 9 (discussing EU Member States' recognition that international cooperation is necessary to counter international crime). One commentator has observed the following about police cooperation among Member States:

[P]oliticians — usually least likely to admit an erosion of state sovereignty — have encouraged this shift by repeatedly stressing the growing impact of trans-frontier crime. The admission that international crime establishes a genuine threat to the internal security of EU Member States has forced them to acknowledge the limitations of national law enforcement policies. European police cooperation, and particularly also the activities of Europol, is beginning to be based on the principle of subsidiarity: criminal activities that cannot be effectively combated at a local, regional or national level as a result of inadequate resources may increasingly become [the] subject of concerted international police cooperation.

Id. at 11. See generally *POLICING ACROSS NATIONAL BOUNDARIES*, *supra* note 23 (discussing international police cooperation initiatives in response to crime within European Union).

71. See, e.g., Vienna U.N. Drug Convention, *supra* note 21, 1992 Gr. Brit. T.S. No. 26, 28 I.L.M. 493 (establishing internationally recognized drug trafficking offenses and requiring that such offenses be criminalized under domestic law of signatories); ELC, *supra* note 24, Europ. T.S. No. 141, 30 I.L.M. 148 (requiring harmonization of domestic

organizations⁷² defined by some commentators as international regimes.⁷³ An international regime whose goals are eradicating drug trafficking and money laundering attempts to reduce the cost of legal business transactions while increasing the cost of illegal ones.⁷⁴ Member States benefit from participating in international regimes by reducing the supply of illicit narcotics, treating those addicted to narcotics, and diminishing the power of organized narcotics traffickers.⁷⁵ The creation of both formal and informal initiatives demonstrates the shift towards increasing interdependence and cooperation among Member States in response to escalating international crime.⁷⁶

drug trafficking and money laundering laws); Schengen Convention, *supra* note 31, 30 I.L.M. 84 (requiring that signatories cooperate in enforcement of its provisions).

72. See *supra* note 26 and accompanying text (discussing activities of Pompidou Group); *supra* note 27 and accompanying text (discussing activities of Trevi Group).

73. Carlson & Zagaris, *supra* note 4, at 554. "[An] International regime" is a specialized term that emanates from international organization theory in the early 1970s." *Id.* (citing R. KEOHANE & J. NYE, *TRANSNATIONAL RELATIONS AND WORLD POLITICS* (1972)). An international regime is a goal-oriented enterprise. Carlson & Zagaris, *supra* note 4, at 554. Its participants are driven by mutual concerns to seek the benefits of "explicit or tacit cooperation. . . . In fact, international regimes have been defined as 'norms, rules and procedures agreed to in order to regulate an issue area.'" *Id.* By establishing "international procedures, rules and institutions," international regimes seek to regulate and control certain transnational activities and relations. *Id.* To accomplish these goals, international regimes must be constructed effectively. *Id.* "Today's dynamic global marketplace and world order present new problems for international regimes. To combat [drug trafficking and] money laundering effectively, international regimes must be flexible, stable, able to make decisions, expend resources, enact laws, provide judicial assistance, and otherwise cooperate in transnational criminal matters." *Id.*

74. Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money Laundering Policy*, 19 *BROOK. J. INT'L L.* 871, 880 (1993).

75. Carlson & Zagaris, *supra* note 4, at 555. Mutually advantageous international regimes traditionally derive their benefits from the "soft power diplomacy" of their participants. *Id.* at 552-53. Soft power refers to a nation's ability to "persuade another [nation] to want what it wants, in contrast to 'hard power,' which involves one nation ordering another to do what it wants." *Id.*

76. See *id.* at 749-50 (discussing trend towards international police cooperation); den Boer, *supra* note 18, at 1-13 (discussing rationales behind European police cooperation). One commentator noted:

Most authors consider that there has been a movement from the informal to the institutional, from diversity to unity: an institutionalised body should logically take the place of earlier multiple informal groups. This is a 'naturalist' approach to integration. According to this approach, the national pattern should be smoothly integrated into a higher level of development towards gradually strengthened cooperation.

Didier Bigo, *The European Internal Security Field: Stakes and Rivalries in a Newly Developing*

C. EU Member State Participation in Global Efforts to Counter International Crime

EU Member States participate in several global initiatives to counter international crime.⁷⁷ In order to overcome the disparity among domestic criminal laws and procedures, the Vienna U.N. Drug Convention⁷⁸ establishes internationally recognized offenses for drug trafficking.⁷⁹ The Vienna U.N. Drug Convention requires international cooperation in enforcement and prosecution.⁸⁰ EU Member States also participate in Interpol, which provides a global framework for the exchange of information and analysis on criminal activity.⁸¹

1. Vienna U.N. Drug Convention

The United Nations' campaign to suppress illicit drug trafficking and related money laundering resulted in the interna-

Area of Police Intervention, in POLICING ACROSS NATIONAL BOUNDARIES 161, 168-69 (Malcolm Anderson & Monica den Boer eds., 1994). Another commentator has described the shift toward international police cooperation with the following schematic:

OLD SYSTEMS

Personal initiative of law enforcement officials
Loose Structure, lack of strategic coordination and functional overlap
Mainly focussed [sic] on the exchange of information
Lack of transparency and control; low status of these issues on the political agenda
Criminal justice matters belonged to the realm of state sovereignty

NEW SYSTEMS

Bureaucratization as a result of growing input of politicians and senior officials
Institutionalisation, formalisation and centralisation
Quantitative and qualitative expansion of activities
More emphasis on accountability and transparency of action
Decline of state sovereignty in criminal justice cooperation, visible from subsidiary [sic] and changing character of border controls

den Boer, *supra* note 18, at 12.

77. See, e.g., Vienna U.N. Drug Convention, *supra* note 21, art. 2(1), 1992 Gr. Brit. T.S. No. 26, at 5, 28 I.L.M. at 500 (requiring international police cooperation among its signatories); INTERPOL CONSTITUTION, *supra* note 22, art. 2, at 1 (establishing global network for exchange of information on criminal activity).

78. Vienna U.N. Drug Convention, *supra* note 21, 1992 Gr. Brit. T.S. No. 26, 28 I.L.M. 493.

79. *Id.* art. 3, 1992 Gr. Brit. T.S. No. 26, at 5-7, 28 I.L.M. at 502; see *supra* notes 43-46 and accompanying text (discussing obstacles to international police cooperation created by inharmonious domestic criminal laws).

80. Vienna U.N. Drug Convention, *supra* note 21, art. 7, 1992 Gr. Brit. T.S. No. 26, at 11-13, 28 I.L.M. at 508.

81. INTERPOL CONSTITUTION, *supra* note 22, art. 2, at 1.

tional community's ratification of the Vienna U.N. Drug Convention.⁸² The Vienna U.N. Drug Convention establishes internationally recognized offenses for drug trafficking, and requires these offenses to be criminalized under the domestic laws of its signatories.⁸³ Further, the Convention imposes binding obligations on its signatories to take various cooperative measures regarding extradition,⁸⁴ confiscation of narcotics and the proceeds derived therefrom,⁸⁵ mutual legal assistance,⁸⁶ and cooperation between law enforcement agencies.⁸⁷ The Vienna U.N. Drug Convention also promotes international cooperation through its drug trafficking prosecutorial framework,⁸⁸ including the establishment of uniform aggravating and mitigating factors.⁸⁹

In addition to its domestic legislation requirement, the Convention also strongly encourages its signatories to enter into bilateral and multilateral agreements to strengthen international cooperation.⁹⁰ The Vienna U.N. Drug Convention obligates parties to maintain open lines of communication for the exchange

82. Vienna U.N. Drug Convention, *supra* note 21, 1992 Gr. Brit. T.S. No. 26, 28 I.L.M. 493. The Convention took effect on November 1, 1990, and has been signed by over forty countries. Phyllis Solomon, Note, *Are Money Launderers All Washed Up in the Western Hemisphere? The OAS Model Regulations*, 17 *HASTINGS INT'L & COMP. L. REV.* 433, 441 (1994). As of April 1993, seventy-two nations had ratified or acceded to the Vienna Convention. *Id.*

83. Vienna U.N. Drug Convention, *supra* note 21, art. 3, 1992 Gr. Brit. T.S. No. 26, at 5-7, 28 I.L.M. at 500-03.

84. *Id.* art. 6, 1992 Gr. Brit. T.S. No. 26, at 10-11, 28 I.L.M. at 507. The text of the Vienna U.N. Drug Convention does not define extradition. *See id.* arts. 1, 6, 1992 Gr. Brit. T.S. No. 26, at 4-5, 10-11, 28 I.L.M. at 499, 507 (defining Convention terms and discussing extradition). Elsewhere, extradition is defined as "surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." *BLACK'S LAW DICTIONARY* 585 (6th ed. 1990).

85. Vienna U.N. Drug Convention, *supra* note 21, art. 5, 1992 Gr. Brit. T.S. No. 26, at 8-10, 28 I.L.M. at 504.

86. *Id.* art. 7, 1992 Gr. Brit. T.S. No. 26, at 11-13, 28 I.L.M. at 508.

87. *Id.* art. 9, 1992 Gr. Brit. T.S. No. 26, at 13-14, 28 I.L.M. at 511.

88. *See id.* arts. 3-11, 1992 Gr. Brit. T.S. No. 26, at 3-15, 28 I.L.M. at 500-13 (addressing drug trafficking prosecutions).

89. *Id.* art. 3(5)(a)-(h), 1992 Gr. Brit. T.S. No. 26, at 6-7, 28 I.L.M. at 502.

90. *Id.* art. 5(4)(g), 1992 Gr. Brit. T.S. No. 26, at 9, 28 I.L.M. at 506. The Vienna U.N. Drug Convention calls for its signatories to provide each other with "the widest measure of mutual assistance in investigations, prosecutions and judicial proceedings." *Id.* art. 7, 1992 Gr. Brit. T.S. No. 26, at 11-13, 28 I.L.M. at 508.

of information⁹¹ and to implement research and training programs designed to share expertise in preventing proscribed criminal offenses.⁹²

The Vienna U.N. Drug Convention's criminal forfeiture provisions also emphasize cooperation among its signatories.⁹³ These provisions require each signatory to enact domestic legislation enabling the signatory to confiscate the proceeds derived from drug trafficking-related activities.⁹⁴ The Convention further provides that a participating country may not refuse a request to reveal its bank records on the basis of its own bank secrecy laws.⁹⁵ Signatories are required to render mutual assistance for the investigation of any of the crimes enumerated within the Convention, including money laundering.⁹⁶

91. *See id.* art. 9(1), 1992 Gr. Brit. T.S. No. 26, at 13, 28 I.L.M. at 511. Article 9(1) states:

1. Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of [drug production and trafficking] offenses. . . . They shall . . .

(a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offenses . . . ;

(b) Co-operate with one another in conducting enquiries, with respect to [the enumerated] offenses . . . having an international character

Id.

92. *Id.* art. 9(3), 1992 Gr. Brit. T.S. No. 26, at 14, 28 I.L.M. at 512.

93. *Id.* pmbi., 1992 Gr. Brit. T.S. No. 26, at 3, 28 I.L.M. at 498. One of the Vienna U.N. Drug Convention's stipulated goals is to "deprive persons engaged in illicit [drug] traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing." *Id.*

94. *Id.* art. 5, 1992 Gr. Brit. T.S. No. 26, at 8-10, 28 I.L.M. at 504-06. Signatories are required "to take such measures as may be necessary to enable the confiscation of: (a) proceeds derived from [illicit drug-production and trafficking]." *Id.* art. 5(1)(a), 1992 Gr. Brit. T.S. No. 26, at 8, 28 I.L.M. at 504. Signatories are also obligated to "adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, [and] instrumentalities . . . for the purpose of eventual confiscation." *Id.* art. 5(2), 1992 Gr. Brit. T.S. No. 26, at 8, 28 I.L.M. at 504.

95. *Id.* art. 5(3), 1992 Gr. Brit. T.S. No. 26, at 8, 28 I.L.M. at 505.

In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Id.

96. *See id.* art. 7, 1992 Gr. Brit. T.S. No. 26, at 11-13, 28 I.L.M. at 504 (requiring signatories to take measures to confiscate "proceeds" derived from activities proscribed in Vienna U.N. Drug Convention). The Convention defines proceeds as "any property derived from or obtained, directly or indirectly, through the commission of an offense

2. Interpol

Interpol is a network of police agencies located in countries throughout the world.⁹⁷ Rather than an operational organization, Interpol is designed to be a communications network.⁹⁸ Interpol provides a global framework for the international exchange of information on criminals and criminal activity.⁹⁹ Interpol headquarters' staff comprises law enforcement officials assigned to temporary duty by their respective governments.¹⁰⁰ Each participating nation maintains its own central bureau to communicate with Interpol headquarters.¹⁰¹

In the years following its inception, Interpol has become a forum for the study of European police cooperation.¹⁰² In the late 1970's, Interpol introduced police liaison officers for many European countries at Interpol headquarters.¹⁰³ These police liaison officers assist in providing requested information concerning their home countries.¹⁰⁴ In 1986, Interpol also addressed

established in accordance with [the terms of the Convention]." *Id.* art. 1(p), 1992 Gr. Brit. T.S. No. 26, at 4, 28 I.L.M. at 500.

97. *Interpol-USNCB: Point of Contact for International Law Enforcement*, INTERPOL, UNITED STATES NATIONAL CENTRAL BUREAU, UNITED STATES DEPARTMENT OF JUSTICE.

98. *Point of Contact for International Law Enforcement*, Interpol, UNITED STATES NATIONAL CENTRAL BUREAU, UNITED STATES DEPARTMENT OF JUSTICE & UNITED STATES DEPARTMENT OF THE TREASURY.

99. INTERPOL CONSTITUTION, *supra* note 22, art. 2, at 1. Article 2 states that Interpol's aims are:

- (a) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights";
- (b) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.

Id.

Since 1923, Interpol has been at the forefront of coordinating international police investigations and has served as a model for other international organizations. *Interpol-USNCB: Point of Contact for International Law Enforcement*, *supra* note 97. See generally MALCOLM ANDERSON, *POLICING THE WORLD, INTERPOL AND THE POLITICS OF INTERNATIONAL POLICE COOPERATION* (1989) (discussing history and activities of Interpol).

100. Nadelmann, *supra* note 50, at 45. Over 100 governments are affiliated with Interpol. *Id.*

101. *Id.* Interpol headquarters is located in France. *Id.*

102. *Id.* at 45. Interpol "serves as a central repository for the collection, transmission, and analysis of information on transnational criminals. It maintains extensive files of names, mugshots, fingerprints and other information." *Id.*

103. Malcolm Anderson, *The Agenda for Police Cooperation*, in *POLICING ACROSS NATIONAL BOUNDARIES* 3, 10 (Malcolm Anderson & Monica den Boer eds., 1994).

104. *Id.*

the need for a more concentrated effort within Europe¹⁰⁵ by creating a European Secretariat¹⁰⁶ within its General Secretariat.¹⁰⁷ Despite Interpol's efforts to address the specific needs of the European Union, however, Interpol's focus remains global.¹⁰⁸ Consequently, commentators view Interpol as an imperfect mechanism for police cooperation between EU Member States.¹⁰⁹

D. *Regional Efforts to Harmonize Domestic Criminal Legislation*

In addition to their participation in global efforts to counter international crime, Member States have also constructed regional initiatives aimed at preventing money laundering and drug trafficking.¹¹⁰ As part of this effort, these regional conventions are designed to harmonize Member States' domestic criminal legislation.¹¹¹ The Council of Europe's European Laundering Convention¹¹² ("ELC") requires EU Member States to criminalize all money laundering activities¹¹³ and calls for international cooperation in the enforcement of its provisions.¹¹⁴

105. den Boer, *supra* note 18, at 2.

106. *See id.* (discussing creation of Interpol's European Secretariat within its General Secretariat).

107. *See* INTERPOL CONSTITUTION, *supra* note 22, art. 26, at 7 (enumerating duties of General Secretariat). The General Secretariat serves as the central command center for Interpol's activities. Anderson, *supra* note 103, at 10.

108. John Benyon et al., *Understanding Police Cooperation in Europe: Setting a Framework for Analysis*, in POLICING ACROSS NATIONAL BOUNDARIES 56, 57 (Malcolm Anderson & Monica den Boer eds., 1994).

109. *See* Nadelmann, *supra* note 50, at 45 (noting that many law enforcement officials in Western Europe are frustrated by Interpol's "failure to adapt to changing circumstances and to quickly integrate new technology advances in crime control and communications"); den Boer, *supra* note 18, at 3 (stating that despite creation of European General Secretariat, "Interpol was hampered by its lack of operational powers, its weak system of accountability and data protection, and its inability to act quickly and efficiently").

