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**CHANGING CONCEPTIONS OF SECURITY
AND THEIR IMPLICATIONS FOR
EU JUSTICE AND HOME AFFAIRS COOPERATION**

MALCOLM ANDERSON
AND
JOANNA APAP



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ABOUT THE CEPS-SITRA NETWORK

CEPS, with financial assistance of the Finnish SITRA Foundation, embarked at the end of 2000 on a programme to examine the impact of Justice and Home Affairs acquis on an enlarged European Union, the implications for the candidate countries and for the states with which they share borders. The aim of this programme is to help establish a better balance between civil liberties and security in an enlarged Europe.

This project will lead to a series of policy recommendations that will promote cooperation in EU JHA in the context of an enlarged Europe as well as institutional developments for the medium- to long-term in areas such as a European Public Prosecutors Office, re-shaping Europol and a developed system of policing the external frontier (Euro Border Guard). These must be made within a balanced framework. There are two key issues:

First of all, to prevent the distortion of the agenda by ‘events’ – some items are being accelerated and other marginalised. This risks upsetting the balance, carefully crafted by the Finnish Presidency, between freedom, security and justice. The current ‘threat’ is that security issues, at the expense of the others, will predominate after the catastrophic events of 11th September. These have resulted in a formidable political shock, which served as a catalyst to promote certain initiatives on the political agenda, such as the European arrest warrant, and a common definition of terrorism. The monitoring of items, which could be marginalised and the nature of the institutional/political blockages that could distort the Tampere agenda, is our priority.

Secondly, how to look beyond the Tampere agenda, both in terms of providing a flexible approach during the period of completion of the Tampere programme as well as what should come afterwards. Much detail remains to be filled in about rigid items on the Tampere agenda and CEPS will continue to work in three very important areas:

- Arrangements for managing and policing the external frontier
- Judicial co-operation leading to the development of a European Public Prosecutor
- Strengthening of Europol, particularly in the field of serious trans-frontier violence and moves towards a more federalised policing capacity

The CEPS-SITRA programme brings together a multi-disciplinary network of 20 experts drawn from EU member states, applicant countries as well as neighbouring states: the European University Institute in Florence, the Stefan Batory Foundation (Warsaw), European Academy of Law (ERA Trier), Academy of Sciences (Moscow), London School of Economics, International Office of Migration (Helsinki), Fondation Nationale des Sciences Politiques (CERI) in France, Universities of Budapest, Université Catholique de Louvain-la-Neuve, University of Lisbon (Autonoma), University of Nijmegen, University of Burgos, CEIFO in Stockholm, University of Tilberg and University of Vilnius, as well as members with practical judicial and legislative backgrounds.

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AND JOANNA APAP*

From the initiation of the debate about Europol in the late 1980s, some law enforcement agencies and political thinkers developed a concept of security that links together broad categories of activities: terrorism, drug trafficking, organised crime, transborder crime, illegal immigration, asylum seekers, and minority ethnic groups. This conception represents a variety of very different problems as elements of one general security threat. In addition, there has been a blurring of the distinction between internal and external security, as the threat of a conventional military attack on Western Europe has declined. This idea has been sharply criticised, by those such as Didier Bigo, (who has labelled this concept a *security continuum*,)¹ for linking very different activities, profiling of groups and criminalising illegal immigrants. It is also objectionable on grounds that it categorises difficult problems as security threats too quickly and too emphatically. A crucial element in the merging of internal and external security has been the re-classification of undocumented immigrants and asylum seekers as problems of security. But the linkage between security fields lies at the core of the redefinition of the West European security following the collapse of the Soviet Union. Integration of the tasks and functions of police services, immigration services, customs and intelligence services, is sustained by the gradual re-shaping of the *security continuum* under the pressure of events, such as, most dramatically, the terrorist attacks of September 2001.

Threat analysis has led to growing importance being attributed to the collection of strategic intelligence, the increased role of certain national police agencies, the entry of intelligence services into domains previously regarded as the preserve of the 'police', and problems of definition of roles and coordination of police agencies. However, it also provides the opportunity of an enhanced role for Europol in both strategic intelligence-gathering and the coordination of investigations of transborder criminal activities. But certain questions are likely to be raised in an acute and urgent form on the problem of the relatively slow progress of EU judicial cooperation and integration, the protection of individual rights, the Treaty basis of JHA cooperation, the legitimacy of rapid development of EU responsibilities in this field, to mention only the most obvious ones.

I. What is a threat to security?

'Security', like 'freedom' or 'equality',² may be described as an essentially contested concept'.³ The various meanings attributed to it are not merely the consequence of different political commitments

* Malcolm Anderson is Senior Research Fellow at CEPS and Joanna Apap is a Research Fellow at CEPS and Programme Coordinator of the Justice and Home Affairs research unit.

¹ Concept coined by Didier Bigo, Professor of Politics, Institut d'Etudes Politiques, Paris, in Didier Bigo, 'The European internal security field stakes an rivalries in a newly developing area of police intervention', in Malcolm Anderson and Monica den Boer (eds), *Policing Across National Boundaries*, London: Pinter, 1994, p. 164.

