3

The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?

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Abstract: The EU's 'Area of Freedom, Security and Justice' is a hugely important area covering criminal law, terrorism, immigration, visa control and civil justice, as well as the massive area of free movement of persons. What is clear, however, is that measures which fall within its scope have the capacity to alienate EU citizens rather than making them feel aware of their European identity in a positive sense. This chapter examines some of the measures taken by the EU in this broad field which cause particular concern, namely a lack of democratic and legal accountability as well as inadequate regard to human rights. It focuses in particular on two areas in which human rights protection in the EU has been undermined. The first is in the field of data protection. The second is in the field of suspects' rights, particularly in thecontext of the European arrest warrant. The chapter concludes by considering why so many restrictions on freedom have been allowed to come about and suggests some possible solutions.

I. INTRODUCTION

SINCE THE 1997 Treaty of Amsterdam came into force, the European Union (EU) has had an 'Area of Freedom, Security and Justice' (AFSJ). While the scope of this 'area' is not clear conceptually,[1] its subject-matter covers at the very least the ambit of Justice and Home Affairs (JHA), formerly the domain of the EU's 'Third Pillar'.[2] Freedom, Security

[1] Nor even jurisdictionally, given that its territorial borders differ depending on what aspect of law is at issue—for example, the Schengen area has a different membership from that of the EU.

[2] Since the Treaty of Amsterdam, the civil elements of Justice and Home Affairs have been moved to Title IV of the EC Treaty, leaving criminal matters in the Third Pillar, which deals

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and Justice have their own Directorate-General within the European Commission.[3] The AFSJ is thus a hugely important area covering criminal law, terrorism, immigration, visa control and civil justice, as well as the massive area of free movement of persons.

One of the motivations for the concept of the AFSJ was an attempt to bring the EU closer to its citizens. This new paradigm might represent a bold and noble aspiration, if a somewhat nebulous one. What is clear, however, is that measures which fall within its scope have the capacity to alienate EU citizens rather than making them feel aware of their European identity in a positive sense. This chapter examines some of the measures taken by the EU in this broad field which cause particular concern. Although its scope will include criminal measures, as these have a clear ability to intrude on individual liberty, the chapter is not restricted to the EU's Third Pillar (the rather inelegantly named Police and Judicial Co-operation in Criminal Matters, or PJCC). This is because the EU action in the AFSJ has a certain porousness, crossing borders between EC and Third Pillar.[4]

However, it should be noted that a large tranche of regulation (now at least 40 per cent of all EU measures) takes place within the Third Pillar alone, either in addition to, but very often replacing, that of Member States in this highly sensitive area of criminal law and justice. What we see now, certainly within the Third Pillar of the Treaty on European Union (TEU),[5] is a substantial criminal law of the EU in the process of being created, which provides scope for development of new concepts, including constitutional concepts, in the EU. Indeed, the European Commission stated, in its final Tampere report of June 2004, that 'criminal law has to become a fully fledged EU policy'.

The EU is currently developing a new five-year strategy for Justice and Home Affairs and Security policy for 2009–14, as its present five-year Hague Programme comes to an end.[6] The groundwork for this has been set by the EU's 'Future Group', which has proposed some rather controversial

with Police and Judicial Co-operation in Criminal Matters. However, there is surely not an exact correlation between JHA and AFSJ, as the latter is wider (covering, for example, aspects of EC law, notably free movement of persons) and more nebulous than JHA.

[3] The Directorate-General for Justice, Freedom and Security home page lists the policy areas it covers, at the top of which is free movement of persons, illustrating the great width of this concept, going beyond Justice and Home Affairs.

[4] For example, in cases where competence is not clear, such as in environmental cases and in the cases involving passenger name records data and data protection, discussed below.

[5] But not solely—see, for example, Case C-176/03 *Commission v Council* [2005] ECR I-7879, regarding EC competence for environmental law under the EC Pillar.