110. *See* ELC, *supra* note 24, Europ. T.S. No. 141, 30 I.L.M. 148 (requiring signatories to criminalize money laundering activities); EC Money Laundering Directive, *supra* note 24, O.J. L 166/77 (1991) (requiring Member States to criminalize laundering of drug trafficking proceeds).

111. ELC, *supra* note 24, art. 6, Europ. T.S. No. 141, at 116-17, 30 I.L.M. at 152; *see* EC Money Laundering Directive, *supra* note 24, art. 1, O.J. L 166/77, at 79 (1991) (requiring Member States to implement provisions of Vienna U.N. Drug Convention and ELC).

112. ELC, *supra* note 24, Europ. T.S. No. 141, 30 I.L.M. 148.

113. *Id.* art. 6, Europ. T.S. No. 141, at 115-16, 30 I.L.M. at 152.

114. *See id.* arts. 7-35, Europ. T.S. No. 141, at 117-31, 30 I.L.M. at 153-61 (establishing measures for international cooperation in prevention of money laundering).

Meanwhile, the EC Money Laundering Directive¹¹⁵ obligates Member States to prohibit the laundering of drug-related proceeds¹¹⁶ and to amend their criminal legislation to fulfill their obligations under the Vienna U.N. Drug Convention and the ELC.¹¹⁷

1. The Council of Europe's European Laundering Convention

The ELC seeks to counter international crime through two avenues.¹¹⁸ Domestically, the ELC requires Member States to enact legislation that will prevent money laundering.¹¹⁹ Internationally, the ELC requires its signatories to cooperate with one another in the prevention and prosecution of money laundering.¹²⁰

a. Domestic Money Laundering Provisions

The ELC¹²¹ requires its signatories to construct a system of international cooperation that will deprive criminals of the proceeds of their crimes.¹²² The drafters of the ELC built upon the Vienna U.N. Drug Convention, using, whenever possible, largely

115. EC Money Laundering Directive, *supra* note 24, O.J. L 166/77 (1991).

116. *Id.* arts. 1-2, O.J. L 166/77, at 79 (1991).

117. *Id.* Statement by the Representatives of the Governments of the Member States Meeting Within the Council, O.J. L 166/77, at 83 (1991).

118. *See* ELC, *supra* note 24, arts. 2-6, Europ. T.S. No. 141, at 115-17, 30 I.L.M. at 151-52 (enumerating signatories' domestic money laundering obligations); *id.* arts. 7-35, Europ. T.S. No. 141, at 117-31, 30 I.L.M. at 152-61 (enumerating international cooperation obligations).

119. *Id.* arts. 2-6, Europ. T.S. No. 141, at 115-17, 30 I.L.M. at 151-52.

120. *Id.* arts. 7-35, Europ. T.S. No. 141, at 117-31, 30 I.L.M. at 152-61.

121. ELC, *supra* note 24, Europ. T.S. No. 141, 30 I.L.M. 148. As of May, 1992, the ELC had fifteen signatories: Austria, Belgium, Cyprus, Denmark, Finland, Germany, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. Zagaris & Castilla, *supra* note 74, at 895. The ELC became effective upon ratification by three signatories. ELC, *supra* note 24, art. 36(3), Europ. T.S. No. 141, at 132, 30 I.L.M. at 162.

122. ELC, *supra* note 24, arts. 2-6, Europ. T.S. No. 141, at 115-17, 30 I.L.M. at 151-

52. The ELC obligates each signatory to take all domestic measures to:

[A]dopt such legislative and other measures as may be necessary to establish under its domestic law, when committed intentionally: a. the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions.

Id. art. 6(1), Europ. T.S. No. 141, at 116, 30 I.L.M. at 152.

the same terminology.¹²³ The ELC, however, expanded on the Vienna U.N. Drug Convention by criminalizing non-drug-related money laundering.¹²⁴

The ELC relies on Member States' criminal statutes to serve as the foundation for overcoming the obstacle of bank secrecy.¹²⁵ Like the Vienna U.N. Drug Convention, the ELC authorizes EU financial institutions to reveal banking information to requesting authorities in money laundering cases.¹²⁶ Further, businesses¹²⁷ must require customers to identify themselves and are required to establish self-monitoring mechanisms and industry standards to achieve this customer identification.¹²⁸ The ELC's criminalization of negligent money laundering imposes an additional duty on financial institutions.¹²⁹

b. International Cooperation in the Prevention of Money Laundering

Chapter Three of the ELC requires its signatories to assist one another in identifying and tracing the property used in the commission of any offenses and any assets or proceeds derived therefrom.¹³⁰ The ELC signatories are also required to cooperate with one another, to the greatest extent possible, in investigating¹³¹ and confiscating¹³² proceeds and property derived

123. Zagaris & Kingma, *supra* note 54, at 450 n.20. The Vienna U.N. Drug Convention is narrower than subsequent international regimes, in part, because its signatories represent a diverse group of nations. *Id.* at 448. Commentators view the ELC as a more ambitious document, with the potential "to revolutionize international cooperation and the overall development of the regime regulating international money movement." *Id.* at 466.

124. Compare Vienna U.N. Drug Convention, *supra* note 21, art. 3(1)(b)(i), 1992 Gr. Brit. T.S. No. 26, at 5, 28 I.L.M. at 501 (prohibiting conversion or disguise of property associated with illicit narcotics) with ELC, *supra* note 24, art. 6(1)(a), Europ. T.S. No. 141, at 116, 30 I.L.M. at 152 (prohibiting conversion or transfer of any property for purpose of concealment or disguise).

125. ELC, *supra* note 24, arts. 3, 4(1), Europ. T.S. No. 141, at 115, 30 I.L.M. at 151.

126. *Id.* art. 4(1), Europ. T.S. No. 141, at 115, 30 I.L.M. at 157.

127. See Clemens Kochinke, *E.C. Launches Offensive Against Money Laundering*, 6 INT'L ENFORCEMENT. L. REP. 50, 51 (1990) (noting that ELC reporting requirements apply to banks, all other financial institutions, casinos, and currency exchanges).

128. *Id.* at 52.

129. Zagaris & Kingma, *supra* note 54, at 467.

130. ELC, *supra* note 24, arts. 8-10, Europ. T.S. No. 141, at 118, 30 I.L.M. at 153.

131. See *id.* art. 7(1), Europ. T.S. No. 141, at 117, 30 I.L.M. at 153 (stating that signatories "shall co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds").

from criminal activity.¹³³ The ELC obligates its signatories to undertake cooperative measures,¹³⁴ including investigative procedures,¹³⁵ specific investigative powers and techniques,¹³⁶ and legal remedies to protect the rights of the accused.¹³⁷ Signatories are also required to consider implementing additional investigative techniques to combat money laundering.¹³⁸

Whereas the Vienna U.N. Drug Convention requires that a signatory request information before it is forwarded,¹³⁹ the ELC permits one signatory to forward information to another without prior request, if the information is thought to provide assistance in carrying out an investigation.¹⁴⁰ The ELC also outlines a signatory's ability to seize criminally obtained assets outside its borders.¹⁴¹ In addition, the ELC permits a signatory to seize a sus-

132. *Id.* art. 13, Europ. T.S. No. 141, at 119-20, 30 I.L.M. at 154.

133. *Id.* arts. 7-8, Europ. T.S. No. 141, at 117-18, 30 I.L.M. at 153.

134. *See id.* arts. 8-10, Europ. T.S. No. 141, at 118, 30 I.L.M. at 153 (discussing investigative assistance among signatories). The ELC applies "to diverse decisions, by criminal courts, administrative courts, and separate judicial authorities, to confiscate in civil or criminal proceedings totally separate from those in which the guilt of the offender is determined." Zagaris & Kingma, *supra* note 53, at 456 n.13.

135. ELC, *supra* note 24, art. 7(1), Europ. T.S. No. 141, at 117, 30 I.L.M. at 153.

136. *See id.* arts. 23-35, Europ. T.S. No. 141, at 125-31, 30 I.L.M. at 158-61 (articulating mechanics of international cooperation).

137. *Id.* art. 21(3), Europ. T.S. No. 141, at 125, 30 I.L.M. at 157.

138. *Id.* art. 4, Europ. T.S. No. 141, at 115-16, 30 I.L.M. at 151. The ELC suggests new investigative techniques, including:

- (a) *monitoring orders* or judicial orders to a financial institution to give information about transactions conducted through an account held by a particular person with the institution (such an order is usually valid for a specific period);
- (b) *observation*, which is an investigative technique of law enforcement agencies that consist in covertly watching the movements of persons without hearing them;
- (c) *interception of telecommunications*, which includes interception of telephone conversations, telex and telefax communications;
- (d) *access to computer systems*; and
- (e) *production orders* instruct[ing] individuals to produce specific records, documents or other items or property in their possession. Failure to comply with such an order may result in an order for search and seizure. The order might require that records or documents are produced in a specific form, as when the order concerns computer-generated material.

Zagaris & Kingma, *supra* note 54, at 491 n.168 (summarizing Article 4 of ELC).

139. *See* Vienna U.N. Drug Convention, *supra* note 21, art. 7(2), 1992 Gr. Brit. T.S. No. 26, at 11, 28 I.L.M. at 508. Article 7(2) states that mutual legal assistance "may be requested." *Id.* Article 7(2) is silent, however, on a signatory's authority to render unrequested assistance. *Id.*

140. ELC, *supra* note 24, art. 10, Europ. T.S. No. 141, at 118, 30 I.L.M. at 153.

141. *Id.* art. 11, Europ. T.S. No. 141, at 119, 30 I.L.M. at 153-54.

pect's assets within its borders, prior to conviction, at the request of another signatory.¹⁴²

2. The EC Money Laundering Directive

As a complement to the ELC, the EC Money Laundering Directive¹⁴³ ("Money Laundering Directive") imposes an obligation on Member States to criminalize the laundering of drug-related proceeds.¹⁴⁴ The Money Laundering Directive adopted the Vienna U.N. Drug Convention's definition of money laundering.¹⁴⁵ The Directive was not designed to be an instrument to harmonize criminal legislation.¹⁴⁶ Nonetheless, its drafters sought to achieve international cooperation by requiring Member States to comply with the money laundering provisions of the Vienna U.N. Drug Convention and the ELC.¹⁴⁷ The Money Laundering Directive also invites Member States to extend its scope to other serious crimes.¹⁴⁸

Under the Money Laundering Directive's provisions, Member States are required to impose obligations on their domestic financial institutions to record and alert the authorities to any

142. *Id.* art. 13, Europ. T.S. No. 141, at 119-20, 30 I.L.M. at 154.

143. EC Money Laundering Directive, *supra* note 24, O.J. L 166/77 (1991).

144. *See id.* art. 2, O.J. L 166/77, at 79 (1991) (stating that "Member States shall ensure that money laundering as defined in this Directive is prohibited."). Money laundering is defined as:

[T]he [intentional] conversion or transfer of property, knowing that such property is derived from criminal activity . . . for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action

Id. art 1, O.J. L 166/77, at 79 (1991).

145. *Id.* art. 1, O.J. L 166/77, at 79 (1991). Article 1 states that "'[c]riminal activity' means a crime specified in Article 3(1)(a) of the Vienna [U.N. Drug] Convention." *Id.*; *see* Vienna U.N. Drug Convention, *supra* note 21, art. 3(1)(a), 1992 Gr. Brit. T.S. No. 26, at 5, 28 I.L.M. at 500-01 (listing drug-related activities proscribed by Vienna U.N. Drug Convention).

146. Flynn, *supra* note 10, at 1.

147. EC Money Laundering Directive, *supra* note 24, Statement by the Representatives of the Governments of the Member States Meeting Within the Council, O.J. L 166/77, at 83 (1991). This Statement obligates Member States "to take all necessary steps by 31 December 1992 at the latest to enact criminal legislation enabling them to comply with their obligations under the [Vienna U.N. Drug Convention and the ELC]." *Id.*

148. *Id.* art. 1, O.J. L 166/77, at 79 (1991). Article 1 states that its provisions may cover "any . . . criminal activity designated as such for the purposes of this Directive by each Member State." *Id.*

suspicious transactions.¹⁴⁹ Specifically, the Money Laundering Directive precludes financial institutions from carrying out transactions that these institutions suspect may be related to money laundering, until they have alerted the appropriate national authorities, who may then instruct them not to execute the transaction.¹⁵⁰ Such disclosure to the authorities does not subject financial institutions or their agents to liability under bank secrecy laws.¹⁵¹

E. *Regional Police Cooperation Initiatives*

The primary impetus for creating cross-border police cooperation mechanisms within the European Union was Article 13 of the SEA,¹⁵² which called for the abolition of internal border controls to achieve the creation of the Internal Market.¹⁵³ Member States recognized that the removal of border and passport controls posed a threat to the internal security of the European Union.¹⁵⁴ Member States embarked on several initiatives¹⁵⁵ to allow law enforcement to respond effectively¹⁵⁶ to the threat of increased international crime.¹⁵⁷

149. *See id.* arts. 2-11, O.J. L 166/77, at 79-81 (1991) (discussing financial institutions' obligation to notify authorities of suspected wrongdoing).

150. *Id.* art. 7, O.J. L 166/77, at 80 (1991). Article 7 states that a financial institution may complete a suspected money laundering transaction without alerting the authorities if "to refrain in such manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money-laundering operation." *Id.* Under these circumstances, "the institutions concerned shall apprise the authorities immediately afterwards." *Id.*

151. *Id.* art. 9, O.J. L 166/77, at 81 (1991).

152. *See supra* note 2 and accompanying text (quoting SEA Article 8(a)).

153. *See SEA, supra* note 1, art. 13, O.J. L 169/1, at 7 (1987), [1987] 2 C.M.L.R. at 747. Article 13 states that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of [the Treaty of Rome]." *Id.*

154. den Boer, *supra* note 18, at 4; *see Carlson & Zagaris, supra* note 4, at 552-54 (discussing effect of abolition of internal border controls on crime).

155. *See supra* notes 23-28 and accompanying text (discussing regional police cooperation initiatives).

156. Carlson & Zagaris, *supra* note 4, at 552-54.

157. *See* den Boer, *supra* note 18, at 3 (noting that abolition of internal border controls provides crucial impetus for increased international police cooperation). *But see* den Boer, *supra* note 18, at 4 (noting that assumption that abolition of border controls will cause rise in international crime is open to question).

[This] philosophy is weak, because it is based on the dubious assumption that in a region with border controls, internationally active criminals move around with caution, while in a region without border controls, international criminals become complacent about their movements. One may question

1. The Pompidou Group

In 1980, the Council of Europe established the Pompidou Group.¹⁵⁸ In 1984, the Pompidou Group began to examine cooperation among Member States' criminal justice systems and social and health services by cataloging and analyzing the differences between its members in the prosecution and treatment of illicit drug use and trafficking.¹⁵⁹ These studies led to several efforts designed to coordinate international measures to combat drug trafficking and use.¹⁶⁰ To effectively counter the increasing sophistication of international crime, the Pompidou Group concluded that international cooperation was essential.¹⁶¹

2. The Trevi Group

The Trevi Group¹⁶² was established in 1975 and originally

whether the abolition of border controls affects the mobile and behavioural pattern of criminals. The assumption ignores that in the past, international crime had the chance to expand across the borders of nation-states despite the existence of border controls, and it backshadows the fact that criminals have even been able to capitalise on the existence of border controls.

Id. at 3-4.

158. Carlson & Zagaris, *supra* note 4, at 565 (citing Council of Europe, *A Brief Description of the Activities of the Pompidou Group and Its Establishment within the Framework of the Council of Europe* 1, Oct. 4, 1989, P-PG(88) Inf. 1). The authors indicate that:

The Original members of the Group were Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, and the United Kingdom. Denmark, Ireland, and Sweden were subsequently admitted to the Group. Turkey joined the Group when the Partial Agreement was established by the Council of Europe in March 1980. Since then Greece became a member in 1981, Norway in 1983, Spain in 1984, Portugal and Switzerland in 1985, Finland in 1987, Austria on 1 January 1988, Malta on 1 April 1988 and Cyprus on 1 October 1989 bringing the number of member states to 20.

Certain countries which are not members of the Council of Europe participate in some activities of the Group on a technical ad hoc basis, for example, Canada, the United States, and the Holy See.

In addition since May 1986, the Commission of the European Communities takes part in the Group's work with a view to ensuring coordination of the two organization's activities.