² Despite the analogy, no one would talk today of a 'freedom policy' or of an 'equality policy', as we talk of 'security policy'. And, similarly, no country in the world has a 'national freedom agency' or a 'state equality council', although institutional bodies specialising in (various aspects of) 'security' exist almost everywhere.

and beliefs of individuals along a Right/Left spectrum. Notions of security are influenced by broader cultural factors, as well as by the socio-economic and professional environments. We are therefore dealing with a very complex pattern of beliefs and perceptions, which cannot be fully explored in this paper.

Concepts of security have, however, one principle thing in common – they are based on fear of actual and potential attacks on public authorities, persons and property. In Europe, until recently, these threats were conceived as coming from two distinct sources. According to Machiavelli's 16th century vision, internal and external threats to the power of 'the Prince' were clearly distinct. Internally, the ruler feared conspiracy. Externally, he dreaded aggression by foreign powers. The Florentine also acknowledged interdependencies between these two fundamental categories of political risks: in practice, external peace would foster internal stability and vice versa. But policy-making in the two fields was based on different sets of tools and responded to different 'logics'.⁴

In the following centuries, in Western Europe, the autonomy of internal and external security policies was strengthened by the development of the Nation State and the increasing specialisation of administrative bodies and public security agencies (national police, on the one side, national armies, on the other).⁵ Recent trends towards the ever-increasing internationalisation of economic and social processes have blurred the traditional distinction between internal and external security (and the relative policy-fields) worldwide.⁶ In Western Europe, however, and especially in the last twenty years, the conceptual convergence of the two faces of security has perhaps been more evident than elsewhere (a theme developed below). Also, the kinds of actions considered to threaten security have been widened considerably with technological and social changes. Threats to the environment and threats to the social balance within societies are now often considered as threats to security.

This very obvious starting point is a necessary preface to the framing of a central hypothesis: different policy approaches have different security 'cultures' and tend to follow (sometimes consciously, sometimes unconsciously) different security models and security logics.

At the macro-level of European security policy-making, a distinction may be made between the culture of 'internal security' (police, in a broad sense) and of 'external security' (involving diplomacy and military expertise). Since the Copenhagen European Council of June 1993 the dominant

Such a paradox has probably to do with the fact that, unlike 'security', the non-sectoral nature of other fundamental political values and policy goals (such as freedom and equality) is usually taken for granted.

³ B. Buzan, Peoples, *States and Fear. An Agenda for International Security Studies in the Post-Cold War Era*, Lynne Rienner, Boulder, CO, 1991, 2nd ed., p. 7.

⁴ F. Ferruccio, 'Reconciling the Prince's two 'Arms'. Internal-External Security Policy Coordination in the EU,' *Occasional Papers* no. 30, Institute for Security Studies, Western European Union (ISS/WEU) Paris Sept. 2001.

⁵ For a literature review on the relations between globalisation processes and security, and on the emergence of what the author calls 'intermestic security' (to designate policies aimed at dealing with non-military 'threats' which are neither exclusively domestic nor purely international in nature) see V.D. Cha, 'Globalization and the Study of International Security,' *Journal of Peace Research*, Vol. 37, No. 3, May 2000, p. 391 ff.. For a useful guide to the rather confusing and moving landscape of the 'non-traditional literature' in the field of security studies, see S. Smith, 'The Increasing Insecurity of Security Studies: Conceptualizing Security in the Last Twenty Years', in S. Croft and T. Terriff (eds), 'Critical Reflections on Security and Change' special issue of *Contemporary Security Policy*, Vol. 20, No 3, December 1999, p. 72 ff. Another overview is provided by T. Terriff, S. Croft, L. James and P.M. Morgan, *Security Studies Today*, Polity Press, Cambridge, 1999.

⁶ On these developments, see for instance, D.H. Bayley, 'The Police and Political Development in Europe', in C. Tilly (ed.), *The Formation of National States in Europe*, Princeton University Press, Princeton (N.J.), 1975.

European approach to external security has explicitly been an inclusive one, exemplified by the Stability Pact for South-Eastern Europe. A security culture based on integration as *a method for 'structural' conflict management and prevention* is clearly present within the European Union. The underlying 'logic' of this culture was that conflict management should be based on bringing the relevant parties into a comprehensive system of cooperative relations.

By contrast, from the mid-1980s, in conjunction with the two connected processes of Europeanisation and externalisation of internal security, an *exclusive* and *defensive* approach (i.e. removal and/or containment of the perceived threats) to European internal security became predominant.

In addition, Western Europe experienced in the last decade and a half a major transformation in the notion and perception of security as a political value and policy goal. With the progress in European integration and the gradual waning of the external threat represented by the Communist bloc, two parallel processes of 'Europeanisation' and 'externalisation' of what were traditionally labelled as 'internal security' issues were, at least in part, considered as coming from the outside.⁷

Europeanisation. During the 1980s, the Schengen agreement (signed in 1985 and followed in 1990 by the implementation Convention) and the Single European Act (1986) accelerated the transformation of the European Community into a unified space, where freedom of circulation is the rule and restrictions to it, the exception.

This unification of the European space was represented in the dominant political discourse as a major achievement, which had nevertheless some negative implications. Lifting controls and restrictions to intra-European circulation of capitals, goods and persons would create, it was said, new opportunities for criminal and other forms of illegal activities. Internal security risks, which until now had been apprehended and tackled at the national level, within the reassuring enceinte of State borders, now needed to be redefined and countered at the European level. Internal security was now defined as legitimate field for European co-optation.