[6] See Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ 2005 C53/1. For an analysis of The Hague Programme, see S Carrera and T Balzacq (eds), *Security versus Freedom: A Challenge for Europe's Future?* (Hampshire, Ashgate Publishing, 2006).

measures, including surveillance techniques and enhanced co-operation with the United States.[7]

The nature of all of this activity undermines the claim made by some theorists that the legitimacy of EU action should not be of primary concern because the EU lacks the competences of a traditional state and its powers are mainly economic. Andrew Moravcsik, for example, claimed that any democratic deficit is of less concern in the EU context because the EU still falls far short of what a nation state can do—it has very little coercive power and does not tax and spend: 'Of the 5 most salient issues in most west European democracies—health care provision, education, law and order, pension and social security policy and taxation—none is primarily an EU competence'.[8] Similarly, Ulrich Haltern suggests that those who aim to create 'foundation narratives' of the constitutional sort for the EU 'will be prone to making a laughing stock of themselves rather than suiting the Union's purpose', proposing instead that the EU be celebrated for what it is: 'a shallow' and 'superficial' entity engineered for the 'privileging of the commercial above all else'.[9]

Nevertheless, within the scope of the AFSJ are matters that are crucial to and indeed almost at the heart of constitutional law, concerning the relationship between the individual and public authorities. Bradley and Ewing[10] refer to constitutional law in this context as 'one branch of human learning and experience that helps to make life in today's world more tolerable and less brutish than it might otherwise be'. However, a significant question is whether, in this case, life has actually been made less 'brutish' in the EU. It is crucial that, if the AFSJ is to be further developed, this be achieved in the spirit of a 'constitutional moment', as a space of hope, rather than what Pocock has called a 'Machiavellian moment'[11] (that is to say, in an attempt to remain stable by any means in the face of a stream of irrational events).

However, unfortunately, it has become commonplace to observe that, within the EU, prospects seem better for achieving *Security* than either Freedom or

[7] See Future Group report: High-Level Advisory Group on the Future of European Justice Policy—Proposed Solutions for the Future EU Justice Programme, 11549/08 JAI 369, full text available at: www.statewatch.org/news/2008/jul/eu-futures-justice-report.pdf. The Commission has now finished consulting on the content of its new 5-year (2010–14) work programme on Justice and Home Affairs, and is expected to present its plans in a Communication to be issued in 2009. As it is likely that the 2009 Swedish Presidency of the Council will present conclusions on these, it is being dubbed the 'Stockholm programme'.

[8] A Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *Journal of Common Market Studies* 603.

[9] U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *European Law Journal* 14.

[10] A Bradley and K Ewing, *Constitutional and Administrative Law*, 13th edn (Harlow, Longman, 2002) 4.

[11] J Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton NJ, Princeton University Press, 2003).

Justice.[12] Measures taken by the EU since September 11 2001 illustrate this. The numerous Framework Decisions, Protocols and international agreements adopted by the EU include, for example: the EU definition of terrorism; the European arrest warrant; a plethora of measures for data collection and storage; the formal strengthening of Europol and Eurojust; and measures to freeze assets.[13] However, these actions have not always been matched by measures which strengthen human rights—for example, a proposed Framework Decision to provide a common minimum level of suspects' procedural rights throughout the EU has not yet been adopted, despite being originally proposed in 2004.[14] The EU's Third Pillar (the PJCC) continues to operate without great democratic scrutiny, mostly in secret (although the Lisbon treaty, had it been implemented, would have rectified this somewhat).

In a well-publicised article in the *London Review of Books*,[15] subsequently published as part of a monograph,[16] the American constitutional scholar Bruce Ackerman regretted the US Bush administration's response to the terrorist attacks in the United States, and suggested that 'new constitutional concepts' were needed to deal with the protection of civil liberties. Ackerman recommended a 'carefully controlled state of emergency' with 'legal and temporal limits'.

In his article (entitled 'Don't panic'), as well as urging the need for new constitutional concepts, and a carefully controlled state of emergency, Ackerman also suggested that Europe could influence this dynamic—perhaps providing a model of caution to the over-zealous US. Ackerman was in fact one of a number of liberal US academics who suggested Europe might offer a better way of dealing with the terrorist threat, or be better placed to act as mediator in zones of conflict. This is a vision of Europe as a contemporary example of the principles of Kant's 'Perpetual Peace', and also, thereby, a check or balance on the US.