Id. at 565 n.63 (citations omitted).

159. *Id.* at 565.

160. *Id.* at 565-66.

161. *Id.* at 566-67 (citing Council of Europe, *Background Paper on Confiscation of the Proceeds of Drug Trafficking at the Extraordinary Ministerial Conference in London, May 18-19, 1989* 2 (1989) P-PG/MIN (89) 3).

162. See Benyon, *supra* note 108, at 60 (discussing activities of Trevi Group and noting that nature of organization hampers efforts to discuss its activities fully).

focused on political crime and terrorism¹⁶³ and later expanded to address drug trafficking and organized crime.¹⁶⁴ The Trevi Group is divided into three tiers, with the Trevi Ministers constituting the top tier.¹⁶⁵ The Trevi Ministers are the ministers of the EU Member States responsible for police and public security.¹⁶⁶ The middle tier consists of senior civil servants and police officers who analyze the reports written by working groups in preparation for the Trevi Ministers' meetings.¹⁶⁷ The third tier, comprised of police officers, civil servants, and other experts in relevant fields, creates working group reports.¹⁶⁸

The Trevi Group operates outside the framework of EU institutional structures.¹⁶⁹ The Trevi Group lacks procedures for reporting its activities to the Commission¹⁷⁰ or the European Parliament.¹⁷¹ Similarly, while the Trevi Ministers are accountable only to their own governments, there is no requirement to report decisions and discussions occurring within the Working Groups to their national parliaments.¹⁷²

Since the Trevi Group's formation, there have been four

163. Anderson, *supra* note 103, at 9.

164. Kenneth G. Robertson, *Practical Police Cooperation in Europe: The Intelligence Dimension*, in POLICING ACROSS NATIONAL BOUNDARIES 106, 113 (Malcolm Anderson & Monica den Boer eds., 1994). Every Member State participate in the Trevi Group. *Id.* In addition, other "friends of Trevi" are affiliated with its work and attend its meetings. The "friends of Trevi" include: Norway, Switzerland, Morocco, Canada, and the United States. Benyon, *supra* note 108, at 60. The Trevi Group provides a forum in which Member States may discuss police and national security matters of common concern. Schutte, *supra* note 27, at 80. The first meeting of the Group took place in Rome, close to the famous Trevi Fountain. *Id.* at 80 n.83.

165. Benyon, *supra* note 108, at 59.

166. Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S. Mexican Cultural Heritage: The need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW 627, n.321 (1992); see E. Muller-Rappard, THE EUROPEAN RESPONSE TO INTERNATIONAL TERRORISM, LEGAL RESPONSES TO INTERNATIONAL TERRORISM: PROCEDURAL ASPECTS 385, 410-11 (M. Cherif Bassiouni ed., 1988) (providing additional background on activities of Trevi Ministers).

167. Benyon, *supra* note 108, at 59.

168. *Id.*

169. Anderson, *supra* note 103, at 12.

170. See *supra* notes 33-49 and accompanying text (discussing role of Commission in European Union).

171. Benyon, *supra* note 108, at 61; see *supra* notes 33-49 and accompanying text (discussing structure of European Union).

172. Benyon, *supra* note 108, at 61. Benyon notes that a low level of accountability, combined with the secrecy of the outcome of Trevi's meetings, raises serious questions about the Group's political legitimacy. *Id.*

Working Groups.¹⁷³ Working Group I, however, is the only group that has a directly operational role, providing secure communications links among Member States for the transmission of sensitive international terrorism information.¹⁷⁴ Working Group III focused on serious forms of international crime, including drug trafficking, organized crime, and money laundering.¹⁷⁵ These Working Groups' recommendations produce tangible results.¹⁷⁶ For example, Working Group III's recommendations were responsible for the creation of the network of Drug Liaison Officers both without and within the European Union.¹⁷⁷ The Trevi Group has also developed standardized and cooperative policing techniques tailored for specific types of crimes.¹⁷⁸ Trevi also contributes simply by bringing together representatives from different police forces.¹⁷⁹

3. The Trevi Action Programme

In 1990, Member States' recognition that European integration would require improved international police cooperation¹⁸⁰ created the impetus for the Trevi Action Programme ("Action Programme").¹⁸¹ The objectives of the Action Programme are embodied in a document that incorporates all of the police cooperation measures on which Member States agreed, whether or

173. *Id.* at 59-60. In 1977, the Trevi Group established Working Group I to coordinate activity against terrorism and related issues. *Id.* The Trevi Group simultaneously established Working Group II to exchange information on training, equipment, public order, and private security issues. *Id.* In June, 1985, Working Group II expanded to include analysis on soccer hooliganism. *Id.* Working Group IV, existing between 1988 and 1992, focused on the policing and internal security consequences of the abolition of border controls. *Id.*; see *supra* notes 1-3 and accompanying text (discussing SEA Article 13's abolition of border controls).

174. Anderson, *supra* note 103, at 12.

175. Benyon, *supra* note 108, at 60. Working Group III focuses on computer crime, environmental crime, automobile crime, and trafficking in stolen antiques and works of art. *Id.*

176. *Id.* at 59-60. *But see* Robertson, *supra* note 164, at 113 (discussing shortcomings of Trevi Group structure).

177. Benyon, *supra* note 108, at 60.

178. *Id.* Specific crimes requiring specialized policing techniques include environmental crime and soccer hooliganism. *Id.*

179. *Id.* Although it is not provided for formally, the development of personal relationships enhances cooperation. *Id.*

180. Anderson, *supra* note 103, at 3.

181. *See id.* at 12-13 (discussing Trevi Action Programme).

not such measures were feasible at the time.¹⁸² The document provides for extensive anti-drug trafficking cooperation measures, including the use of controlled delivery,¹⁸³ the use of both bi-national and multi-national operational teams, and training and research programs.¹⁸⁴

The Action Programme achieves intergovernmental communication and coordination through establishing an information exchange center for data held by national drug intelligence units.¹⁸⁵ The Action Programme envisioned that liaison officers would effectuate cooperation between Member States.¹⁸⁶ Furthermore, while the Action Programme encourages cooperation between liaison officers, the liaison officers are only accountable to their national authorities.¹⁸⁷

4. The Schengen Convention

On June 14, 1985, five Member States concluded the Schengen Agreement,¹⁸⁸ which represented the first attempt to create an area within the European Union without internal borders.¹⁸⁹ The Agreement was later expanded by the Schengen Convention.¹⁹⁰ The Schengen Convention focuses on five inter-related areas: the abolition of checks at internal borders and the

182. *Id.* at 12. The Action Programme's preamble states that the Trevi system does not prejudice previously established agreements and systems, such as Interpol. *Id.*

183. *Id.* See Vienna U.N. Drug Convention, *supra* note 21, art. 1(g), 1992 Gr. Brit. T.S. No. 26, at 4, 28 I.L.M. at 499. The Vienna U.N. Drug Convention defines "controlled delivery" as:

the technique of allowing illicit or suspect consignments of narcotic [or other illegal] drugs . . . or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of [the relevant illegal acts].

Id.

184. Anderson, *supra* note 103, at 12.

185. *Id.*

186. *Id.*

187. *Id.* at 12-13. Liaison Officer cooperation includes access to the national criminal intelligence databases of other Member States. *Id.*

188. Schengen Convention, *supra* note 31, 30 I.L.M. 84.

189. Martin Baldwin-Edwards & Bill Heberton, *Will SIS Be Europe's Big Brother?, in POLICING ACROSS NATIONAL BOUNDARIES* 137, 138-39 (Malcolm Anderson & Monica den Boer eds., 1994) [hereinafter Baldwin-Edwards].

190. Schengen Convention, *supra* note 31, 30 I.L.M. 84. Italy joined the Schengen Convention on November 27, 1990. Benyon, *supra* note 108, at 57. Portugal and Spain joined in June, 1991, and Greece joined in November 1992. *Id.*

free movement of persons;¹⁹¹ police and security measures to respond to this innovation;¹⁹² the Schengen Information System (SIS);¹⁹³ the free movement of goods;¹⁹⁴ and the protection of personal data.¹⁹⁵

The Schengen Convention's signatories originally sought to eliminate controls at their common borders to attain economic advantages.¹⁹⁶ In Member States' efforts to counter international crime, however, the Schengen Convention is significant because it represents the first attempt among any Member States to integrate the three spheres of EU police cooperation.¹⁹⁷ It provides for legislative harmonization,¹⁹⁸ a centralized data exchange system,¹⁹⁹ and operational police cooperation.²⁰⁰

a. Legislative Harmonization and Operational Police Cooperation

The Schengen Convention establishes new and permanent institutions dedicated to overseeing its implementation, particularly in the area of drug trafficking.²⁰¹ The Schengen Convention requires signatories to develop common policies on the granting of visas²⁰² and asylum.²⁰³ It also contains specific provi-

191. Schengen Convention, *supra* note 31, arts. 2-38, 30 I.L.M. at 86-95. Title II is entitled "Abolition of checks at internal borders and movement of persons." *Id.*

192. *Id.* arts. 39-91, 30 I.L.M. at 101-23.

193. *Id.* arts. 92-119, 30 I.L.M. at 123-34. Title IV of the Convention is entitled "The Schengen Information System" ("SIS"). *Id.*

194. *Id.* arts. 120-25, 30 I.L.M. at 135-37. Title V of the Convention is entitled "Transport and movement of goods." *Id.*

195. *Id.* arts. 126-30, 30 I.L.M. at 137-40. Title VI of the Convention is entitled "Protection of personal data." *Id.*

196. Baldwin-Edwards, *supra* note 189, at 138. The "[m]ovement of goods was to profit from the elimination of control procedures at the respective borders, and mutual trade was expected to receive a substantial boost." *Id.*

197. Benyon, *supra* note 108, at 57-59.

198. Schengen Convention, *supra* note 31, arts. 9-17, 30 I.L.M. at 89-92 (providing for harmonization of EU Member States' visa policies).

199. *See id.* arts. 92-119, 30 I.L.M. at 123-35 (establishing SIS).

200. *See id.* arts. 39-47, 30 I.L.M. at 101-10 (specifying parameters for police cooperation).

201. *See* Bruce Zagaris, *Schengen Convention Points Way to Enhanced EC Criminal Cooperation*, 7 INT'L ENFORCEMENT L. REP. 26 (1991) (discussing international police cooperation aspects of Schengen Convention); *Five EC Members Reach Agreement on Schengen Accord*, 6 INT'L ENFORCEMENT L. REP. 226 (1990) (noting potential impact of Schengen Convention on combatting international drug trafficking).

202. Schengen Convention, *supra* note 31, art. 9, 30 I.L.M. at 89. Article 9(1) states: "The Contracting Parties undertake to adopt a common policy on the move-

sions on police force cooperation,²⁰⁴ drug trafficking,²⁰⁵ and illegal firearms and explosives activity.²⁰⁶ Article 39²⁰⁷ requires police to render mutual assistance, upon request, for the purpose of preventing and detecting criminal offenses.²⁰⁸ The Schengen Convention also calls for the establishment of a permanent working group to examine common problems of drug criminality.²⁰⁹ Article 40²¹⁰ grants signatories the jurisdiction to continue investigations beyond the physical confines of their borders.²¹¹ Signatories' police officials are empowered to render assistance to one another for the prevention or investigation of crime.²¹² Each country's national law, however, remains paramount.²¹³

ment of persons and in particular on the arrangements for visas. They shall give each other assistance to that end. The Contracting Parties undertake to pursue by common agreement the harmonization of their policies on visas." *Id.* See *id.* arts. 10-18, 30 I.L.M. at 89-92 (detailing particulars of visa arrangements under Convention).

203. *Id.* Final Act (5), 30 I.L.M. at 145. "Contracting Parties shall make an inventory of national asylum policies with a view to the harmonization thereof." *Id.* The Schengen Convention defines application for asylum as:

[A]ny application submitted in writing, orally or otherwise by a [person other than a national of an EU Member State] at an external border or within the territory of a Contracting Party with a view to obtaining recognition as a refugee in accordance with the Geneva Convention of 28 July 1951 relating to the Status of Refugees

Id. art. 1, 30 I.L.M. at 86.

204. *Id.* arts. 39-47, 30 I.L.M. at 101-12.

205. *Id.* arts. 70-76, 30 I.L.M. at 116-18.

206. *Id.* arts. 77-91, 30 I.L.M. at 118-23.

207. *Id.* art. 39(1), 30 I.L.M. at 101. Article 39(1) obligates signatories to "undertake to ensure that their police authorities shall, in compliance with national legislation . . . assist each other for the purposes of preventing and detecting criminal offenses." *Id.* Although assist is not explicitly defined in the Schengen Convention, it is understood to include the sharing of information. Baldwin-Edwards, *supra* note 189, at 140.

208. Schengen Convention, *supra* note 31, art. 39, 30 I.L.M. at 101.

209. *Id.* art. 70, 30 I.L.M. at 116.

210. *Id.* art. 40(1), 30 I.L.M. at 101-02.

211. *Id.* To illustrate, assume that a hypothetical suspect whom the law enforcement authorities of Nation A have been investigating has crossed into Nation B. Article 40(1) authorizes Nation A to continue monitoring the suspect in Nation B, even when Nation A does not yet have evidence sufficient to support an extradition request. *Id.* The officers of Nation A, however, would be subject to certain limitations regarding the conduct of their investigation: they are not allowed to enter private dwellings, and may interrogate or arrest the suspect only if in hot pursuit. *Id.* art. 39(3), 30 I.L.M. at 101. Further, the Nation A officers can continue their surveillance only if they believe the suspect has committed murder, rape, arson, fraud, firearm or drug trafficking, or toxic waste trafficking. *Id.*

212. *Id.* art. 39, 30 I.L.M. at 101.

213. *Id.* art. 39(1), 30 I.L.M. at 101. Each signatory's evidentiary and procedural rules of law ultimately control the criminal proceeding. *Id.*

For example, when a signatory requests and is supplied with written information, the requesting signatory cannot use the evidence to inculcate a suspect without the approval of that signatory's competent judicial authority.²¹⁴

b. The Schengen Information System

The Schengen Convention provides for the establishment of a common information system, the Schengen Information System ("SIS").²¹⁵ SIS enables Convention signatories to access data on people and objects for the purpose of border checks and police inquiries.²¹⁶ SIS is not a system that links existing police information databases or computer systems; it is an independent transnational system.²¹⁷ The purpose of SIS is to preserve the order and public security of its signatories, who anticipate that they will be especially threatened by the free circulation of persons within their signatories' territory.²¹⁸

Articles 95 through 100²¹⁹ identify the six categories of information which are to be collected and maintained within the SIS.²²⁰ Access to SIS is governed by elaborate procedural safe-

214. *Id.*

215. *Id.* art. 92, 30 I.L.M. at 123.

216. *Id.* art. 92(2), 30 I.L.M. at 123.

217. Baldwin-Edwards, *supra* note 189, at 140. SIS is composed of identical national databases joined by a central information system. *Id.* SIS will eventually be installed at the external border control sites. *Id.*

218. Schengen Convention, *supra* note 31, art. 92(1), 30 I.L.M. at 123-24. "The Schengen Information System shall enable the authorities . . . , by means of an automated search procedure, to have access to reports on persons and objects for the purposes of border checks and controls and other police . . . checks carried out within the country in accordance with national law . . ." *Id.*

219. *Id.* arts. 95-100, 30 I.L.M. at 125-28.

220. *Id.* The relevant language is:

Article 95(1): Data relating to persons wanted for arrest for extradition purposes. [Such an entry must include minimum essential background information on the entry].

Article 96: Data relating to aliens who are reported for the purpose of being refused entry [into the territory of the Parties to the Convention].

Article 97: Data relating to persons who have disappeared or to persons who, in the interests of their own protection or in order to prevent threats, need to be placed provisionally in a place of safety at the request of . . . the reporting Party.

Article 98: [Data relating to witnesses or suspects summoned to appear before a court in criminal proceedings].

guards and the database is reserved exclusively for border control, police, customs, and immigration officials.²²¹ The Schengen Convention also states that a signatory's agents may use the information only for the six stated purposes.²²² Further, when a signatory enters an individual's name onto the SIS under one of these categories, only certain types of information may be entered.²²³

Despite these precautions, however, SIS raises serious personal privacy concerns.²²⁴ Specific provisions govern the protection of personal data²²⁵ and the security of data on SIS.²²⁶ Article 117²²⁷ requires signatories to take measures to ensure that personal or private data remain protected, at least to the degree prescribed in the relevant Council of Europe resolutions.²²⁸ Further, each signatory must take measures to prevent any unau-

...
Article 99: Data relating to persons or vehicles . . . for the purposes of discreet surveillance or specific checks.