Externalisation. Through a series of distinct but connected processes, all the main traditional 'internal threats were re-conceptualised, and the external (extra-European) origin or dimension of each of them was emphasised, both in qualitative and in quantitative terms. Within law enforcement agencies, and frequently in political discourse, the idea of a security continuum was advanced making connections between broad categories of activities: terrorism, drug trafficking, organised crime, trans-frontier crime, illegal immigration, asylum seekers, and some minority ethnic groups.

The main aspects of that process of externalisation of internal security can be summarised as follows:

- Despite the persistence of acts of political violence, commonly called terrorism, in several European countries, the non-European, transnational components of terrorism gained greater relevance in public opinion and political discourse.
- International migration, within which the irregular/undocumented/illegal component has become progressively more important, started to be perceived and treated as a security threat with non-European sources.⁸

⁷ F. Ferruccio, *op. cit.*

⁸ On this crucial development, see, for instance: O. Weaver, B. Buzan, M. Keistrup, P. Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Pinter, London, 1993; J. Huysmans, *Migrants as a Security Problem: Dangers*

- Globalisation and the collapse of law enforcement systems in the former Communist countries boosted the internationalisation of criminal organisations engaged in drug trafficking, money laundering, people smuggling, car theft and other traffics. However, the relative importance of the transnational component in organised crime (and of the ‘imported’ component in ‘petty’ crime) has probably been overestimated and overemphasised.

The Europeanisation and the externalisation of internal security have had a major impact on structures, methods and contents of the policy-making process in the field of justice and home affairs. Europeanisation of the (perceived) threats has been the central incentive (and crucial legitimising argument) to reinforce and institutionalise the already existing European cooperation in that field. This was done in several stages and at different levels: first in the Schengen framework, then under the third pillar of the EU, finally in the inter-pillar context of the ‘area of freedom, security and justice’ outlined in Amsterdam.

The externalisation of internal security issues created an incentive for national law enforcement agencies, whose activities had been exclusively concentrated within national borders, to devote an increasing share of their institutional and operational efforts to the international arena. This was embodied in partly overlapping intergovernmental cooperative frameworks (Trevi; Schengen; Maastricht’s third pillar), which produced a peculiar, homogeneous and (in spite of its institutional clumsiness) cohesive ‘internal security regime’.⁹ The basic features of such security regime were the following:

- lifting of systematic police controls on movements of people and goods at internal borders;
- strengthening of international police cooperation, particularly in (internal) cross-border regions (regulation of cross-border pursuit, joint police stations, joint patrolling in cross-border areas, etc.);
- pooling of police data and information among national law enforcement bodies (Schengen Information System – SIS; Customs Information System – CIS; Europol’s ‘computerised system of collected information’);
- harmonisation and reinforcement of external border controls, conceived as a ‘system of concentric security lines’.¹⁰

of ‘Securitizing’ Societal Issues, in R. Miles and D. Trönhardt (eds), *Migration and European Integration: the Dynamics of Inclusion and Exclusion*, Pinter, London, 1995; D. Bigo, L’immigration à la croisée des chemins sécuritaires, in *Revue Européenne des Migrations Internationales*, 1998 (14) 1, p. 25 ff.; A. Ceyhan, Migrants as a Threat: a Comparative Analysis of Securitarian Discourse: France and the United States, in V. Gray (ed.), *A European Dilemma. Immigration, Citizenship and Identity in Western Europe*, Bergham Books, Oxford, 1999.

⁹For the use of the concept of ‘security regime’ to designate the European ‘area of freedom, security and justice’, see J. Monar, *Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion*, Economic and Social Research Council, ‘One Europe or Several’ Programme, Working Paper 07/00, Sussex European Institute, 2000, pp. 11-12.

¹⁰ The definition is contained in an interesting strategy paper addressed by the Schengen Working Group I (Police and Security) to the Central Group, on 24 November 1998, [SCH/I (98) 86, 2nd rev.]. For a comparative overview on the most recent evolution of border controls in Europe, see G. Brochman and T. Hammar, *Mechanisms of Immigration Control*, Berg, Oxford, 1999; G. Sciortino, *L’ambizione della frontiera. Le politiche di controllo migratorio in Europa*, Franco Angeli, Milano, 2001.

The external projection of internal security agencies has caused some problems. It generated an increasing overlapping of, and occasionally open competition between, the policy communities and public agencies traditionally invested with the task of ensuring external security.¹¹

In a national context, such potential for overlapping, competition and/or conflict had been apparent for some years. At the European level, although the ‘internal security’ pillar was officially created almost a decade ago, it was triggered by major developments that affected both ‘second pillar’ and ‘third pillar’ policy-makers. Despite the fact that ‘the idea of a link between internal and external security is a logical consequence of the process of European integration’¹², only very recently did the European Heads of State and Government recognise explicitly – in the Tampere Presidency Conclusions – that internal and external security policies require coordination:

The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.¹³

But, as this assertion suggests, internal-external security policy coordination is a complex matter and needs to operate in two directions. First, external security policy tools should be compatible or, better, create synergies with internal security policy objectives. Second, internal security policies should contribute to the general political objectives of the Union’s external policy. This is exemplified in the official statement: ‘JHA is essential given the worldwide challenges facing the Union, such as restoring the rule of law, controlling migratory movements and combating organised crime. Above and beyond the strategic importance of a particular country, a global approach is required’¹⁴

In brief, three recent changes are modifying the landscape of EU internal security, and Justice and Home Affairs more generally.