II. FLASHPOINTS OF CONCERN

Action to date suggests cause for concern about the nature of EU[17] action and its ability to rise to Ackerman's challenge. Principal areas of concern

[12] See, eg, E Guild and F Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Hampshire, Ashgate Publishing, 2008) 289–307.

[13] All of which have some sort of impact on individuals and which I have detailed elsewhere: see S Douglas-Scott, 'The rule of law in the European Union—putting the security into the area of freedom, security and justice' (2004) *European Law Review* 219.

[14] Proposal for a Council framework decision on combating racism and xenophobia, OJ 2002 C75 E.

[15] B Ackerman, 'Don't Panic' London Review of Books, 7 February 2002, 15–16.

[16] B Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven CT, Yale University Press, 2006).

[17] This article does not consider the ability of individual European states to rise to Ackerman's challenge but it is suggested that their actions too cause concern—see, eg, the

are a lack of democratic and legal accountability as well as inadequate regard to human rights. I will take these in turn.

A. Lack of Accountability and Transparency

For a long time the EU's Third Pillar, in particular, has existed with little accountability or transparency. Throughout the 1990s, progress in the field of JHA was not swift, partly because much of its subject-matter—criminal law and procedure, as well as immigration—are areas close to national sovereignty, and partly because of the cumbersome nature of the legal instruments available under the Third Pillar. These are common positions, framework decisions, decisions, and, in particular, the Convention, which all require unanimity and allow little involvement of the European Parliament, reflecting the inter-governmental nature of the Third Pillar. However, the post-September 11 institutional climate illustrated that (what were by now) PJCC instruments could be relatively efficient, at least when the Member States are united in purpose, as they are in the desire for increased internal security in the fight against terrorism.

Yet the lack of political accountability still remains. The nature of the processes by which measures are adopted is very troubling. The European arrest warrant and common definition of terrorism were adopted by the Council in secret,[18] with minimal involvement of the national and European Parliaments.[19] There is also a dearth of parliamentary scrutiny over executive agencies such as Europol or Eurojust. This has been the nature of decision-making under the Third Pillar, in which matters that were previously the province of the domestic legislature are now decided at EU level, subject to remarkably little democratic control. Perhaps some of these measures could not have been taken so speedily had democratic controls been in place—the compelling nature of the need for security demands swift action, and the checks and balances of the democratic process tend to get in the way of efficiency. However, at present, the need for swift, efficient action results in a deplorable lack of scrutiny and transparency, suggesting that the rule of law is scarcely observed in this area of EU activity. This secrecy and lack of transparency within the AFSJ was berated by the ECJ in the case of

UK's Terrorism Act 2005, *A and Others v United Kingdom*, judgment of European Court of Human Rights, 19 February 2009.

[18] Although in some areas of EC work, the Council of Ministers has now opened up its legislative processes to a limited extent—see Council Rules of Procedure Art 4(1) and (2) and Art 207(3) EC; these have not yet been applied to the Third Pillar.

[19] See comments of House of Commons Select Committee on European Scrutiny 33rd Report, *Democracy Accountability and the Role of National Parliaments* HC 152-xxxiii-I, 21 June 2002.

Heinrich,[20] in which a disgruntled passenger brought a case against airport authorities who forced him off a plane he had boarded with tennis racquets in breach of EC safety regulations[21] on prohibited articles. However, the relevant measures had not been published by the EU Commission. The ECJ (in its Grand Chamber) held that an act adopted by a Community institution cannot be enforced against individuals before they have had the opportunity to learn of its existence. The ECJ stated that

> [i]n particular, the principle of legal certainty requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.[22]

In addition to the opaque and undemocratic law-making procedures under the Third Pillar (as if that were not enough!) there have also been the 'extra-EU' mechanisms for law creation, such as the Treaty of Prüm, or agreements within the G6—meetings which take place usually behind closed doors, in an opaque, impenetrable way, but which often end up informing, or even penetrating, EU criminal justice action.