...
Article 100: Data relating to objects sought for the purpose of seizure

...
Id.

221. Baldwin-Edwards, *supra* note 189, at 141-42.

222. *See supra* notes 219-20 and accompanying text (describing six instances where individual's name and information may be reported). One commentator notes that if the information can be used in conjunction with any or all of the six categories, as opposed to the specific category under which it was originally reported, the Convention's personal data protection safeguards are severely undermined. Baldwin-Edwards, *supra* note 189, at 143. He continues: "States can [circumvent] the 'purpose limitation' principle where it can be justified by the need to prevent an imminent serious threat to public order and safety, for serious reasons of state security or for the purposes of preventing a serious offense (Article 102)." *Id.* (citations omitted).

223. Schengen Convention, *supra* note 31, arts. 126-30, 30 I.L.M. at 137-40. Title VI of the Schengen Convention is entitled "Protection of Personal Data." *Id.*

224. Charles D. Raab, *Police Cooperation: The Prospects for Privacy*, in *POLICING ACROSS NATIONAL BOUNDARIES* 121, 128-30 (Malcolm Anderson & Monica den Boer, eds. 1994); *see generally* Baldwin-Edwards, *supra* note 189 (discussing privacy issues).

225. Schengen Convention, *supra* note 31, arts. 126-30, 30 I.L.M. at 137-40.

226. *Id.* arts. 102-18, 30 I.L.M. at 129-34.

227. *Id.* art. 117, 30 I.L.M. at 133.

228. *Id.* The Schengen Convention refers to the Council of Europe's standard for data protection:

[T]he Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data, and in compliance with Recommendation R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe regulating the use of personal data in the police sector.

Id.

thorized access to such information, including preventing unauthorized copying, transmittal, modification or removal of data.²²⁹

F. *Europol Drugs Unit and the Europol Convention*

Pursuant to the Maastricht Treaty,²³⁰ EU institutions now have greater authority in areas of internal security and police cooperation.²³¹ Maastricht created the Council of Ministers of Justice and Home Affairs, and empowered them to create an EU-wide police agency.²³² Subsequently, the Council of Ministers of Justice and Home Affairs created the EDU²³³ and recently completed the Europol Convention.²³⁴ While the EDU is currently operating, Europol will not come into full effect until the Europol Convention is ratified by the Member States.²³⁵

1. The Maastricht Treaty: Catalyst for the Creation of Europol

Maastricht²³⁶ amends and supplements the 1957 Treaty of Rome,²³⁷ and the 1987 SEA,²³⁸ which prepared for the creation of the European Union's internal market after 1992.²³⁹ Towards the goal of harmonizing policies associated with criminal justice, Maastricht commits Member States to regard what were traditionally national interests as areas of common interest, including: policies on asylum;²⁴⁰ border checks;²⁴¹ immigration;²⁴²

229. *Id.* art. 118, 30 I.L.M. at 133-34.

230. TEU, *supra* note 1, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. at 719.

231. *Id.* art. K.1(9), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 735; *see supra* note 6 and accompanying text (quoting Article K.1(9)).

232. TEU, *supra* note 1, art. K.1(9), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 735. "Member States shall regard . . . as [a] matter[] of common interest . . . the organization of a Union-wide system for exchanging information within a European Police Office (Europol)." *Id.*

233. *See* Council's Joint Action, *supra* note 16, O.J. L 62/1 (1995) (discussing Council's creation of EDU).

234. Europol Convention, *supra* note 5, 54 *Europol*, Rev. 5, Annex.

235. *Id.* art. 45, 54 *Europol*, Rev. 5, Annex, at 67-68; *see EU: Criticism of Cannes Focuses on Europol*, *supra* note 15 (noting that Europol Convention will not enter into force until it is ratified by Member States).

236. TEU, *supra* note 1, O.J. C 224/1 (1992).

237. EEC Treaty, *supra* note 1, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1.

238. SEA, *supra* note 1, art. 8(a), O.J. L 169/1, at 7 (1987), [1987] 2 C.M.L.R. at 747.

239. *See supra* note 2 (quoting SEA art. 13).

240. *See supra* note 199 (discussing Schengen Convention's definition of asylum).

drug addiction;²⁴³ international fraud;²⁴⁴ judicial cooperation;²⁴⁵ customs cooperation;²⁴⁶ and police cooperation.²⁴⁷

Maastricht's objectives in the area of justice and home affairs will be achieved by operational support and other forms of international cooperation.²⁴⁸ As to operational support, Article K.1(9) calls for the development of a system of information exchange to prevent and combat terrorism, drug trafficking, and other serious forms of international crime.²⁴⁹ The drafters of Maastricht also envisioned that Europol would provide an EU-wide system for exchanging information on criminal activity among EU Member States.²⁵⁰

Maastricht grants EU institutions a limited role in the area of international police cooperation.²⁵¹ The European Coun-

241. TEU, *supra* note 1, art. K.1, O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 735.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. See *supra* note 6 and accompanying text (discussing police cooperation under TEU Article K.1(1)-(9)). Article K.3 permits for the adoption of joint positions and international conventions relating to justice and home affairs. *Id.* art. K.3(a)-(c). One commentator notes that "[t]his will facilitate for more systematic regulation in an area with unratified agreements on asylum and external frontiers policy." Neil Walker, *European Integration and European Policing: A Complex Relationship*, in *POLICING ACROSS NATIONAL BOUNDARIES* 22, 29 (Malcolm Anderson & Monica den Boer eds., 1994).

248. Walker, *supra* note 247, at 28.

249. TEU, *supra* note 1, art. K.1(9), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 735. This cooperation may include customs officials. *Id.*

250. *Id.*

251. Jean-Louis Debrouwer, *The Treaty on European Union: New Perspectives for the Fight Against Crime*, 7 *INT'L L. PRACTICUM* 84, 84 (1994). See *supra* notes 33-48 and accompanying text (discussing functions of EU institutions).

The Commission is associated with the Maastricht provisions, and shares the right of initiative with the Member States regarding all areas of Article K except customs cooperation, criminal justice cooperation, and police cooperation. TEU, *supra* note 1, art. K.3(2), O.J. C 224/1, at 97-98 (1992), [1992] 1 C.M.L.R. at 736. The Presidency of the Commission is to inform regularly the European Parliament of all justice and home affairs activity. *Id.* art. K.6, O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 737. Since the Commission is not directly involved in customs, criminal justice, and police cooperation, however, the Council must inform Parliament of measures in these areas, so that Parliament may consider whether such measures are consistent with the overarching principals of the European Union. Telephone interview with Jean-Louis Debrouwer, Administrator with the Secretariat General of the Commission of the European Union (Mar. 1, 1995). The Parliament has the right to make recommendations to or ask questions of the Council. TEU, *supra* note 1, art. K.6, O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 737. The Council may confer jurisdiction to the European Court of Justice

cil,²⁵² the bi-annual meeting of Member States' leaders, makes decisions concerning justice and home affairs.²⁵³ Pursuant to its powers under Maastricht, the European Council finalized the current version of the Europol Convention, which may be ratified by the Member States.²⁵⁴

2. The EDU's Organizational Structure and Scope of Authority

The TEU's Declaration on Police Cooperation²⁵⁵ delineates Europol's anticipated functions.²⁵⁶ These functions fall into three categories.²⁵⁷ First, Europol is to provide support for national criminal investigation and security authorities, particularly through coordinating investigations and search operations.²⁵⁸ Second, Europol is to create a computer database that enables it to provide central analysis and assessment of data to develop investigative strategies.²⁵⁹ Finally, Europol will compile and analyze Member States' drug prevention programs to promote prevention strategies, training, and research.²⁶⁰

Until the Member States ratify the Europol Convention, the EDU will continue to operate under the Council's Joint Action document of March 10, 1995 ("Council's Joint Action document").²⁶¹ This agreement replaced the Ministerial Agreement of June 2, 1993.²⁶² The EDU began operations in January

to interpret provisions of treaties drawn up by the Council. *Id.* art. K.3(2)(c), O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 736.

252. *See supra* notes 33-49 and accompanying text (discussing role of Council and other EU institutions).

253. TEU, *supra* note 1, art. K.3(2), O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 736.

254. *Id.* art. K.3(2)(c), O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 736.

255. *Id.* O.J. C 224/1, at 1; Declaration on Police Cooperation, O.J. C 191/108 (1992), [1992] 1 C.M.L.R. at 792.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. Council's Joint Action, *supra* note 16, art. 1, O.J. L 62/1, at 1 (1995). Austria, Finland and Sweden, who acceded to the European Union on January 1, 1995, have joined the EDU through a Common Joint Action Agreement completed at the Meeting of the Council of Justice and Home Affairs Ministers in Essen. Interview with Jean-Louis Debrouwer, *supra* note 251.

262. Council's Joint Action, *supra* note 16, art. 1, O.J. L 62/1, at 1 (1995).

1993.²⁶³ Its permanent headquarters is in the Hague, the Netherlands.²⁶⁴

A committee comprised of the Council of Ministers of Justice and Home Affairs²⁶⁵ of the EU Member States supervises the EDU.²⁶⁶ The EDU's current Coordinator, Jurgen Storbeck, was appointed by these Ministers.²⁶⁷ The Coordinator,²⁶⁸ along with two assistant Coordinators, are responsible for the day-to-day operations of the EDU.²⁶⁹ The EDU is run principally through the coordination of the Europol Liaison Officers,²⁷⁰ comprised of police and customs service agents from the Member States.²⁷¹ Member States finance the EDU, according to their respective gross national products.²⁷² The cost of the Liaison Officers's equipment is borne by their respective nations.²⁷³

The EDU is non-operational, meaning that it is prohibited from taking part in any physical actions.²⁷⁴ The Council's Joint Action document restricts the EDU's activities to exchanging

263. *Id.*

264. Fact Sheet, Europol Drugs Unit (EDU)/the Hague, Oct. 29, 1994, at 1 [hereinafter EDU Fact Sheet].

265. *See supra* notes 236-54 and accompanying text (discussing role of Council of Ministers of Justice and Home Affairs under Maastricht).

266. EDU Fact Sheet, *supra* note 264, at 1-2. *See supra* notes 251-54 and accompanying text (discussing role of European Council under Maastricht).

267. EDU Fact Sheet, *supra* note 264, at 1. Mr. Storbeck was appointed Coordinator on "20/21 June 1994." *Id.*

268. Council's Joint Action, *supra* note 16, art. 5(1), O.J. L 62/1, at 2 (1995). "The Unit shall be headed by a Coordinator. In addition to the Coordinator, the management team shall consist of two Assistant Coordinators and of two other members who have a direct hierarchical link to the Coordinator . . ." *Id.* The management team is responsible for the EDU's "day-to-day operation." *Id.*

269. *Id.* "The Coordinator, the two Assistant Coordinators and the other two members of the management team shall be appointed by the Council in accordance with the procedures provided for in Title VI of the Treaty." *Id.*

270. *Id.* art. 2(1), O.J. L 62/1, at 1 (1995). Article 2(1) states: "Each Member State shall send one or more liaison officers to The Hague in order to constitute, with the liaison officers of the other Member States, a team which will cooperate within the Unit." *Id.* "Apart from the liaison officers sent directly by Member States, other staff shall be posted to the Unit in such numbers as may be agreed by the Council in accordance with the procedures provided for in Title VI of the Treaty." *Id.* art. 5(2), O.J. L 62/1, at 3 (1995).

271. *Id.*

272. *Id.* art. 7, O.J. L 62/1, at 7 (1995). The Liaison Officers and their equipment are financed by their respective governments. *Id.* The 1994 budget was ECU 2065 million. EDU Fact Sheet, *supra* note 264, at 2. The budget allotted by the Council for 1995 is ECU 3710 million. *Id.*

273. Council's Joint Action, *supra* note 16, art. 7, O.J. L 62/1, at 3 (1995).

274. EDU Fact Sheet, *supra* note 264, at 1. *See* Leonard Doyle, *Britain's Drug Crisis:*

and analyzing information and intelligence related to drug and other contraband trafficking and money laundering.²⁷⁵ The object of the EDU is to provide data and analysis on these activities to the narcotics squads of the Member States.²⁷⁶ To achieve international cooperation, therefore, the EDU operates as an umbrella organization²⁷⁷ for the Member State's national drug information units.²⁷⁸

The Council's Joint Action document grants the Liaison Officers the authority to perform two central tasks.²⁷⁹ First, the Liaison Officers may exchange information between Member States for investigations of the crimes within the EDU's compe-

Drugs Intelligence Unit Sweeps Into Action, THE INDEPENDENT, Mar. 3, 1994, at 9 (discussing EDU's scope of authority).

275. Council's Joint Action, *supra* note 16, art. 2(2), O.J. L 62/1, at 1 (1995). Article 2(2) provides the EDU's objectives and scope:

2. The Unit shall act as a non-operational team for the exchange and analysis of information and intelligence, as soon as they affect two more Member States, in relation to:

- (a) illicit drug trafficking;
- (b) illicit trafficking in radioactive and nuclear substances;
- (c) crimes involving clandestine immigration networks;
- (d) illicit vehicle trafficking;

together with the criminal organizations involved and associated money-laundering activities.

Id.

276. *Id.* art. 2(3), O.J. L 62/1, at 1 (1995). Article 2(3) of the Council's Joint Action provides that:

The objective of the Unit is to help the police and other competent agencies within and between Member States to combat the criminal activities referred to in paragraph 2 more effectively. For this purpose, members of the Unit, acting in accordance with their national laws, other relevant legal rules and any instructions given by their respective Member States, shall perform the following tasks:

- (a) exchange, between Member States, of information (including personal information) in furtherance of specific criminal investigations concerning the criminal activities referred to in paragraph 2;
- (b) preparation of general situation reports and analyses of criminal activities on the basis of non-personal information supplied by Member States or from other sources. The activities of the Unit shall be without prejudice to other forms of bilateral or multilateral cooperation in combating the criminal activities referred to in paragraph 2, or to the competencies of the European Communities.

Id.

277. Jim Cusack, *Intelligence Agency Will Combat Crime Throughout Europe*, IRISH TIMES, June 4, 1993, at 2.

278. *Id.*

279. Council's Joint Action, *supra* note 16, art. 2(3), O.J. L 62/1, at 1 (1995).

tence.²⁸⁰ This data may include specific information about individuals.²⁸¹ Second, Liaison Officers may prepare crime analysis reports from information supplied by Member States and other sources.²⁸² Because these reports are not undertaken for a specific investigation, however, they may not include the names of individuals.²⁸³

3. Information Management and Access

The Council's Joint Action document requires the EDU's Liaison Officers to contribute information relevant to pending criminal investigations within its authority.²⁸⁴ To facilitate this information transfer, Liaison Officers are authorized to have access to their respective State's criminal data and intelligence.²⁸⁵ The Liaison Officers' contributions, however, are subject to their respective States' national legislation and the instructions of their Ministers.²⁸⁶

The Council's Joint Action document explicitly addresses the need to protect information from unauthorized access and transmittal.²⁸⁷ To secure the data gathered during an EDU investigation against unauthorized access, Member States' requests for information are channeled through a minimal number of bureaucratic layers.²⁸⁸ All exchanges of personal information between Liaison Officers are subject to the Officers' respective national laws and requirements regarding the dissemination of

280. *Id.* art. 2(3)(a), O.J. L 62/1, at 1 (1995).

281. *Id.* Liaison Officers, "acting in accordance with their national laws, other relevant legal rules and any instructions given by their respective Member States, [may] (a) exchange . . . information (including personal information) in furtherance of specific criminal investigations." *Id.*

282. *Id.* art. 2(3)(b), O.J. L 62/1, at 1 (1995).

283. *Id.* "The activities of the Unit shall be without prejudice to other forms of bilateral or multilateral cooperation in combating the criminal activities [delimited in the agreement], or to the competencies of the European Communities." *Id.*

284. *Id.* art. 3(1), O.J. L 62/1, at 2 (1995). See *supra* notes 275-78 and accompanying text (discussing criminal activity currently within EDU's authority).