First, with the Treaty of Amsterdam coming into force, the European internal security regime entered a dynamic phase of transformation, marked primarily by the stronger role of EU institutions (incorporation of the Schengen *acquis* in the EU; ‘communitarisation’ of immigration and asylum policies) and by a stronger political impulse to the development of the judiciary dimension of European cooperation in the field of law enforcement (European Judicial Network; Eurojust). The 1999 Tampere Presidency Conclusions set out the agenda for change over the coming years with a mechanism (the ‘scoreboard’) for ensuring that the timetable was adhered to.

Second, new institutional (the Commission and the European Parliament) and professional actors (prosecutors, judges, senior police officers) have been brought closer to the centre of the JHA’s political arena. Such increased pluralism could foster a significant evolution away from the exclusive

¹¹ On the conceptual, political and operational convergence of internal and external security in Europe, since the late 1970s, see D. Bigo, ‘When Two Become One. Internal and External Securitisations in Europe’, in M. Kelstrup and M.C. Williams, *International Relations Theory and the Politics of European Integration. Power, Security and Community*, Routledge, London-New York, 2000, p. 171 ff.

¹² A. Politi, *European Security: the New Transnational Risks*, Chaillot Papers, n. 29, October 1997, Institute for Security Studies, Western European Union, Paris 1997, p. 10.

¹³ Tampere European Council (15-16 October 1999), Presidency Conclusions, point 59.

¹⁴ Council of the European Union, European Union priorities and policy objectives for external relations in the field of justice and home affairs, doc. 7653/00 JAI 35, Brussels, 6 June 2000, p. 6.

and defensive approach to European internal security issues. However, over the past decade these two security 'logics' – the political-diplomatic one, fundamentally inclusive, and the law enforcement one, more focused on exclusion – diverged or even collided on different issues and on strategic choices.¹⁵

Third, the emergence of the EU as an area of freedom of circulation has fostered a common perception of internal security priorities and the intensification of technical and political cooperation in this area. More than elsewhere, the 'external' (extra-EU) dimension of 'internal security threats' has been increasingly emphasised.¹⁶ This has resulted in a strong incentive towards better coordination between the internal and external security policy fields, typified by Mr. Javier Solana's role in promoting the use of civil police in peacekeeping operations and in promoting judicial and police cooperation between the EU and neighbouring states (such as the JHA Action Plan for the Ukraine). Within the EU member states, police and judicial authorities are increasingly seeking international partnerships and extending their liaison activities with foreign jurisdictions; the military, on their side, seek a role in assisting with public order problems and in anti-terrorist activities.

Recent events have accelerated the general trends outlined above and added crucial new dimensions.

II. How did the events of September 11th affect concepts of security?

The unique characteristics of the events of September 11th are clearly evident. It was an unprecedented attack on the world's most powerful country, whose citizens had previously had a sentiment of invulnerability. The scale of the attack on the World Trade Centre and Washington dwarfed anything that preceded it. The quantitative change made possible the qualitative change in the response – a global alliance including partners normally suspicious of American intentions, the backing of the United Nations and a swift and successful military intervention assisted, usually in modest ways, by the European allies of the USA. The European Union promulgated a series of measures, actions and declarations, which culminated in an agreement on a European arrest warrant and a common definition of terrorism on 7-8 December 2001. Both of these radical measures were subject to less controversy, and agreed more quickly, than could have conceivably been the case without the events of September 11th.

The attacks on New York and Washington destroyed lives, caused psychological disorientation and economic damage, but, like the collapse of Communism within the former Eastern Bloc, they also struck a blow against the existing conventional wisdom about the nature of security in terms of the kinds of actor likely to pose the most unmanageable threats. The effect of this was that the traditional distinction between the internal and the external sphere – and particularly between internal and external security, much weakened by the end of the Cold War, largely disappeared. The characteristic of security discourse at the highest political level is to take one issue, dramatise it, and make it the most important threat confronting our societies. At present, this threat is terrorism. In combating it, security policies will be conceived, elaborated and analysed as a continuum, stretching from street level and activities which were formally thought to belong to ordinary criminality (such as

¹⁵ On the professional 'security culture' of member states' police officials operating in an international environment, the fundamental references are still D. Bigo, *Polices en réseaux: l'expérience européenne*, Presses de Sciences Po, Paris, 1996; M. Anderson et al., *Policing the European Union*, Clarendon Press, Oxford 1995.

¹⁶ Parallel changes occurred in American thinking roughly at the same time. See P. Andreas & R. Price, 'From War Fighting to Crime Fighting: Transforming the American National Security State.' *International Studies Review*, 2001, 1 1, pp. 31-52.

the clandestine transfer of funds), to macro-strategic balances when punitive action is envisaged against states. This approach will be increasingly apparent in policies designed to combat all forms of serious crime. The already recognisable trend towards deeper and more systematic internal-external security policy coordination will be accelerated and strengthened.