The Treaty of Prüm was signed by a group of EU Member States (initially Belgium, The Netherlands, Luxembourg, Germany and Austria, later joined by France, Spain and Italy) in order to further closer co-operation and the exchange of information, including DNA profiles, fingerprints and vehicle registration data. Although all of its signatories are EU Member States, the Treaty was signed outside of the EU framework and is seen by many as working against the goal of Community-wide legislation in this area. However, the Justice and Home Affairs Council, meeting in June 2007, agreed to transpose substantial parts of the Treaty into the EU's legal framework, namely those provisions on the stepping up of cross-border co-operation, particularly in combating terrorism and cross-border crime, as well as those requiring all EU Member States to set up DNA databases.[23] In so deciding the Council ignored the views of the European Parliament, which was given only three weeks to scrutinise the proposal, and the concerns of the EU Data Protection chief. The original Prüm treaty version was adopted without giving the other Member States the opportunity to amend it, thereby undercutting the trend towards 'Community method' decision-making. This is unsatisfactory, given that the contents of Prüm have the capacity to make a decisive impact on individual liberty. Since Prüm is an

[20] Case C-345/06 *Gottfried Heinrich*, judgment of 10 March 2009.

[21] The relevant measure being the European Parliament and European Council Regulation (EC) No 2320/2002 establishing common rules in the field of civil aviation security of 16 December 2002, OJ 2002 L355/1.

[22] Case C-345/06 *Gottfried Heinrich*, judgment of 10 March 2009, para 44.

[23] Council Decision 2008/615/JHA on the stepping-up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ 2008 L210/1, Art 2.

international treaty, the capacity of national parliaments to scrutinise it was very limited; the EU Parliament ought therefore to have had time for a through scrutiny of the Prüm decision, rather than relying on statements as to its nature from the Council. It has also been suggested that transfer of Prüm into EC law is a breach of Article 10 of the EC Treaty (the principle of loyal co-operation). For example, Elspeth Guild writes, 'transferring privately negotiated treaties into the EU *acquis* does not fulfil the requirements of legitimacy. It appears underhanded and dishonest'.[24] Yet it seems that this 'Prümification' of European law will continue to take place, given that it will be more achievable for small groups, rather than all 27 EU Member States, to take the initiative on controversial issues, and then for them to be transferred into EU law.

The EU G6 is composed of the United Kingdom, Germany, France, Italy, Spain and Poland. At a meeting in Heiligendamm in March 2006 the G6 ministers discussed their joint response to terrorism, illegal immigration and organised crime. The House of Lords European Union Committee was extremely critical of the G6 decision to press forward with the 'availability principle' (which concerns making information from one Member State available in others—see below) and disregard data protection issues, commenting:

> A G6 meeting is not a forum in which ministers of some only of the Member States can purport to change EU policy, or even to make formal proposals for changes to EU policy (as opposed to expressing a hope or expectation that such policy will change). It is not clear that the ministers recognise this. The Conclusions record that other Member States 'will be fully informed about proposals made by the G6 countries and can participate in their implementation'. This is an extraordinarily patronising way of referring to the interests of three quarters of the Member States. There is no suggestion that those States might have views of their own about the desirability of these proposals, and so far from being grateful for being allowed to participate in their implementation, might even be opposed to them.[25]

So many EU, or EU-backed, initiatives in this area lack the safeguards of democratic and legal accountability which exist at national level or even within the EC Pillar. This is highly undesirable given the nature of the measures taken, which frequently involve intrusions into the liberty and private life of the individual.

It should also be noted that many Third Pillar actions, in particular, are not legislative initiatives but executive or operational measures. They involve the operations of various recently-formed executive agencies, such

[24] See, eg, Elspeth Guild's written evidence to House of Lords European Union Committee, 18th Report of 2006–07 Session: 'Prüm: an effective weapon against terrorism and crime?'

[25] House of Lords European Union Committee, 40th Report of 2005–06 Session 'Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm'.

as Europol or Eurojust, or the co-ordination and co-operation of national police or security services. Such operations are not highly public at national level, and their nature is even murkier within the EU. Yet, as well as furthering the push of EU competence into national areas of control, the activities of these agencies raise crucial issues of individual rights, particularly in the field of data control. However, the sorts of controls and scrutiny necessary for operational measures differ from those in the legislative field, making the issues within the Third Pillar even more complex.