285. Council's Joint Action, *supra* note 16, art. 3(1), O.J. L 62/1, at 2 (1995).

286. *Id.*

287. *Id.* art. 4(3), O.J. L 62/1, at 2 (1995). "Member States shall undertake to see that their liaison officers cooperate fully with their competent national data-protection authorities." *Id.*

288. *Id.* art. 3(2), O.J. L 62/1, at 2 (1995). "Requests for information made to the Unit by the police or any other competent service shall be channelled through one national central authority. The latter shall also be responsible for the receipt and the passing on of any replies supplied by the Unit." *Id.*

personal information.²⁸⁹ The information gathered by the delivering state may also be made available to other Liaison Officers to whom it is relevant, if to do so would not violate the national laws of all respective parties.²⁹⁰ Personal information gathered pursuant to a Liaison Officer's request, however, may not be transmitted to non-Member States or other international organizations.²⁹¹

As additional protection against the unauthorized dissemination of personal information, Liaison Officers must keep a record of all information transmitted.²⁹² The Council's Joint Action document also prohibits the storage of personal information in areas of the EDU to which other Liaison Officers have access, including common databases.²⁹³ The authorities responsible for data protection within each Member State supervise their Liaison Officers' activities to ensure compliance with national data protection procedures.²⁹⁴

4. Accountability

Although the Liaison Officers must follow the Coordinator's instructions,²⁹⁵ the Officers are currently accountable only to their respective nations' governments.²⁹⁶ Collectively, the Ministers function as overseers of the EDU's activities, without affecting the right of each Minister to control the activities of his individual Liaison Officers.²⁹⁷ To facilitate the Ministers' over-

289. *Id.*

290. *Id.* art. 4(1), O.J. L 62/1, at 2 (1995). Article 4(1) provides, in relevant part: Should the delivering State, in the course of dealing with a request, discover any information in connection with a criminal activity [within its competence] (2) which is of interest to another Member State, this information may be made available to that Member State via the liaison officers of the States involved in accordance with their respective national legislation.

Id.

291. *Id.*

292. *Id.* art. 4(2), O.J. L 62/1, at 2 (1995).

293. *Id.*

294. *Id.* art. 4(3), O.J. L 62/1, at 2-3 (1995).

295. *Id.* art. 5(1), O.J. L 62/1, at 3 (1995). "The Member States shall instruct their liaison officers to follow the instructions of the Coordinator, in accordance with their national legislation" *Id.*

296. *See id.* art. 3(1), O.J. L 62/1, at 2 (1995) (stating Liaison Officers shall communicate to EDU headquarters information on criminal activity "in accordance with their national laws"); *id.* art. 4(1), O.J. L 62/1, at 2 (1995) (stating each Liaison Officer shall communicate personal information "in accordance with his national laws").

297. *Id.* art. 6, O.J. L 62/1, at 3 (1995). Article 6 provides in relevant part that:

sight function, the Ministerial Agreement instructs the Coordinator to present to the Ministers a bi-annual report on the management and activities of the EDU.²⁹⁸

5. The EDU's Current Activities

The EDU employs a drug liaison officer from each state who is permanently stationed at its headquarters.²⁹⁹ This facilitates strategic communication among multinational narcotics agencies during investigations and avoids potential language barrier problems.³⁰⁰ The EDU's ability to provide immediate tactical information about targeted individuals and organizations demonstrates its vital importance in assisting the EU police forces.³⁰¹

Although still not fully operational, Europol's present form, the EDU, has already contributed to several successful drug seizure operations.³⁰² In the Spring of 1994, for example, the EDU assisted Greek, Belgian, and French narcotics officers by providing back-up intelligence data that permitted the officers to execute their operations successfully.³⁰³ The EDU's direct computer links to national police intelligence services allowed it to provide information to national authorities almost instantaneously.³⁰⁴

"[w]ithout prejudice to the responsibility of each Member State for controlling its national liaison officers, the Council shall exercise general oversight over the activities of the Unit." *Id.*

298. *Id.* "[T]he Coordinator shall submit a six-monthly written report on his management and the activities of the Unit. The Coordinator shall also provide any other report or information for which the Council may ask." *Id.*

299. Doyle, *supra* note 274, at 9.

300. *Id.*

301. Watson, *supra* note 18, at 680. In addition to its own database, Europol accesses the database of the European Monitoring Centre for Drugs and Drug Addiction ("EMC"), located in Portugal. *Id.* The EMC focuses on "gathering, processing, and providing reliable comparable information on the drug phenomenon, drug addiction, and their consequences." *Id.* The data the EMC provides will be used by Europol, the Council of Europe's Pompidou Group, and the United Nations. *Id.* See *supra* note 17 and accompanying text (discussing recent successful EDU operations).

302. See *supra* note 17 and accompanying text (discussing EDU's coordination of successful contraband seizures).

303. Doyle, *supra* note 274, at 9. Europol Director Jurgen Storbeck stated that intelligence information provided by the EDU allowed the officers to execute their operation with "pinpoint accuracy." *Id.* at 9. Recently, Europol cooperated with Scotland Yard and police in Spain, France, and Ireland to seize cannabis from an alleged Irish-based drug trafficking ring. Michael Smith, *Customs Raid Smashes Irish Cannabis Ring*, DAILY TEL., July 11, 1995, at 3.

304. Doyle, *supra* note 274, at 9.

6. The Europol Convention: The European Union's Most Recent International Police Cooperation Initiative

The EDU will not expand into a fully operational Europol unit until the Member States ratify the Europol Convention.³⁰⁵ As the President of the European Union from July through December, 1994, German Chancellor Helmut Kohl sought to complete the Europol Convention in time for the summit of European Union Leaders in Essen in early December, 1994.³⁰⁶ During the meetings in preparation for this summit, however, disagreement surfaced between Member States over the draft Europol Convention.³⁰⁷ The Europol Convention was ultimately completed after the Cannes Summit in late July, 1995.³⁰⁸

a. Establishment and Intended Tasks of Europol

Europol's ultimate objective is to improve cooperation among Member States' competent authorities³⁰⁹ in their efforts to prevent and combat unlawful drug trafficking,³¹⁰ terrorism, and other serious forms of international crime.³¹¹ Initially, Europol will focus solely on drug trafficking, trafficking in nuclear and radioactive substances,³¹² illegal immigrant smug-

305. Europol Convention, *supra* note 5, art. 45, 54 Europol, Rev. 5, Annex, at 66. See EU: *Criticism of Cannes Focuses on Europol*, *supra* note 15 (noting that Europol Convention will not enter into force until it is ratified by Member States).

306. *EU in Disarray [sic] Over Europol Convention*, STATEWATCH, Nov.-Dec. 1994, at 16.

307. *Id.*

308. See *supra* note 5 and accompanying text (noting Europol Convention completed after Cannes Summit).

309. See Europol Convention, *supra* note 5, art. 2(4), 54 Europol, Rev. 5, Annex, at 10 (defining "competent authorities" as "all public bodies existing in the Member States which are responsible under national law for preventing and combating criminal offenses").

310. *Id.* art. 2(5), at 10. "'Unlawful drug trafficking' means the criminal offenses listed in Article 3(1) of the [Vienna U.N. Drug Convention]." *Id.*; see Vienna U.N. Drug Convention, *supra* note 21, art. 3(1), 1992 Gr. Brit. T.S. No. 26, at 5-6, 28 I.L.M. at 500-01 (listing proscribed offenses); see *supra* notes 82-96 and accompanying text (discussing Vienna U.N. Drug Convention).

311. Europol Convention, *supra* note 5, art. 2, 54 Europol, Rev. 5, Annex, at 8-10. Europol is to facilitate international cooperation "where there are factual indications that an organized criminal structure is involved and two or more Member States are affected . . . in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offenses concerned." *Id.*

312. *Id.* art. 2(2), at 9. The Europol Convention defines trafficking in nuclear and radioactive substances as "the criminal offenses listed in Article 7(1) of the Convention on the Physical Protection of Nuclear Material [March 3, 1980] . . . relating to the

gling,³¹³ trade in human beings,³¹⁴ and motor vehicle crime.³¹⁵ Within two years after its entry into force, Europol will also deal with terrorist activities.³¹⁶ Europol's competence extends to money laundering,³¹⁷ and other criminal offenses,³¹⁸ when it relates to the commission of crimes within Europol's competence.³¹⁹ The Council may also authorize Europol to deal with any of the crimes specified in the Annex to the Europol Convention.³²⁰

Three organs will contribute to Europol's operations: the National Units located in each Member State,³²¹ the Liaison Of-

nuclear and/or radioactive materials defined in Article 197 of the Euratom Treaty and Directive 80/836 Euratom of 15 July 1980." *Id.* annex at 70.

313. *Id.* art. 2(2), at 9. The Europol Convention defines "[I]llegal immigrant smuggling" as "activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States of the European Union, contrary to the rules and conditions applicable in the Member States." *Id.* annex at 70.

314. *Id.* at art. 2(2), at 9. The Europol Convention defines "Traffic in human beings" as the "subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children." *Id.* annex at 71.

315. *Id.* art. 2(2), at 9.

316. *Id.* art. 2(2), at 9. Within two years:

Europol shall also deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property. The Council, acting unanimously in accordance with the procedure laid down in Title VI of the Treaty on European Union, may decide to instruct Europol to deal with such terrorist activities before that period has expired.

Id.

317. *Id.* art. 2(3)(1), at 9. "[I]llegal money-laundering means the criminal offences listed in Article 6(1) to (3) of the [ELC]." *Id.* annex at 71. *See supra* notes 118-42 and accompanying text (discussing provisions of ELC).

318. Europol Convention, *supra* note 5, art. 2(3)(2), Europol 54, Rev. 5, Annex, at 9-10. Other offenses include those that are in preparation of, facilitate, or "ensure the impunity of" crimes within Europol's competence. *Id.*

319. *Id.*

320. *Id.* art 2(2), at 9. The crimes listed in the Annex are divided into three categories. *Id.* annex at 69-70. The first group covers crimes "[A]gainst life, limb or personal freedom," which includes violent crimes against the person, illicit trade in human organs and tissue, and racism and xenophobia. *Id.* The second group covers crimes "against property or public goods including fraud". *Id.* The third group covers "Illegal trading and harm to the environment." *Id.* "In addition, in accordance with Article 2(2), the act of instructing Europol to deal with one of the forms of crime listed above implies that it is also competent to deal with the related money-laundering activities and the related criminal offenses." *Id.*

321. *Id.* art. 4, at 12-13. Article 4 states:

ficers at Europol's headquarters,³²² and each Member State's competent authorities.³²³ The National Units are to supply information and intelligence to Europol's headquarters either upon request or on their own initiative.³²⁴ The National Units will also transmit information to competent authorities.³²⁵ As under the EDU's current structure,³²⁶ the Liaison Officers will assist in coordinating the exchange and analysis of information among Member States' competent authorities.³²⁷ The Liaison Officers will both forward information from Europol to their respective National Units and provide Europol with information from their National Units.³²⁸

The Europol Convention grants Europol the authority to obtain, collate, and analyze information and intelligence and to coordinate the exchange of this information between Member States.³²⁹ Europol will aid Member States' investigations by forwarding all relevant information to the National Units, where it will ultimately be forwarded to the State's competent authori-

1. Each Member State shall establish or designate a national unit to carry out the tasks listed in this Article.

2. The national unit shall be the only liaison body between Europol and the competent national authorities. Relationships between the national unit and the competent authorities shall be governed by national law, and, in particular the relevant national constitutional requirements.

3. Member States shall take the necessary measures to ensure that the national units are able to fulfil their tasks and, in particular, have access to relevant national data.

Id. art. 4(1)-4(3), at 12.

322. *Id.* art. 5, at 14-15. "Each national unit shall second [sic] at least one liaison officer to Europol. . . . The liaison officers shall be instructed by their national units to represent the interests of the latter within Europol. . . ." *Id.* art. 5(1)-5(2), at 14.

323. *See id.* art. 3(1)(3), at 10 (stating that one of Europol's principal tasks is "to notify the competent authorities of the Member States without delay via the national units").

324. *Id.* art. 4(4)(1)-4(4)(2), at 12.

325. *Id.* art. 4(4)(4), at 12.

326. Council's Joint Action, *supra* note 16, art. 1, O.J. L 62/1, at 1 (1995); *see supra* notes 279-83 and accompanying text (discussing role of Liaison Officers in EDU structure).

327. Europol Convention, *supra* note 5, art. 5, 54 *Europol*, Rev. 5, Annex, at 14-15. *See id.* art. 2(4), at 10 (defining "competent authorities" as "all public bodies existing in the Member States which are responsible under national law for preventing and combating criminal offenses").

328. *Id.* art. 5(3)(1)-5(3)(2), at 14. The Liaison Officers will cooperate "with officials of Europol by providing information and giving advice as regards analysis of the information concerning the seconding Member State." *Id.* art. 5(3)(3), at 14.

329. *Id.* art. 3(1), at 10.

ties.³³⁰ Europol will also provide advice on investigations and strategic intelligence to maximize the resources of the competent authorities.³³¹ Further, Europol is empowered to provide training, equipment, and technical and forensic assistance to Member States' competent authorities.³³²

b. Organizational Structure

Europol's Management Board will have principal authority over its operations.³³³ The Management Board will be comprised of one representative from each Member State.³³⁴ Among other responsibilities, the Management Board will determine Europol's objectives³³⁵ and define the Liaison Officer's rights and obligations.³³⁶ This body will resolve disputes either between a Member State and Europol, or between two Member States, concerning the compensation paid for unauthorized or incorrect data processing.³³⁷ Europol's Director³³⁸ will oversee the day-to-day administration of Europol's activities, and will be accountable to the Management Board for his decisions.³³⁹

c. Computerized Information System

As one of its primary tools in coordinating international police cooperation, Europol will establish a three-part computer-

330. *Id.* art. 3(1)(4), at 11.

331. *Id.* art. 3(2), at 11. In order to maximize its resources, Europol will become well acquainted with the investigative procedures of each Member State's competent authorities. *Id.* art. 3(2)(1), at 11.

332. *Id.* art. 3(3), at 11. Providing training and assistance to Member States' competent authorities will be "in accordance with its staffing and the budgetary resources at [Europol's] disposal and within the limits set by the Management Board." *Id.*

333. *See id.* art. 28, at 48-51 (detailing Europol Management Board's authority over operations).

334. *Id.* art. 28(2), at 50.

335. *Id.* art. 28(1)(1), at 48.

336. *Id.* art. 28(1)(2), at 48. The Management Board will also unanimously determine the number of Liaison Officers Member States send to Europol headquarters. *Id.* art. 28(1)(3), at 48.

337. *Id.* art. 28(1)(21), at 50. The Management Board "shall act by a two-thirds majority in disputes between a Member State and Europol or between Member States concerning compensation paid under the liability for unauthorized or incorrect processing of data." *Id.*

338. *See id.* art. 29, at 51-52 (defining role of Europol's Director). Two Deputy Directors will assist the Director in Europol's daily administration. *Id.* art. 29(2), at 51. The Director will define the roles of the Deputy Directors. *Id.*

339. *Id.* art. 29, at 51-52.

ized system of information processing.³⁴⁰ The system will include a Europol information system,³⁴¹ analysis work files,³⁴² and an index system for each.³⁴³ Access to the Europol information system will be limited to the National Units, the Liaison Officers, and Europol's Management Board.³⁴⁴ The text of the Convention does not grant access to Member States' competent authorities.³⁴⁵

The Europol information system may only contain data relating to persons suspected of having committed or who are considered likely to commit an offense within Europol's competence.³⁴⁶ The Europol Convention imposes restrictions on the kinds of personal data that may be entered regarding such persons.³⁴⁷ Only the unit that entered an individual's personal data may make deletions, modifications, or corrections.³⁴⁸ The information system may also be used to enter a detailed account of a targeted person's criminal history, including his or her suspected membership in any criminal organizations.³⁴⁹ In the lat-

340. *Id.* arts. 7-9, at 17-21.

341. *See id.* arts. 7-8, at 17-20 (establishing and defining contents of computerized information system that will be used by Liaison Officers, National Units, and management).

342. *Id.* arts. 10-12, at 22-28. Europol's Management Board must approve the opening of every data analysis file that contains personal data. *Id.* art. 12(1), at 27-28. "If the urgency of the matter is such as to preclude obtaining the approval of the Management Board" the Director may order the opening of a data file "on his own initiative or at the request of the Member States concerned." *Id.* art. 12(2), at 28.

343. *Id.* art. 11, at 26-27.

344. *Id.* art. 7(1), at 17. The information system allows "Member States, represented by their national units and liaison officers, [to] directly input data in compliance with their national procedures, and [allows] Europol [to] directly input data supplied by third bodies and States and analysis data." *Id.* "Data may be retrieved where this is necessary for the performance of Europol's tasks in a particular case; retrieval shall be effected in accordance with the laws, regulations, administrative provisions and procedures of the retrieving unit, subject to any additional provisions contained in this Convention." *Id.* art. 9(1), at 20.