New perceptions of security were particularly evident in the speed of the EU's response to September 11th. The new Council and Commission structures in JHA, which had been set up after the Treaty of Amsterdam, showed themselves capable of a rapid response to a crisis and to what was regarded as a common threat to the security of member states. Within ten days, the JHA Council decided on a package of anti-terrorist measures in the areas of judicial and police cooperation, the prevention of financing of terrorism, improved border controls and cooperation with the United States. The European arrest warrant, a common definition of a terrorist acts, and laying down common criminal sanctions were also agreed. The JHA Council was charged to agree on the arrangements for these by its meeting of 6-7 December 2001. This it duly did, despite some very difficult negotiations. There is clearly a problem of implementation because many of the decisions fall into the category of soft law – the common definition of terrorism, for example, does not have the force of a legislative act. It serves a guideline and will be translated into legislation, if it is at all, by the actions of the member States.

In the aftermath of September 11th the EU was able to make progress on a number of other issues, which are of importance in terrorist action such as the amendment of the Money Laundering Directive, the freezing of assets, the setting up of the Eurojust cross-border prosecution unit, on the framework decision on joint investigative teams and on the seizure of assets and evidence by a judicial order issued in any member state across the whole territory of the EU. These clearly have a general impact that extends far beyond combating terrorism. Decisions were also taken on improved cooperation between police and intelligence services. Amongst these the Police Chiefs Task Force was charged with, cooperation between police and intelligence services with a view to improving operational cooperation with third countries; guarantee a high level of security particularly in air safety; consider the missions to be given to a team of counter-terrorist specialists within Europol.

A further strengthening of controls at the external borders was also agreed and the Police Chiefs Task Force were made responsible for this. A strengthening of surveillance measures under Article 2(3) Schengen 1990 was decided. The issue of identity and residence documents should be subject to re-enforced checks. Extra measures should be adopted for the issue of visas and local consular cooperation must be increased. The Commission is requested to propose legislation for a network for information exchange on visas issued. Member states are asked to be more systematic in the SIS entries under articles 95, 96 and 99 of Schengen 1990. The Commission was asked to examine the relationship between safeguarding internal security and compliance with international protection obligations and instruments. This refers to the Geneva Convention relating to the status of refugees 1951 and its 1967 Protocol and the European Convention on Human Rights. Finally, the Council will examine urgently the situation in countries where there is a risk of large-scale population movements as a result of heightened tensions and examine the scope for an application of the Directive on temporary protection.

A whole raft of measures were put in place to improve cooperation between the EU and the USA. In a Joint EU-US Ministerial Statement of 20 September 2001 on combating terrorism Mr Solana announced that agreement had been reached for the EU and US to work together against terrorism in the following fields:

- Aviation and other transport security;
- Police and judicial cooperation, including extradition;
- Denial of financing of terrorism, including financial sanctions;
- Denial of other means of support to terrorists;
- Export control and non-proliferation;
- Border controls, including visa and document security issues; and
- Law enforcement access to information and exchange of electronic data.

Following this, a new body, the joint COTER/JHA Working party on Terrorism Troika has been set up. Twice yearly meetings with US authorities are planned. Increased cooperation and consultation with the US in international fora, in particular in the UN and a coordinated approach to the fight against financing global terrorism is proposed. The US authorities will be invited to participate in relevant discussions with the heads of EU counter-terrorism units at the invitation of the Police Chiefs Task Force to develop and share practices in various areas.¹⁷

There can be little doubt that the terrorist attacks of September 11th have provided the development of the Area of Freedom, Security and Justice (AFSJ), introduced by the Treaty of Amsterdam, with a new impetus. The member states governments, security agencies and public opinions have been made dramatically aware of the extent to which international forms of crime that can only be met effectively through common action threaten 'internal' security, and the AFSJ provides the obvious framework to develop such action. However, the problem of balance between security (strengthening controls on persons and their activities, improved surveillance, intrusive investigatory procedures) and freedom (civil liberties, rights for non-EU nationals, treatment of immigration and asylum cases, even freedom of speech) in the wake of September 11th is likely to become more acute.

There is clearly a risk of the security rationale becoming predominant. The decisions adopted by the Council after September 11th were essentially a 'security' package combining various law enforcement and criminal justice cooperation measures. There has been a spillover of the security rationale into JHA areas extending beyond law enforcement against terrorism. An example is paragraph 29 of the Conclusions adopted by the Council on 20 September 2001¹⁸ which invites the Commission 'to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments' which – put in less covert words

¹⁷ Amongst other measures and proposals are the following. The Director of Europol is instructed to establish informal cooperation with the US ending a formal agreement and to finalise a formal agreement as quickly as possible. The agreement will provide for exchange of liaison officers between Europol and US agencies in the policing sector. A second agreement will permit transmission of personal data. The counter-terrorist unit of Europol has established relations with the US authorities and make a joint evaluation of terrorist threats and exchange of information on national measures to fight terrorism. These include cooperation with the US on the identification of terrorist organisations, the involvement of US representatives in joint meetings of the 'second pillar' counter-terrorism working group (COTER) and the JHA anti-terrorism working group (four times a year), participation of the US in the meetings of the heads of EU counter-terrorist units (mentioned above) and the negotiation of a formal agreement with the United States on the exchange of liaison officers between Europol and the US and on the transmission of personal data. An agreement on the legal basis of Article 38 TEU between the EU and US on penal cooperation on terrorism is also proposed.