Indeed, much of the action within the Third Pillar occurs at a sub-state and operational level, agreed by groups of experts and professionals—almost acts of private law created with little state input (certainly none from any parliament). In the context of international commercial law, Gunther Teubner described a similar development as a new global 'lex mercatoria'.[26] Within criminal law and justice such a phenomenon not only suffers from problems of accountability but also human rights and justice concerns where coercive law is enforced in private (such development has been described as a 'lex vigilatoria',[27] paralleling Teubner's 'lex mercatoria' in the public law field). It is just this sort of arrangement that traditional constitutional law (or even national criminal law) is liable to miss; however, there are considerable consequences of this growth of executive power, both for individual liberty and for a lessening of democratic accountability.

B. Lack of Legal Accountability?

The EU has also been criticised for a lack of judicial control over the Third Pillar. The ECJ may give preliminary rulings only where the Member States have opted to let it do so under Article 35 TEU. Furthermore, Article 35 also specifically states that the Court of Justice shall have

> no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

There is also, unlike under the EC Pillar, no possibility for individuals and companies to bring direct actions for the annulment of Third Pillar measures (although it is questionable how effective these actions are in the context of the EC pillar, given the inflexible standing rules under Article 230(4) EC). Under Third Pillar procedures only the Commission and Member

[26] See G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law without a State* (Aldershot, Dartmouth Publishing, 1997).

[27] T Mathiesen, 'Lex Vigilatoria—Towards a control system without a state?' European Civil Liberties network, *Essays for civil liberties and democracy in Europe*, available at: www.ecln.org/essays/essay-7.pdf.

States may bring direct actions for annulment of framework decisions and decisions under Article 35(6) TEU. Nor, in the majority of cases, do national courts (whose role in many of the matters discussed in this chapter remains unclear) provide a forum in order to fill this gap of court control.[28]

However, notably, a new form of procedure, the urgent preliminary ruling procedure, was introduced on 1 March 2008.[29] This was designed specifically with the AFSJ in mind, indicating a desire to improve access to the ECJ in this area, and to enable the Court to deal far more quickly with sensitive issues, such as those relating to deprivation of liberty, or proceedings concerning custody of children. The Rules of Procedure of the Court of Justice were amended by inserting a new Article 104b that sets out the new urgent procedure. A special chamber of five judges deals with these urgent references, and such cases carry the suffix 'PPU'. For example, *Santesteban Goicoechea*[30] concerned the Framework Decision 2002/584/JHA on the European arrest warrant. It seems that national courts are not yet fully acquainted with this new reference procedure, since a preliminary point in *Goicoechea* concerned whether the ECJ was properly seised of the case given that the order for reference referred to Article 234 EC only, whereas the interpretation sought concerned the European arrest warrant Framework Decision, a Third Pillar act to which Article 35 TEU applies. This did not seem to worry the ECJ, which held that it did have jurisdiction notwithstanding the making of the reference under Article 234, pointing out that, in accordance with Article 46(b) TEU, the system under Article 234 EC also applied to the Court's jurisdiction to give preliminary rulings under Article 35 TEU. Therefore the fact that the order for reference does not mention Article 35 TEU but rather Article 234 EC does not of itself make the reference for a preliminary ruling inadmissible.[31]

Goicoechea illustrates a more proactive approach taken by the ECJ in areas where its jurisdiction has not been seen as straightforward—other examples of this would be the *Pupino* and *Kadi* cases.[32] *Pupino* is another case which illustrates spill-over of function and principle from the EC to the Third Pillar. In *Pupino*, the ECJ held that Third Pillar measures, although explicitly lacking direct effect according to the wording of the TEU, could

[28] Although there was much litigation in national courts concerning the domestic legislation implementing the European arrest warrant—see further below.

[29] Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice and amendments to the Rules of Procedure of the Court of Justice adopted by the Court on 15 January 2008, OJ 2008 L24/39.

[30] Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR 000.

[31] See also Case C-467/05 *Criminal Proceedings against Giovanni Dell'Orto* [2007] ECR I-5557, para 36.