345. *See id.* art. 7(1), at 17 (failing to grant access to Member State's competent authorities).

346. *Id.* art. 8(1)(1) - 8(1)(2), at 18.

347. *Id.* arts. 8(2)-(3), at 19-20. Personal data may only include: names and aliases; date and place of birth; nationality; gender; and "where necessary, other characteristics likely to assist in identification, including any specific objective physical characteristics not subject to change." *Id.* art. 8(2)(5), at 19. "If proceedings against the person concerned are dropped or if that person is acquitted, the data relating to either decision shall be deleted." *Id.* art. 8(5), at 20.

348. *Id.* art. 9(2), at 21.

349. *Id.* art. 8(3), at 19-20. This information system may also include information

ter circumstance, any unit may add information.³⁵⁰

The analysis work files combine, for specific analysis,³⁵¹ the information contained in the Europol information system with other types of information.³⁵² Liaison Officers, Europol data analysts, and experts from Member States will staff each analysis project.³⁵³ Data from the National Units may be routed directly to these analysis groups,³⁵⁴ depending on its sensitivity.³⁵⁵ Europol may also request information from groups outside the Europol structure, such as EU bodies, Interpol, and other intergovernmental organizations.³⁵⁶ Analysis that has a direct operational aim and bears on a specific case, but does not concern all Member States, is accessible only by those Member States with an interest therein.³⁵⁷ By contrast, non-specific crime analysis strategies are accessible to all Member States.³⁵⁸

d. Information Processing Provisions

The Europol Convention obligates Europol to transmit all information on criminal activity to the relevant Member States' National Units and Liaison Officers.³⁵⁹ The Convention details the procedures governing the exchange of information.³⁶⁰ The Member State supplying the information is responsible for its

on criminal activity where no suspect has been identified: "These data may also be input when they do not yet contain any reference to persons." *Id.*

350. *See id.* art. 9(2), at 21 (stating that "any unit may enter [nonpersonal] data").

351. *Id.* art. 10(1)(1) - 10(1)(5), at 22. The data analysis files will combine the information in the Europol Information System with: information on persons who might be called upon to testify in investigations; "persons who have been the victims of one of the offenses under consideration or with regard to whom certain facts give reason for believing that they could be the victims of such an offence;" contacts and associates; and other persons who can provide information relevant to an investigation. *Id.*

352. *Id.* arts. 10, 12, at 22-28. Analysis is defined as "the assembly, processing or utilization of data with the aim of helping a criminal investigation." *Id.* art. 10(2), at 23.

353. *Id.* art. 10(2), at 23.

354. *Id.* art. 10(3), at 23-24.

355. *Id.* art. 10(8), at 26. "The Member State communicating an item of data to Europol shall be the sole judge of the degree of its sensitivity . . ." *Id.*

356. *Id.* art. 10(4), at 24. Europol "may also . . . accept information provided by those various bodies on their own initiative." *Id.*

357. *Id.* art. 10(6), at 25. A Member State's Liaison Officer will be granted automatic access to analysis bearing on a specific case upon written request, which must be approved by the analysis group. *Id.* art. 10(7), at 25.

358. *Id.* art. 10(6), at 25.

359. *Id.* art. 13, at 29.

360. *See id.* arts. 14-25, at 29-46 (detailing procedures for exchange of information).

security.³⁶¹ Before the Convention enters into force, each Member State must have enacted domestic legislation that ensures the adequate protection³⁶² of personal data.³⁶³ A Member State may not communicate personal data until the Member State has achieved this standard.³⁶⁴ The Europol Convention also requires each Member State to create a National Supervisory Body, which is to independently monitor the Member State's contributions of personal information.³⁶⁵ The National Supervisory Body will ensure that all Member State contributions of data to the Europol information system are in compliance with their national data protection legislation.³⁶⁶

e. Liability and Legal Protection

Pursuant to the Europol Convention, Member States' liability for damages caused by legal or factual errors in data stored or processed by Europol will be determined in accordance with their national laws.³⁶⁷ Europol itself will also be liable if it deviates from its prescribed procedures.³⁶⁸ The Europol Convention grants Europol's agents, management, and employees immunity from personal liability when acting in performance of their duties.³⁶⁹

361. *Id.* art. 15(1), at 30. Europol is responsible for the security of "data communicated to Europol by third parties or which result from analyses conducted by Europol." *Id.* art. 15(1)(2), at 30.

362. *Id.* art. 14(1), at 29.

363. See *supra* notes 347 and accompanying text (discussing meaning of personal data under Europol Convention).

364. Europol Convention, *supra* note 5, art. 14(2), 54 Europol, Rev. 5, Annex, at 30.

365. *Id.* art. 23, at 41-42. The Europol Convention also requires Member States to set up a joint supervisory board, which is to review the acts of Europol "to ensure that the rights of the individual are not violated by the storage, processing and utilization of the data held by Europol." *Id.* art. 24(1), at 42.

366. *Id.* art. 23(1), at 41.

367. *Id.* art. 38(1), at 61. Only the Member State where the damage occurred is liable: "A Member State may not plead that another Member State had transmitted inaccurate data in order to avoid its liability under its national legislation" *Id.*

368. *Id.* art. 38(2), at 61.

369. *Id.* art. 41, at 63. A Protocol will set out "the rules to be applied in all Member States and the particular rules to be applied in the headquarters State, including the rules for family members." *Id.*

f. Dispute Settlement: Extent of European Court of Justice Jurisdiction

The Europol Convention does not definitively prescribe the forum for resolving disputes between Member States on the interpretation or application of the Convention.³⁷⁰ Specifically, Member States were unable to resolve the issue of whether the European Court of Justice should have jurisdiction over disputes involving Europol.³⁷¹ Article 40(2) provides that Member States who are parties to a dispute must determine among themselves the forum in which the dispute will be resolved.³⁷² With the exception of Great Britain, all Member States have agreed to systematically submit these disputes to the European Court of Justice.³⁷³

II. IMPEDIMENTS TO RATIFICATION: THE DEBATE OVER THE PROPER SCOPE OF EUROPOL'S POWER

Despite its ongoing contributions to international law enforcement, the EDU's scope of operations is limited.³⁷⁴ There are a number of areas of disagreement that may delay the ratification of the Europol Convention.³⁷⁵ Perhaps the most contentious area is whether the European Court of Justice will have ju-

370. See *id.* art. 40(1), at 63. Article 40(1) states that disputes between Member States "shall in an initial stage be discussed by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with the aim of finding a settlement." *Id.*

371. See *Europol Convention Signed but Still to be Ratified*, *supra* note 5 (noting that unresolved issue of role of European Court of Justice may impede ratification); *No Cannes Do*, THE ECONOMIST, July 1, 1995, at 57 (stating that Council members agreed to sign Europol Convention, but reserved decision on role of European Court of Justice until next year).

372. Europol Convention, *supra* note 5, art. 40(2), 54 Europol, Rev. 5, Annex, at 63.

373. *Id.* Declarations, art. 40(2), at 73.

374. Alister Bull, *Europol Strains at Leash as Politicians Wrangle*, Europol Drugs Unit / Reuters Press Notice, Reuters News Service, Jan. 9, 1995, at 1. Director Storbeck notes that while the EDU's staff has "already answered hundreds of calls for aid and facilitated dozens of international operations that would otherwise have been strangled by official bureaucracy," it still lacks the technical and legal powers to fulfill its potential. *Id.* For example, as of January 1995, the EDU lacked a central database and access to national police data. *Id.*

375. See *No Cannes Do*, *supra* note 371, at 57 (noting failure to resolve issue of jurisdiction of European Court of Justice may prevent ratification of Convention); Robertson, *supra* note 164, at 115 (discussing issues raised by creation of centralized database); Monica den Boer, *Europe and the Art of International Police Co-operation: Free Fall or Measured Scenario?*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 279, 289 (David

jurisdiction over Europol's activities.³⁷⁶ The creation of a centralized database raises two interrelated problems.³⁷⁷ First, there is concern over Member States' ability to control and access the information housed in Europol's database.³⁷⁸ Second, the use of this information raises personal privacy concerns for EU citizens.³⁷⁹ There is further debate over the accountability of the Liaison Officers and National Units.³⁸⁰

A. *Europol's Integration into the EU's Constitutional Structure*

The current Europol Convention does not resolve the question of whether the European Court of Justice will have jurisdiction over Europol.³⁸¹ While Great Britain continues to oppose granting the Court jurisdiction, however, every other Member State has agreed to systematically submit disputes among themselves to the Court.³⁸² The Council of Ministers of Justice and Home Affairs agreed to set aside this issue until the next European Council Summit in the summer of 1996.³⁸³ In so doing, the Council declined to resolve the vexing problem of the extent to which EU institutions have competence over international po-

O'Keeffe & Patrick Twomey eds., 1994) [hereinafter *Europe and the Art of International Police Co-operation*] (discussing issue of accountability of Europol's agents).

376. See *No Cannes Do*, *supra* note 371, at 57 (stating Council members agreed to sign Europol Convention, but reserved decision on role of European Court of Justice until next year); Emma Tucker, *EU Police Agency Plans Deadlocked: Britain Resists Power of European Court to Interpret Convention in Case of Disputes*, *FIN. TIMES*, June 21, 1995, at 3 (discussing deadlock at Cannes Summit over role of European Court of Justice).

377. See Robertson, *supra* note 164, at 115 (discussing issue of Member States' ability to control access to sensitive information); *European Community Moves Towards the Establishment of a European Police Force (EUROPOL)*, 9 *INT'L ENFORCEMENT L. REP.* 52, 52 (1993) (discussing personal privacy issues raised by centralized database).

378. Robertson, *supra* note 164, at 115.

379. *European Community Moves Towards the Establishment of European Police Force (EUROPOL)*, *supra* note 377, at 52.

380. *Europe and the Art of International Police Co-operation*, *supra* note 375, at 289.

381. See *supra* note 370 and accompanying text (discussing dispute resolution provisions under Article 40(1)).

382. See *Limited Summit Success Leaves Large Workload Ahead*, *European Insight*, June 30, 1995, available in *LEXIS*, World Library, Allwld File (stating that British Prime Minister John Major was immovable in his objections to European Court of Justice's jurisdiction).

383. See *No Cannes Do*, *supra* note 371, at 57 (stating Council agreed to address issue of European Court of Justice in June, 1996); *Limited Summit Success Leaves Large Workload Ahead*, *supra* note 382 (stating issue of role of European Court of Justice deferred until June, 1996, European Council).

lice cooperation efforts.³⁸⁴

Many argue that Europol should not be governed by EU legislation.³⁸⁵ Member States are divided over the extent to which Europol must consult the European Parliament prior to making important decisions.³⁸⁶ Some Member States consider Article K.6³⁸⁷ of the Maastricht Treaty to encompass Europol's obligation to Parliament.³⁸⁸ Other Member States favor specifying the type of Parliamentary oversight that is to exist.³⁸⁹

Pursuant to the Europol Convention, the President of the Council is to forward to the European Parliament an annual report detailing Europol's activities.³⁹⁰ The Council must also consult Parliament before the Council may amend the Europol Convention.³⁹¹ Because the Council's prerogatives under the Europol Convention, however, are subject to Article K.6 of the Maastricht Treaty,³⁹² the Council must also ensure that the views of Parliament are duly taken into consideration.³⁹³

384. See *Europe and the Art of International Police Cooperation*, *supra* note 375, at 288-89 (discussing how issue of international monitoring of cross-border policing remains unresolved). See also *No Cannes Do*, *supra* note 371, at 57 (noting Council failed to resolve issue of European Court of Justice); *Limited Summit Success Leaves Large Workload Ahead*, *supra* note 382 (stating Council deferred until June, 1996, European Council issue of role of European Court of Justice).

385. Schutte, *supra* note 27, at 64; Walker, *supra* note 247, at 30.

386. *EU in Disarray [sic] Over Europol Convention*, *supra* note 306, at 17.

387. TEU, *supra* note 1, art. K.6, O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 737.

388. *Id.* art. K.6, O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 737. Article K.6 of the TEU states:

The Presidency and the Commission shall regularly inform the European Parliament of discussions [about Europol's policies]. The Presidency shall consult the European Parliament on the principal aspects of activities [of Europol] and shall ensure that the views of the European Parliament are duly taken into consideration. The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in implementing [Europol].

Id.; see *EU in Disarray [sic] Over Europol Convention*, *supra* note 306, at 17.

389. *EU in Disarray [sic] Over Europol Convention*, *supra* note 306, at 17.

390. Europol Convention, *supra* note 5, art. 34, 54 Europol, Rev. 5, Annex, at 57.

391. *Id.*

392. *Id.* art. 34(3), at 57.

The obligations laid down in this Article shall be without prejudice to the rights of national parliaments, to Article K.6 of the Treaty on European Union and to the general principles applicable to the relations with the European Parliament pursuant to Title VI of the Treaty on European Union.

Id.

393. TEU, *supra* note 1, art. K.6, O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 737. "The European Parliament may ask questions of the Council or make recommen-

1. Arguments in Favor of The European Court of Justice's Institutional Competence

The Maastricht Treaty granted EU institutions power over several areas that had formerly been under the exclusive control of Member States' national governments.³⁹⁴ Some argue that Maastricht created a closer link between the areas of justice and home affairs³⁹⁵ and the mainstream institutional framework of the EU.³⁹⁶ In addition to a symbolic recognition that international crime requires international police cooperation, Maastricht's the provisions attempt to formalize and coordinate various initiatives.³⁹⁷

In this sense, Maastricht represents a convergence of previously divergent areas of concern within the European Union.³⁹⁸ For example, the informal Trevi Group structure³⁹⁹ has been replaced by the Council of Ministers of Justice and Home Affairs.⁴⁰⁰ Further, the European Parliament recommended in its 1993 Report⁴⁰¹ that it and the national parliaments be intensively involved in deciding the objectives, powers and instru-

mentation to it. Each year, it shall hold a debate on the progress made in implementation of the areas referred to in this Title." *Id.*

394. Debrouwer, *supra* note 251, at 84. Criminal justice is one of "the policy areas that ha[s] always been connected with national culture and on which the different and typically national legal concepts, systems, traditions and sensitivities have left, and continue to leave, their imprint." *Id.*

395. See *supra* notes 236-54 and accompanying text (discussing areas covered by justice and home affairs).

396. Walker, *supra* note 247, at 29. Policy on visas for third-party nationals is brought explicitly within the legislative competence of the Community. TEU, *supra* note 1, art. 100(c), O.J. C 224/1, at 32 (1992), [1992] 1 C.M.L.R. at 634.

397. den Boer, *supra* note 18, at 9.

398. *Id.* Under one view, "international police cooperation may be understood as a policy-making process which interacts directly with the wider context of European integration, that is, first, political and legal concepts of federalism and potential 'transfer of sovereignty' to supranational bodies, and second, the concept of Europe's internal security." *Europe and the Art of International Police Co-operation*, *supra* note 375, at 279.

399. See *supra* notes 162-87 and accompanying text (discussing Trevi Group structure).

400. den Boer, *supra* note 18, at 9; see TEU, *supra* note 1, art. K.3(2), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 736. (discussing Council's authority). Article K.4 of the Convention establishes Coordinating Committees within the Council to facilitate the Council's work. *Id.* art. K.4, O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 736. The Coordinating Committee "shall give opinions for the attention of the Council, either at the Council's request or on its own initiative" and contribute to the preparation of the Council's discussions. *Id.*

401. *European Community Moves Towards Establishment of a European Police Force (EUROPOL)*, *supra* note 377, at 52-56 (citing *Report of the Committee on Civil Liberties and*

ments of Europol and the European information system.⁴⁰² The Report suggests that Europol must be governed by EU legislation, rather than by the laws of individual national legislatures, and that it be supervised by the European Court of Justice.⁴⁰³

The Maastricht's provisions lead some to conclude that, eventually, Europol and related criminal justice initiatives may be governed by EU law and institutions.⁴⁰⁴ Maastricht commits Members States to regard, as matters of common interest, their policies on immigration, asylum, external borders, and strategies to combat international fraud and drug addiction.⁴⁰⁵ Some argue that cooperation will facilitate the systematic regulation in areas previously governed solely by intergovernmental agreements.⁴⁰⁶ Maastricht can be seen, therefore, as representing the foundation that may eventually lead to institutional competence in criminal justice matters.⁴⁰⁷ As one commentator observes, Maastricht, combined with the proliferation of police cooperation initiatives,⁴⁰⁸ provides evidence of a momentum towards permitting EU institutions to play a greater role in international police cooperation matters.⁴⁰⁹

2. Arguments Against Institutional Competence

The integration of international police cooperation into the

Internal Affairs on the Setting Up of Europol, Eur. Parl. (A3-0382/92 Doc ENRR217877.WPS PE 202.364/fin. Or.NL 26 November 1992)).