¹⁸ Council document SN 3926/6/01 REV 6.

– means a re-examination of asylum and refugee guarantees and procedures in the light of the terrorist threat. The anti-terrorist ‘security’ package has also almost entirely taken over the agenda of the JHA Council meetings after September 11th, with the effect that other areas – such as judicial cooperation in civil matters which is a crucial element in the construction of an ‘area of justice’ – have been put on the backburner.

There is some tendency towards ‘negative’ (restrictive and exclusionary) rather than ‘positive’ measures increasing the rights and liberties of individuals. The Conclusions of September 20 abound with restrictive measures such as ‘utmost vigilance’ in the issuing of residence permits, the ‘immediate strengthening’ of surveillance measures under Article 2.3 of the Schengen Convention and ‘more systematic checking of identity papers’ (paragraphs 24 and 25). The Council has also committed itself to a ‘particular effort’ to strike a balance between the protection of personal data and the need of law enforcement authorities to gain access to data for criminal investigation purposes (paragraph 4). The context leaves little doubt that this balance is likely to make more rather than less personal data available to law enforcement authorities. A recent article by left wing authors in *Le Monde* has pointed to the particularly restrictive – according to the authors even ‘repressive’ – tendency and language of some of the post September 11th texts under discussion.¹⁹

Democratic control may also be weakened; parliaments have been given little time and, in some cases, no authority to examine the security package agreed by the Council. The decision to provide the European Parliament with an annual report on ‘Terrorism Situation and Trends’ (to be entitled TE-SAT)²⁰ cannot be regarded as a sufficient guarantee of effective parliamentary control of cooperation arrangements and structures between law enforcement authorities such as the meetings between the heads of counter-terrorist units (the first took place on 15 October 2001), the projected missions entrusted to counter-terrorist specialists and the drawing up of a common list of terrorist organisations. In Council texts no mention is made of any parliamentary scrutiny – at the national or European level – of the regular meetings of the heads of the intelligence services²¹ (the first of which took place on 11 October). Several new forms of inter-agency cooperation – such as the joint investigation teams consisting of police officers, specialised magistrates, Eurojust and Europol representatives referred to in paragraph 2 of the Conclusions of 20 September – will also not be easily monitored by parliaments because EU governments have so far tended to treat inter-agency cooperation as a purely operational aspect.

The balance between necessary confidentiality and desirable transparency is unlikely to be decided in favour of the latter. Cooperation in the fight against terrorism – ever since its origins in the context of the TREVI framework of the mid-1970s – has always been considered as particularly sensitive and therefore secret. The involvement of national intelligence services – the least transparent part, despite recent changes, of national government structures – will not help. However, the Council has made public all the main elements of the post-September 11th security package that has provoked comment in the media and reactions from civil liberties groups.

Over-optimism, much in evidence in the last quarter of 2001, about both the stability of the anti-terrorist alliance and the consensus on the priority to be given to the fight against terrorism should be

¹⁹ Alima Boumediene-Thiery, Alain Krivine, Giuseppe Di Lello Finuoli: ‘Europe: vers l’Etat d’exception?’, *Le Monde*, 29 November 2001.

²⁰ Council Conclusions of 20 September 2001, paragraph 17.

²¹ Council Conclusions of 20 September, paragraph 14.

avoided. Improved international cooperation to counter terrorism has often emerged as a priority on the international agenda in the last three decades. It proved to be an elusive goal. Since the early 1970s, the highly industrialised nations have repeatedly returned to the theme with repeated lack of success. The question, raised in the 1980s,²² was whether the numerous proposals made were on a road that led anywhere.

Prior to 2001, counter-terrorism was a dubious basis for systematic police and judicial cooperation, for a variety of reasons. First, terrorism is usually directed towards influencing state policy and therefore an issue of state security, (necessarily a secret domain), rather than ordinary policing. Second, since political causes and interests are involved, governments usually have widely differing perspectives on the implications, importance and potential effects of particular terrorist incidents. Third, a wide variety of agencies – both police and intelligence services – are involved in countering terrorism and coordination between them within states is highly problematic: different agencies often have different interests in international cooperation and conflicts between them over resources, competences and territory are common. Fourth, political violence linked to broadly based political movements cannot be repressed by police action alone but requires a mix of policies aimed at removing the underlying conditions which provoke violence; governments do not have the same priorities or the same level of commitment in these policies. Fifth, although acts of terror have a dramatic impact on public opinion, these are relatively rare compared with ordinary criminality, and long periods can pass without countries experiencing any incident; this weakens the day-to-day commitment of police agencies faced by other pressing problems. These reasons have been obscured by the events of September 11th but they are still present.

The events of September 11th have radically altered the international climate but there are grounds for pessimism about the permanence of the change. The ‘war on terrorism’ will probably, like the ‘war on drugs’, be a conflict that cannot be won. The extraordinarily broad international support for the USA may not be very deep. It could unravel over aspects of American policy, particularly in the Middle East. The characterisation of terrorism, contained for example in President Bush’s State of the Union address of 2002, as an absolute evil with the same characteristics throughout the world may cease to carry conviction with governments in the light of specific conflicts in very different contexts.

Terrorism, particularly ‘international terrorism’, is not a homogeneous criminal threat which governments invariably have a common interest in repressing. This lack of common interest and outlook is the product of a variety of factors, and usually several factors at the same time: divergent colonial/imperial histories, regional problems, struggles for autonomy, the inability of states to guarantee internal security, extreme social tensions, cultural and linguistic cleavages. Situations, which foster political violence, are also very diverse; the complex origins of terrorism seldom reach the surface of public or political discourse (Bourdieu, 1992: 132). Lack of convergence between otherwise friendly governments may also have to do with calculations of interest in international relations or *raisons d’etat* concerning more important national interests than the imprisonment of individual terrorists.

²² M. Anderson, *Policing the World: Interpol and the Politics of International Police Cooperation*, Clarendon Press: Oxford 1989 140.

Whether or not counter-terrorism remains the driving force behind EU security co-operation, there will almost certainly be long-term effects of the aftermath of September 11th. These can be grouped under seven categories.

1. The impact of September 11th could help to correct the current imbalance between an ambitious political agenda and the actual institutional capacity to deliver results, which could lead to an overhaul of the working procedures and re-opening the debate about an extension of qualified majority voting to most areas of JHA, including police and judicial cooperation in criminal matters, still firmly in the grip of the unanimity rule. With the next Intergovernmental Conference already on the horizon, September 11th could emerge as new starting point for treaty reforms in JHA aimed at increasing the EU's decision-making capacity.

2. The profile of EU coordinating mechanisms in counter-terrorism has been considerably enhanced – particularly Europol (especially its anti-terrorist unit), the Working Group of Chiefs of Police and Eurojust. The effects of this are likely to endure and have effects over the whole spectrum of criminal law enforcement issues. There is pressure to refine and extend the mandate of these units. As soon as they are institutionally secure, like all bureaucracies with political support, they will press for increases in their resources, establishments and powers. This will introduce additional elements in the increasingly complex area of treaty revision and constitution building in the EU. At this stage, it is very difficult to predict, with any degree of plausibility how this will work out. However, some move away from the (now very confusing) pillar structure is highly desirable towards an EU constitutional framework in which some powers belong to the Union, some are reserved by the member states and others are a shared responsibility. This would clarify the lines of political and legal responsibility, which is particularly important in police and judicial cooperation.

3. The clear reluctance of member states to agree to harmonisation of criminal law and criminal law procedure will, however, probably not be affected in the short-term. This will have the effect that most of the EU level decisions remain in the category of 'soft' law, texts with the appearance of law but which the courts cannot apply. Among the main categories of soft law are conventions negotiated under international law; even when ratified these do not enter the municipal law of most member states, unless some form of legislative action is taken, still less do they form a part of European law. Action plans, the most celebrated of which is that on organised crime, common positions such as that on terrorism, and recommendations (of which there are a large number), also fall into this category. States undertake to abide by these documents but they are without binding effect.

No sanctions exist to require states to abide by them, although for political reasons governments do not like to be seen ignoring a high proportion of them. Ratifications of conventions have been so slow that a new instrument called 'framework decisions' was agreed on following the Treaty of Amsterdam. These look like directives issued under the first pillar, which are genuine legislative acts with direct effect on the member states. Framework decisions are solemn declarations by member states of agreement on principles but it is up to the member states how they implement these principles. The implementation of action plans is uneven across the member states. Common positions, such as that on terrorism are not usually followed by legislative action on the part of States.

What happens to these categories of soft law depends on future political shocks and the general political climate of support for the EU. The EU Council may decide that some of the rules and recommendations in this domain should be made enforceable in the courts. The member states did this in the Treaty of Amsterdam by simply transferring, immigration and asylum policy from the third

to the first pillar. It is easy to imagine them enlarging what is understood by these headings to issues such as management and control of the external frontier. Or they may decide that a new function should be given a basis in European law. One of the most frequently mentioned is executive police powers for Europol as it gains a greater presence in operational policing.

The European Court of Justice may engage in some creative jurisprudence; the ECJ established the supremacy of European economic law and its direct effect on the member states in a series of landmark judgements, and it has extended the domain of EU law beyond the strict limits of the treaties. It already has the competence to give the authoritative interpretation of third pillar conventions. It could expand the area understood by free movement, immigration and asylum and perhaps other areas such as the EU directive on money laundering to give the EU greater criminal law competence. It is unlikely that the ECJ would repeat the extension of EU criminal law competence in the same way as in economic law, unless a clear political consensus emerges to do so, but some movement in this direction may be expected.

4. On the budgetary side September 11th may well serve as an incentive to expand EU spending on JHA and reduce the imbalance between objectives and financial means. At the very least, one would expect new programs for training, research and know-how transfer, as well as new pilot projects being introduced in the area of the fight against terrorism. Such new programmes could give the EU some authority to monitor whether minimum standards of performance are met by member states. This will certainly have implications for other areas of repression of serious crime. The authority and resources of the *Bundeskriminalamt* increased rapidly as a result of terrorist activity in Germany in the 1970s and did not diminish thereafter. We are likely to see this replicated at the European level.