402. *Id.*

403. *Id.* at 56. The European Court of Justice may have to create a special internal Europol section. *Id.*

404. See Walker, *supra* note 247, at 28 (stating Europol may provide foundations for system of vertical integration in form of supranational police facility with power to operate through European Union).

405. *Id.* at 29.

406. *Id.*

407. *Europe and the Art of International Police Co-operation*, *supra* note 375, at 282. Under one view:

The move towards integrating the fields of International Co-operation in Justice and Home Affairs into the institutional clockwork of the EC may be read as a political manifestation of the growing willingness to link crime and criminal justice issues with other issues on the European agenda, such as health, education, employment and migration.

Id.

408. *Id.* at 280. In an analogous situation, the Committee on Civil Liberties and Public Affairs considered the European Court of Justice to be the appropriate body to interpret the Schengen Convention. *Id.*

409. *Id.*

scope of Justice and Home Affairs may demonstrate a momentum towards EU institutional competence over Europol.⁴¹⁰ Acceptance of this proposition, however, does not necessarily lead to the conclusion that it is currently appropriate to subject Europol to the European Court of Justice's jurisdiction.⁴¹¹ Thus, critics argue that although Maastricht empowered EU institutions to create Europol, Europol will not be fully integrated within the constitutional structure of the EU because these institutions lack both legislative and judicial competence in criminal justice matters.⁴¹² Critics of institutional competence argue that European criminal justice cooperation, including the coordination of investigative operations and prosecutions, the techniques used to gather and produce evidence, and the determination of criminal sanction objectives does not lend itself well to standardized regulation through EU law.⁴¹³ Standardized regulation fails to allow for exercising discretion and also fails to accommodate Member States' varying legal principles and practices.⁴¹⁴

One international criminal law expert argues that simply applying the national law of the place where the event in question occurred will not overcome all of the difficulties of international cooperation.⁴¹⁵ Other unresolved substantive and procedural issues will remain,⁴¹⁶ including: the substantive issues surrounding the disparity among nations' definitions of categories of offenses⁴¹⁷ and the procedural difficulties surrounding the treatment and processing of offenders, the use of coercive measures,

410. *Id.*

411. *See, e.g., id.* at 282-84 (noting that slow evolutionary process towards institutional competence in matters of criminal justice implies that EU institutions are not presently competent).

412. Walker, *supra* note 247, at 30. While the European Union may acquire legislative competence over most areas of justice and home affairs, "this does not apply to police cooperation, or . . . to judicial cooperation in criminal matters or customs cooperation." *Id.* at 41.

413. Schutte, *supra* note 27, at 69.

414. *Id.* As of 1990, for example, the Netherlands, Spain, and Denmark had insufficiently stringent money laundering statutes, particularly with regard to the duties of financial institutions to know their customers. Kochinke, *supra* note 127, at 51. Italy, because it had only criminalized the laundering of funds derived from extortion and ransom, experienced widespread abuse of its financial institutions laws. *Id.* Finally, Greece, Portugal, and Ireland lacked money laundering statutes entirely. *Id.*

415. *European Community Moves Towards Establishment of European Police Force (EUROPOL)*, *supra* note 377, at 52, 56.

416. *Id.*

417. *Id.*

and the methods of collecting information.⁴¹⁸

Moreover, European Court of Justice precedent may indicate that the Community is not competent to govern international cooperation in criminal matters.⁴¹⁹ In 1978, the European Court held that the European Community ("EC") institutions were incompetent to carry out those aspects of a EC-wide treaty concerning international criminal cooperation.⁴²⁰ In ruling on the division of authority between the Community and the Member States, the Court held that the treaty's criminal law provisions rested with the Member States alone.⁴²¹

B. Access to Europol Database

1. Member States' Ability to Access and Control Data

There are benefits and drawbacks associated with transmitting information to and from Europol headquarters.⁴²² Officers in each country must weigh the costs of keeping information under their nation's exclusive control in order to protect its confidentiality against the benefits of contributing such information to a database that other nations may access in order to facilitate cooperation.⁴²³ The Europol Convention's provisions address both Europol's need for the open exchange of information and the Member State's need for data security.⁴²⁴

418. *Id.*

419. *Id.*

420. In re Draft Convention of the International Atomic Energy Agency (IAEA) on Physical Protection of Nuclear Material, Ruling of 14 November 1978 pursuant to Article 103 of the EAEC Treaty, [1978] E.C.R. 2151, [1979] 1 C.M.L.R. 131. See Schutte, *supra* note 27, at 64 (discussing European Court of Justice precedent); see *supra* notes 33-49 and accompanying text (discussing EU institutions).

421. Schutte, *supra* note 27, at 64. Each Member State was responsible for taking measures to comply with the Convention "for its own territory, regarding deployment of police forces, initiation of criminal proceedings, and extradition." *Id.*

422. Robertson, *supra* note 164, at 115.

423. *Id.* As one commentator explains:

Individual officers in each country are unlikely to have sufficient information to calculate the costs of keeping information under their control or passing it to [Europol headquarters]. The difficulties of making a rational calculation are going to be compounded by the organizational distance involved. Assessing the costs involved in losing control over information becomes more difficult as one moves from the team, to station, division, force, regional or national unit. Such difficulties are compounded when an extra layer, in the form of a European agency, is added.

Id.

424. See Europol Convention, *supra* note 5, art. 10, 54 Europol, Rev. 5, Annex, at

The Europol Convention articulates standards for data exchange and security.⁴²⁵ Pursuant to Europol Convention, each National Unit is obligated to supply Europol, either upon request or upon its own initiative, with all information relevant to Europol's activities.⁴²⁶ Member States commit themselves to facilitating the National Units' information exchange responsibilities.⁴²⁷ Under the terms of the Europol Convention, however, a Member State may withhold information from Europol when the Member State's national security interests outweigh Europol's interest in receiving information from the State's National Units.⁴²⁸

When Europol's analysis is of a general nature, all Liaison Officers and National Units may access it.⁴²⁹ When information relates to a specific investigative operation, however, the Europol Convention restricts access to the Member States who entered the information and the Member States to whom it is relevant.⁴³⁰

22-26 (establishing procedures for information exchange and data protection). National intelligence on terrorism is a primary example of the tension between Europol's need for full exchange of information, and Member States' need to retain control over access to such information. David Gardner, *EU States Divided on Europol Police Force Plan*, FIN. TIMES, Dec. 1, 1994, at 2. Great Britain, Ireland, Germany, Denmark, and the Netherlands have favored restricting access to sensitive information on terrorist groups to prevent their national police forces from losing control of their most sensitive operations. *Id.* These Member States insisted on restricting access to sensitive information for security reasons, except where the requesting Liaison Officer is directly involved in the matter. Euroservice Factsheet on Europol, May 12, 1994, at 2; *EU in Disarray [sic] over Europol Convention*, *supra* note 306, at 16. In contrast, France opposed restrictions on access to the Liaison Officers, advocating that the Officers should have access to all Europol information. *Id.* Euroservice Factsheet on Europol, May 12, 1994, at 2. Access to Europol information would extend to intelligence information, including sensitive data possibly compiled by a another country. *EU in Disarray [sic] over Europol Convention*, *supra* note 306, at 16. *See id.* (noting that complete access to Europol's information would facilitate Member States' efforts to counter terrorism).

425. Europol Convention, *supra* note 5, arts. 9-25, Europol 54, Rev. 5, Annex, at 20-46 (outlining procedures for data entry, storage, processing, and analysis).

426. *Id.* art. 4(4), at 12-13.

427. *Id.* art. 4(5), at 13.

428. *Id.* National Units may decline to provide certain information to Europol if it would mean "(1) harming essential national security interests; or (2) jeopardizing the success of a current investigation or the safety of individuals; (3) involving information pertaining to organizations or specific intelligence activities in the field of State security." *Id.* The Europol Convention also allows a National Unit to decline to contribute information where it would compromise "the maintenance of law and order and the safeguarding of internal security." *Id.* (citing TEU, art. K.2(2), O.J. C 224/1, at 97 (1992), [1992] 1 C.M.L.R. at 736).

429. *Id.* art. 10(6), at 25.

430. *Id.*

A Liaison Officer will automatically gain access to the information via written requests to all participants in the analysis project.⁴³¹ If a member of the analysis project objects to a certain Liaison Officer having access to the information, automatic access will be deferred until either the two parties or the Management Board resolve the conflict.⁴³²

The data control procedures embodied in the Europol Convention ensure that Member States will not lose control over sensitive information.⁴³³ Because each contributing party has plenary discretion as to its degree of sensitivity, the party contributing the information is able to bar other nations' Liaison Officers from access.⁴³⁴ Despite the suggestions of some Member States, the Convention's drafters declined to create a system that would permit Liaison Officers to have access to Europol information on a need-to-know basis. Under this proposal, Europol would decide what information will be distributed to whom.⁴³⁵ If Europol's operating procedures did not include the present veto power, National Units would arguably be reluctant to transmit information that they know will be time sensitive and highly valuable.⁴³⁶ Moreover, while the latter control system would address security concerns, it would also risk alienating the suppliers of information, because the suppliers would only receive information from Europol when Europol considers it necessary.⁴³⁷ Europol, therefore, needed to strike the difficult balance between maximizing the flow of information to the center while restricting dissemination from the center.⁴³⁸

431. *Id.* art. 10(7), at 25-26.

432. *Id.*

433. Robertson, *supra* note 164, at 115.

434. Europol Convention, *supra* note 5, art. 10(8), Europol 54, Rev. 5, Annex, at 26.

435. *Id.*

436. *Id.* A related issue involves the question of who determines what information is relevant and, therefore, important enough to be transmitted:

If it is the operational units in each country then the centre will only get what each country thinks is worth collecting rather than what the analysts require. If, on the other hand, Europol can task each country to collect the information which it requires[,] this will create competition for resources between Europol and national agencies.

Id. at 116.

437. *Id.*

438. Robertson, *supra* note 164, at 116. One commentator explains that "[i]t is difficult to believe that Europol can be an effective intelligence system unless it [incor-

2. Data Protection for the Individual: Personal Privacy

In 1993, the European Parliament expressed concern that Europol's provisions may infringe upon personal privacy and liberties.⁴³⁹ The Parliament Report states that Europol must ensure respect for individual privacy and procedural guarantees in its gathering, processing, and communicating of information.⁴⁴⁰ The Report seeks to compel each Member State to create legal consequences for the unlawful or improper divulsion of personal data by the police or judicial authorities.⁴⁴¹ The Report also recommends that Europol comply with the European Convention on Human Rights and that it recognize all of the rights upheld by the European Court of Justice.⁴⁴² Further, the precise meaning of information that Europol would be authorized to provide must be established to prevent the unauthorized transmittal of sensitive data.⁴⁴³

Under the Europol Convention, the exchange of data must be in accordance with the national laws of the contributing and receiving states.⁴⁴⁴ Europol is obligated to take measures to provide for data protection.⁴⁴⁵ Any individual has the right to request access the data about himself stored at Europol.⁴⁴⁶ The individual may make such a request to his national competent authorities, and Europol must respond to it within three months.⁴⁴⁷

There are, however, significant limitations on one's right to

porates] strict security procedures; but security measures will create tensions between countries as to how, when, and to whom, information will be distributed." *Id.*

439. *European Community Moves Towards Establishment of a European Police Force (EUROPOL)*, *supra* note 377, at 52.

440. *Id.* The information gathered and exchanged for use in a prosecution must be obtained legally. *Id.* Further, judicial authority must have the ability to review the methods employed to obtain the information. *Id.* The Report recommends that, upon judicial request, Europol be required to disclose the source of information. *Id.*

441. *Id.* The Report recommends that an investigated person be given notice and opportunity to intervene, as well as have access to all relevant information. *Id.* The investigated person must also be able to monitor the further collection of information. *Id.* at 53.

442. *Id.*

443. *Id.*

444. Europol Convention, *supra* note 5, art. 2(2), 5(2), Europol 54, Rev. 5, Annex, at 9, 14.

445. *Id.* art. 25, at 44-46.

446. *Id.* art. 19(1), at 34.

447. *Id.* art. 19(2), at 34.

access data relating to oneself.⁴⁴⁸ For example, Europol may deny an individual's request if disclosure would prevent Europol from performing its duties properly,⁴⁴⁹ would compromise a Member State's national security interests,⁴⁵⁰ or would jeopardize the rights of third parties.⁴⁵¹ Moreover, before Europol can grant an individual's request, any Member State to whom the information is of interest may intercede to prevent its disclosure.⁴⁵² An individual may reverse Europol's decision by appeal to the Joint Supervisory Body.⁴⁵³ If Europol or a Member State makes persistent objections to the disclosure, however, the joint supervisory board may only overrule the objections by a two-thirds vote.⁴⁵⁴

C. *Accountability*

Commentators conclude that, because EU institutions have limited authority over Justice and Home Affairs matters,⁴⁵⁵ Europol will be subject to adequate scrutiny and control⁴⁵⁶ only by relying on national accountability mechanisms.⁴⁵⁷ National accountability standards and procedures, however, are considered to be widely disparate.⁴⁵⁸ The accession of Austria, Finland, and Sweden to the European Union may only exacerbate this disparity.⁴⁵⁹ Europol's accountability is also suspect because Europol

448. *See id.* art. 19(3),(4), at 35-36 (discussing right of individual to access data relating to that individual).

449. *Id.* art. 19(3)(1), at 35.

450. *Id.* art. 19(3)(2), at 35.

451. *Id.* art. 19(3)(3), at 35.

452. *Id.* art. 19(4), at 35-36.

453. *Id.* art. 19(7), at 36-37.

454. *Id.*

455. *See supra* notes 236-54 and accompanying text (discussing EU institutions' role under TEU Article K).

456. den Boer, *supra* note 18, at 13.

457. *Id.*

458. *Id.*

459. *Id.* at 14. The European Union will become more heterogeneous with the accession of Austria, Finland, and Sweden. *Id.* One commentator observes that, in particular, the inclusion of the Scandinavian States will intensify the north-south divide:

[I]n Southern Europe there is a predominantly repressive approach with a high tolerance vis-a-vis information-exchange and police cooperation, while in Northern Europe, a more professional and differentiated approach prevails. Nordic states may also introduce scenario's [sic] for improved accountability, [and] more intensive working relationships between police and prosecution

Id.

was created by the Trevi Group, which has minimal democratic accountability procedures.⁴⁶⁰

Accountability under the Europol Convention is divided between the Member States and Europol itself.⁴⁶¹ One potentially unsettled area concerns citizens' rights to access the data that Europol enters about them.⁴⁶² The Europol Convention grants Europol wide latitude over whether to grant a citizen's request to access the data relating to him.⁴⁶³ These provisions may conflict with the authority of the National Supervisory Body⁴⁶⁴ and the Joint Supervisory Body,⁴⁶⁵ which was designed to ensure that the rights of the data subject are not violated.⁴⁶⁶ From the provisions of the Europol Convention, it is unclear which authority would control in a given case.⁴⁶⁷

III. THE EUROPOL CONVENTION WILL FACILITATE EFFECTIVE INTERNATIONAL POLICE COOPERATION AMONG EU MEMBER STATES

Europol will be a workable and effective mechanism for countering international crime within the European Union. Although many regard inconsistencies among Member States' criminal legislation as an obstacle to Europol's potential effectiveness, previous international police cooperation efforts have

460. Benyon, *supra* note 108, at 62; *see supra* notes 169-72 and accompanying text (discussing Trevi Group's lack of accountability mechanisms).

461. *See* Europol Convention, *supra* note 5, arts. 2(2), 5(2), 28, Europol 54, Rev. 5, Annex, at 9, 14, 48-58. Articles 2(2) and 5(2) subject the actions of Europol Liaison Officers and National Units to national law. *Id.* arts. 2(2), 5(2), at 9, 14. In comparison, Article 28 gives Europol's management final decision-making power in selected areas. *Id.* art. 28, at 48-50.

462. *See supra* notes 359-66, 433-38 and accompanying text (discussing Europol Convention's personal privacy and data protection provisions).

463. Europol Convention, *supra* note 5, art. 19(1), Europol 54, Rev. 5, Annex, at 34.

464. *See supra* note 448-54 and accompanying text (discussing right of citizens to access data relating to them).