5. An important impact of September 11th is likely to be that of a better balance between internal and external EU action. The terrorist attacks have highlighted in a dramatic way the global dimension and the need for a more active role of the EU in international cooperation. The US is the first obligatory partner, and the EU has already engaged in a number of measures to upgrade bilateral cooperation. While some of these measures have problematic aspects – such as the question of the adequate protection of personal data provided by the EU to the US – there can be no doubt that the extent of cooperation the EU has now engaged in marks a new departure in external action. The involvement of representatives of a third country in EU cooperation structures and mechanisms constitutes an important new feature. It is a particular sign of solidarity with the US but may not be easily transferable to relations with other third-countries. The Council has also decided to sustain a more active role for the EU in relevant JHA areas in the UN context. The EU has put pressure on a number of third-countries for more cooperation in the fight against the financing of terrorism. Taken together this amounts to a new dynamism of the EU in the external dimension of the AFSJ.

6. Greater clarity in the methods of cooperation may become a priority. The many different frameworks for cooperation are a hindrance. These include: a common strategy and an overall action plan (Ukraine), a targeted action plan (Russia – organised crime), a stability pact, a stabilisation and association process (Balkans), a common strategy and the Barcelona process (Mediterranean), an informal dialogue alongside the Task Force or the Joint Cooperation Committee (United States, Canada), and common approaches or joint positions within international organisations. The picture is further complicated by the EU's participation in a number of international fora (Council of Europe, United Nations, Financial Action Task Force, G8, Special Conferences, etc.). Member states also take initiatives, reducing the visibility of EU actions still further. The instruments for providing assistance to cooperative actions are also complex. To mention only obvious examples – regional

programmes, action plans, regional cooperation, and the methods used – MEDA (Financial support for the Euromed partnership), TACIS (Support for transformation in East Europe and Central Asia) and shortly CARDS (Assistance for the Western Balkans). The external relations of JHA would be clearer if they were part of a more integrated, overall vision and approach that was better understood by those responsible at the technical level. There should at least be regular assessments of each priority set out on a list, as is already the practice for the Balkans.

7. The management of the external frontier will acquire greater salience, especially if terrorist incidents happen inside the EU or further attacks on the USA are partially planned in Europe. This will draw much needed attention to the very complexity of the issues involved: the very different conditions pertaining to different sections and ports of entry to the EU, the very different kinds and categories of people seeking to enter the EU, the number and sensitivity of tasks at border check points, the varying perceptions and political significance of border controls. The disruptive effects of up-grading border controls and migration management systems at the future external border should not be over-estimated – a tendency among states neighbouring the EU and some academic analysts. Certainly if there are more rigorous personal checks on every individual seeking entry to the EU, if all goods crossing the external frontier are subject to detailed physical examination, the results would be disastrous. But if intelligence is upgraded and ways of filtering out any suspect individuals are improved, disruption can be kept to a minimum. All too often, the Justice and Home Affairs aspect of the enlargement process, particularly the requirement for candidate states to adopt Schengen norms, has been depicted in wholly negative terms. Images are conjured up of Fortress Europe or of a new Iron Curtain dropping across Eastern Europe, disrupting relationships between countries, which have hitherto enjoyed close ties. The reality is entirely different. The Union's objective is to construct an area of peace, stability and prosperity, which extends beyond the borders of the enlarged Union. However, the perceptions of the citizens of the relatively poor states neighbouring the EU are not likely to believe in this benign vision, unless flexible ways are introduced for handling local border traffic.

Conclusions

While September 11th makes it much more difficult for the EU to arrive at a better balance between the main aims of the AFSJ, it also provides some opportunities. Quite clearly a major new impetus has been given to certain difficult issues such as the European arrest warrant and the seizing of assets and evidence; more external action on JHA matters has been encouraged, with significant measures already adopted concerning cooperation with the US. The breakthrough on the European arrest warrant could well pave the way to a much wider application of mutual recognition in judicial cooperation. The shortcomings in terms of decision-making capacity, which have again become apparent after September 11th, could increase the willingness to engage in new reforms in the next Intergovernmental Conference, perhaps even including the controversial issue of more qualified majority voting. A better balance between ambitious objectives and institutional capacity to deliver would greatly add to the credibility of the AFSJ.

The danger is that a dynamic may be established which leads to an over-securitisation of European society with adverse effects on the internal cohesion of European societies. In particular certain minority groups could feel that they were subject to excessive attention. Also the legitimacy in the fight against terrorism can be used to undermine legality at the national and EU level. Anti-terrorist legislation inevitably diminishes individual rights, and this legislation can be abused. In addition, the

discretionary powers of police and security agencies can be extended and increased latitude given to these agencies can seem, in a fearful public opinion, to be justified. The EU, the member states and law enforcement agencies generally should remember the European Council's declaration on 21 September 2001 that the objective of these efforts to combat terrorism is a world of tolerance, peace and rule of law. The procedural and substantive rights of individuals should be protected with even greater vigilance in the new circumstances. It will be impossible to build a world of rule of law if the first step on the route is to disregard the fundamental principles of this rule.

The security decisions taken by the EU in the aftermath of September 11th have been numerous and far-reaching in their implications. Their effects are, however, uncertain because it is usually the exclusive responsibility of the member states to put them into effect. It is too early to evaluate how the States have fulfilled the obligations that they have accepted. Unfortunately, a systematic evaluation of the implementation of security policy is unlikely to be undertaken because it would encounter resistance in governments. Nonetheless, a thorough evaluation is necessary before clear judgements can be made on the implications of changing concepts of security on the form and substance of EU cooperation in the JHA field.