465. Europol Convention, *supra* note 5, art. 25, Europol 54, Rev. 2, Annex, at 44-46.

466. *Id.* arts. 23(1), 24(1), at 41, 42. The task of the Independent Joint Supervisory Body is to "review [], in accordance with this Convention, the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and utilization of the data held by Europol." *Id.* art. 24(1), at 42.

467. *Compare id.* art. 19(7), at 36-38 (requiring two-thirds majority to overrule Europol's objections to data disclosure) *with id.* arts. 23(1), 24(1), at 41-42 (installing supervisory bodies to ensure that entry and use of data does not infringe on rights of individual).

largely overcome this concern. Moreover, Europol constitutes both a necessary complement and desirable alternative to existing international police cooperation initiatives. It is not yet appropriate, however, for EU institutions to oversee Europol's activities. Member States, therefore, should ratify the Europol Convention only if it grants Member States more authority to monitor Europol's activities.

A. Existing Initiatives Overcome the Obstacles that Inharmonious Domestic Criminal Legislation Present to Effective International Cooperation

The disparity among Member States' national criminal laws is commonly cited as an impediment to greater international police cooperation.⁴⁶⁸ Member States, however, participate in a number of initiatives specifically intended to harmonize their criminal law.⁴⁶⁹ These initiatives are an important supplement to Maastricht's efforts to facilitate centralized policing.⁴⁷⁰

The Vienna U.N. Drug Convention facilitates the harmonization of the signatories' domestic criminal laws by requiring all signatories to criminalize money laundering and drug trafficking through appropriate domestic legislation.⁴⁷¹ This Convention also requires the forfeiture of assets procured from drug trafficking and the prohibition of drug money laundering.⁴⁷² Further, the Convention calls for mutual assistance in carrying out its provisions.⁴⁷³

468. See *supra* notes 54-58 and accompanying text (noting difficulties of successful law enforcement in international law context because of disparate legal systems among nations).

469. See Vienna U.N. Drug Convention, *supra* note 21, 1992 Gr. Brit. T.S. No. 26, 28 I.L.M. 493 (establishing internationally recognized offenses relating to drug trafficking that are to be criminalized under signatories' domestic laws); ELC, *supra* note 24, Europ. T.S. No. 141, 30 I.L.M. 148 (obligating signatories to criminalize money laundering); EC Money Laundering Directive, *supra* note 24, O.J. L 166/77 (1991) (requiring Member States to criminalize money laundering as defined in Vienna U.N. Drug Convention).

470. Walker, *supra* note 247, at 81.

471. Vienna U.N. Drug Convention, *supra* note 21, art. 3, 1992 Gr. Brit. T.S. No. 26, at 5-7, 28 I.L.M. at 500-03.

472. See *supra* notes 93-96 and accompanying text (discussing Vienna U.N. Convention's asset forfeiture and money laundering provisions).

473. See *supra* notes 90-96 and accompanying text (discussing Vienna U.N. Convention's mutual legal assistance provisions). In addition to its domestic legislation requirement, the Vienna U.N. Drug Convention strongly encourages its signatories to enter into bilateral and multilateral agreements that strengthen international coopera-

The ELC also facilitates the harmonization of Member States criminal law by building upon the Vienna U.N. Drug Convention⁴⁷⁴ and criminalizing all money laundering activity.⁴⁷⁵ As with the Vienna U.N. Drug Convention, the ELC provides that domestic bank secrecy laws shall not prevent international cooperation.⁴⁷⁶ Finally, the EC Money Laundering Directive requires Member States to comply with their obligations under the Vienna U.N. Drug Convention and the ELC.⁴⁷⁷ These initiatives seek to achieve international police cooperation through their legal harmonization provisions. Finally, the Schengen Convention⁴⁷⁸ requires signatories to develop common policies on the granting of visas,⁴⁷⁹ asylum,⁴⁸⁰ and police cooperation measures to compensate for the abolition of border controls within the Schengen territory.⁴⁸¹

tion. Vienna U.N. Drug Convention, *supra* note 21, art. 5(4)(g), 1992 Gr. Brit. T.S. No. 26, at 9, 28 I.L.M. at 506.

474. See *supra* note 124 and accompanying text (comparing money laundering provisions of ELC and Vienna U.N. Drug Convention).

475. See *supra* note 123 and accompanying text (noting that ELC is more comprehensive because signatories are more homogeneous than those of Vienna U.N. Drug Convention).

476. ELC, *supra* note 24, Europ. T.S. No. 141, 30 I.L.M. 148. Although, as its name implies, the ELC focuses on money laundering, the impact on drug trafficking is obvious: with nowhere to divert the money derived from drug trafficking, traffickers will lose the economic incentive to continue the activity. See Zagaris & Castilla, *supra* note 74, at 871 (noting that anti-money laundering regimes were created to counter international drug trafficking).

477. See *supra* notes 143-51 and accompanying text (discussing EC Money Laundering Directive).

478. See *supra* notes 188-235 and accompanying text (discussing Schengen Convention).

479. Schengen Convention, *supra* note 20, art. 9, 30 I.L.M. at 89. Article 9 states: "The Contracting Parties undertake to adopt a common policy on the movement of persons and in particular on the arrangements for visas. They shall give each other assistance to that end. The Contracting Parties undertake to pursue by common agreement the harmonization of their policies on visas." *Id.*; see *id.* arts. 10-18, 30 I.L.M. at 89-91 (detailing particulars of visa arrangements under Schengen Convention).

480. See *id.* Joint Statement on National Asylum Policies, 30 I.L.M. at 145. "Contracting Parties shall make an inventory of national asylum policies with a view to the harmonization thereof." *Id.*

481. See *supra* notes 201-14 (discussing Schengen Convention's criminal law harmonization provisions). One commentator states that "[t]he international criminal law elements of the Schengen Convention are significant because the Convention enhances procedural aspects of cooperation while simultaneously enhancing cooperation in selected substantive areas, such as drugs, terrorism, and illegal firearms and ammunition." Bruce Zagaris, *Schengen Convention Points Way to Enhanced EC Criminal Cooperation*, 7 INT'L ENFORCEMENT L. REP. 26, 26 (1991).

B. *Europol is a Desirable Alternative and Necessary Complement to Existing International Police Cooperation Initiatives*

The ratification of the Europol Convention is a desirable alternative and necessary complement to existing police cooperation initiatives.⁴⁸² While most EU officials and commentators advocate limiting Europol's powers solely to providing information and analysis to domestic police agencies,⁴⁸³ German Chancellor Helmut Kohl continues to advocate of granting Europol immediate authority to conduct investigations within the territory of the Member States.⁴⁸⁴ This debate raises the question of whether existing international police cooperation initiatives are adequately performing Europol's intended functions.⁴⁸⁵ Although existing international police cooperation organizations certainly play a role in countering international crime within the European Union, Europol will be a more effective international police cooperation mechanism.⁴⁸⁶

In responding to the needs of the European Union, Euro-

482. den Boer, *supra* note 18, at 6-7. The accession of Austria, Finland, and Sweden to the European Union increases the need for effective police cooperation. *Id.* at 14. These States create new external frontiers for the European Union, which in turn presents new criminal opportunity structures. *Id.* One example of a new criminal opportunity is the availability of vast areas which can be used for environmental dumping. *Id.* at 15.

While these States' accession may pose new challenges for Europol, there are arguably three benefits. *Id.* 15-16. First, because of their unique geographic position, Nordic countries have had substantial experience with common operational cross-border policing. *Id.* at 16. Second, the high level of harmonization among Nordic states' criminal justice systems could serve as a model for the rest of the European Union. *Id.* Third, the extensive accountability of Nordic police forces may serve as a useful model for the rest of the European Union and for Europol. *Id.*

483. *Id.*

484. *German Minister Wants Official Creation of Europol Before Year's End*, Agence France Presse, Sept. 15, 1994, available in LEXIS, World Library, Allwld File.

485. See den Boer, *supra* note 18, at 6 (comparing Europol to Trevi Group and Interpol).

486. See *supra* notes 102-09 and accompanying text (discussing Interpol's efforts to address specific needs of European Union). It appears that one commentator, who has highlighted some foreseeable difficulties with the creation of Europol, does not regard the difficulties as insurmountable: "The enormous problems of organized crime and illegal migration demand that there be a Community police force to ensure the integrity of the market and compensate for the increased opportunities for criminals that result from elimination of the barriers of the movement of persons, goods, and capital." *European Community Moves Towards Establishment of European Police Force (EUROPOL)*, *supra* note 377, at 57.

pol will be more effective than Interpol⁴⁸⁷ because Europol's members are more homogenous and able to respond more quickly to investigation requests.⁴⁸⁸ Moreover, disparities in the efficiency of national law enforcement agencies and the necessity of translating information into many other languages hamper Interpol's investigatory effectiveness.⁴⁸⁹ These problems have resulted in significant delays in the transmission of requested information.⁴⁹⁰ Europol will operate more efficiently, despite some disparity in the quality of services, because similar infrastructures and technical resources are available to Member States' Liaison Officers.⁴⁹¹

Europol is a desirable alternative to the Trevi Group because the Europol Convention, in addition to empowering Europol to address policy-making issues,⁴⁹² also focuses on operational policing activities.⁴⁹³ Some observers criticize Trevi for failing to focus adequately on the practice of policing.⁴⁹⁴ The Europol Convention's provisions allow Europol to both focus on international criminal law enforcement policy⁴⁹⁵ and assist Mem-

487. See *supra* notes 97-109 and accompanying text (discussing structure and activities of Interpol).

488. den Boer, *supra* note 18, at 6-7.

489. *Id.*

490. *Id.*

491. *Id.* den Boer notes that European complaints about Interpol have lessened since the Interpol Headquarters in Lyons instituted two technical advances. *Id.* First, the Automated Message Switch System ("AMSS"), created in 1987, processes about one million messages per year. *Id.* This is particularly important for Europe: the information-exchange between European countries accounts for eighty percent of Interpol's message traffic. *Id.* Second, the Automated Search Facility ("ASF"), created in 1992, allows Interpol "to control information which is entered into the computerized database and to control who has access to it, granting or denying access to any other member country." *Id.*

One commentator, however, notes that Interpol's regulations do not address political and public accountability. Benyon, *supra* note 108, at 56-57. Although this is not presently problematic because Interpol functions primarily as a means of communication, "if Interpol were to assume a greater role in police cooperation in Europe much consideration would need to be given to the incorporation of structures to increase accountability and hence legitimacy and public consent." *Id.*

492. See Europol Convention, *supra* note 5, art. 3(3), Europol 54, Rev. 5 Annex, at 11 (empowering Europol to assist Member States in policy development through advice and research)

493. *Id.* art. 3(1)-(2), at 10-11. See den Boer, *supra* note 18, at 7 (noting Trevi Group's emphasis on policy issues); see *supra* notes 161-83 and accompanying text (discussing Trevi Group's policy-oriented approach).

494. den Boer, *supra* note 18, at 7.

495. Europol Convention, *supra* note 5, art. 2(3), Europol 54, Rev 5, Annex at 11

ber States in their active criminal investigations.⁴⁹⁶ Thus, by working with Member States' National Units and competent authorities, the Liaison Officers at Europol headquarters will be able to concentrate on both concrete and theoretical aspects of international police cooperation.⁴⁹⁷

Europol will also serve as a valuable complement to Member States' existing initiatives. While the Schengen Convention⁴⁹⁸ permits the exercise of modest operational powers within the territory of fellow signatories,⁴⁹⁹ it does not establish a central location from which cross-border crime developments can be monitored.⁵⁰⁰ Europol can fill this void, with the help of the National Drug Units in the Member States, by acting as a central data exchange and analysis center.⁵⁰¹

Maastricht⁵⁰² provides a link between various security issues, including asylum policy, external border controls, immigration policy, drug addiction, fraud, judicial cooperation in criminal and civil matters, customs cooperation and police cooperation.⁵⁰³ Maastricht specifically authorizes Europol's creation.⁵⁰⁴ Europol, therefore, arises out of a supranational political infrastructure in a way that Interpol and Schengen do not, thereby acting as a point of convergence for the coordination of these security concerns.⁵⁰⁵ Thus, Europol will provide cohesion and

(authorizing Europol to cooperate with Member States in developing international police cooperation policies).

496. See *supra* notes 309-32 and accompanying text (discussing Europol's authority to contribute to Member States' criminal investigations).

497. den Boer, *supra* note 18, at 7.

498. See *supra* notes 188-229 and accompanying text (discussing Schengen Convention).

499. See *supra* notes 201-14 and accompanying text (discussing cross-border operation powers under Schengen Convention).

500. den Boer, *supra* note 18, at 7-8 (noting that provisions of Schengen Convention do not provide for data analysis headquarters).

501. *Id.* at 7. Whereas the Schengen Convention provides for "horizontal" cross-border police cooperation, Europol provides the "vertical component." *Id.*

502. TEU, *supra* note 1, art. K.1(9), O.J. C 225/1, at 97 (1992), [1992] 1 C.M.L.R. at 735. See *supra* notes 236-54 and accompanying text (discussing provisions of Maastricht Treaty).

503. TEU, *supra* note 1, art. K.1(1)-(9), O.J. C 225/1, at 97 (1992), [1992] 1 C.M.L.R. at 735. See den Boer, *supra* note 18, at 8 (discussing Maastricht's police cooperation aspects); Debrouwer, *supra* note 247, at 85 (noting Maastricht brings police cooperation closer to EU institutional framework).

504. TEU, *supra* note 1, art. K.1(9), O.J. C 225/1, at 97 (1992), [1992] 1 C.M.L.R. at 735.

505. Debrouwer, *supra* note 247, at 86.

structure to the various cross-border law enforcement initiatives in the European Union.

C. Member States Should Ratify the Europol Convention Only If It Grants Member States More Authority to Monitor Europol's Activities

With the text of the Europol Convention finalized, the Justice and Home Affairs Ministers must present it to their Member States for ratification.⁵⁰⁶ EU institutions are not presently competent to oversee Europol's activities, and therefore, the Europol Convention should not give jurisdiction to the European Court of Justice. Rather, while EU institutions should continue to expand their role in criminal justice matters, the Europol Convention should grant Member States primary oversight over Europol's activities.⁵⁰⁷ Consequently, without institutional oversight, the Europol Convention should make Europol more accountable to Member States than the Convention presently provides.⁵⁰⁸ Such an arraignment would be consistent with the current structure of the EDU.⁵⁰⁹

The present text of the Europol Conventions falls short, however, of adequately ensuring that citizens have access to their own personal information.⁵¹⁰ The relationship between Europol's ability to deny citizens' rights to access to information and the Supervisory Bodies' authority to protect these rights is unclear.⁵¹¹ The right to access data must be enforced through a strong National Supervisory Board system. If these agencies are not able to carry out their functions, Europol's legitimacy with the public could be damaged. Indeed, national accountability will prevent a chasm from opening between law enforcement and the public.⁵¹² Further, in the event that information about a

506. See *supra* notes 236-54, 390-409 (discussing EU institutional power in area of Justice and Home Affairs).

507. See *supra* notes 394-421 and accompanying text (discussing debate over EU institutional competence in criminal justice matters).

508. See *supra* notes 439-67 and accompanying text (discussing accountability, and proposals for personal privacy protection).

509. See *supra* notes 274-83 (discussing EDU Liaison Officers' responsibilities and limitations under Council's Joint Action document).

510. See *supra* notes 367-73, 455-67 and accompanying text (discussing accountability provisions under Europol Convention).

511. See *supra* notes 461-67 and accompanying text (discussing shared oversight authority between Supervisory Boards and Management Board under Europol Convention).

512. den Boer, *supra* note 18, at 19. This commentator explains that:

citizen is entered by a Member State other than his own, a nation's domestic data protection measures may fall short of providing an adequate safeguard against invasions of privacy. This, therefore, also increases the need for a strong Joint Supervisory Body.⁵¹³

CONCLUSION

The Europol Convention presents a workable and effective mechanism to counter international crime within the European Union. Since EU institutions are not competent to oversee Europol's activities, the Europol Convention should empower Member States to assume the primary oversight role. In doing so, Member States will ensure that the Europol Convention strikes the necessary balance between achieving effective international police cooperation and ensuring that citizens' rights are adequately protected.

[T]he larger the distance between [the] policing unit and the public, the less control the public is able to exercise over the police. Interaction between police and public is essential, and the police . . . need the public to give them information. What should therefore be avoided is that the police become alienated: otherwise the social legitimacy of policing becomes problematic as a result of the lack of social control. The lack of adequate control of European policing could be problematic.

Id. at 19-20.

513. See *supra* notes 340-66 and accompanying text (discussing multiple sources of information contained in Europol databases).