[32] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR 000.

be interpreted as having indirect effect, thus giving the ECJ the jurisdiction to review the ability of national measures to be interpreted in conformity with them. This ruling has been interpreted as a very bold finding by the Court, raising the issue of whether the Court will take further steps with Third Pillar law, finding it to be capable of primacy over national law.[33] In *Kadi*, (which concerned an EC regulation and not a Third Pillar measure), the Court did not follow the Court of First Instance, which had held that the primacy of the United Nations (UN) and international law prevented review of the measure on the basis of EU standards, instead finding that the obligations of an international agreement could not prejudice the constitutional principles of the EC Treaty. From there it was able to go on to review the measure under EU rights standards and to find that Mr Kadi's right to effective judicial process and his right to property had been violated. *Kadi* reveals a similar confidence to *Pupino* in terms of the ECJ asserting a jurisdiction for itself, relying on the autonomy of EU law to show less deference than previously to UN measures and international law. So there are signs of greater judicial willingness at the ECJ to check measures that it previously might not have been willing to assert jurisdiction over. Whether this will result in increased protection for the individual, however, remains to be seen. In Mr Kadi's case, the contested measures were simply re-adopted, but this time with the giving of reasons and notice to him.

C. Lack of Regard for Human Rights[34]

In the light of the very wide-reaching array of measures which the EU is taking within the AFSJ, it is essential that there be adequate protection of fundamental rights. In the absence of a legally binding Charter of Fundamental Rights (although at least the ECJ now appears willing to refer to the Charter in its jurisprudence[35]) it is all the more critical that the EU be aware of the need to protect fundamental rights and adopt measures if necessary. The Fundamental Rights Agency appears unlikely to play a critical

[33] See, eg, K Lenaerts and T Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law' (2006) 31 *European Law Review* 287.

[34] On this issue generally see Network of Independent Experts on Fundamental Rights, Thematic Comment, 'The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats' (March 2003) and subsequent reports in 2004 and 2005. This Network produced very valuable annual reports on the state of fundamental rights in the EU following its inception in 2002. However, its contract was terminated in 2006 and was not subsequently renewed. See also the European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–08 (2007/2145(INI)) in which the Parliament expressed grave concerns about the number of rights violations in the EU.

[35] It referred to the Charter in, for example, Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECR I-3633.

role in this regard either, given that its role is mainly limited to the gathering and provision of information on rights rather than an ability to take any steps regarding enforcement.[36] Although the EU has succeeded in adopting a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law,[37] which renders criminal intentional public acts designed to incite violence or hatred, or trivialise genocide and similar atrocities, there has been less success in other areas. The remainder of this Section will examine two areas[38] in which protection of fundamental rights in the EU appears to have been undermined. The first is the field of data protection. The second is the field of suspects' rights, particularly in the context of the European arrest warrant.

(i) Data and Privacy

The EU has long considered control and exchange of information to be a necessary weapon in the fight against terrorism: 'Timely and accurate information—its collection, analysis and dissemination—is essential to prevent acts of terrorism and to bring terrorist suspects to Justice'.[39] So wrote the European Union's counter–terrorism co-ordinator, Gijs de Vries.

There are already diverse EU-wide databases in existence across the field of Justice and Home Affairs. For example, states exchange immigration and crime-related information through the Schengen Information System. Crime-related information is also exchanged through the Europol Information System to which the Europol Convention applies. The Eurojust Information System applies to national prosecutors and courts exchanging information and the Customs Information system applies to data on, for example, smuggling collected by customs officers.[40]

[36] Indeed, its role seems to have been limited partly as a result of an unsightly scrap between the EU and the Council of Europe over the protection of rights, and the Council of Europe fear that they might lose pre-eminence to the EU in this field; see, for example, O De Schutter, 'The two Europes of human rights: the emerging division of tasks between the Council of Europe and the European Union in promoting human rights in Europe' (2008) 14 *Columbia Journal of European Law* 509.

[37] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ 2008 L328/55.

[38] And others are omitted simply on account of lack of space. One might equally well have highlighted the worrying growing powers of Europol and the European Police Agency, or the sweepingly broad definition of 'terrorism' in the framework decision on terrorism.

[39] G de Vries, 'The European Union's Role in the Fight Against Terrorism' (2005) *Irish Studies in International Affairs* 3.

[40] See: Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at Their Common Borders, OJ 2000 L239/19; Convention Based on Article K3 of the Treaty of European Union, on the Establishment of a European Police Office, OJ 1995 C316/2, Arts 2–3; Decision 2002/187/JHA of 28 February 2002 Setting Up Eurojust with a View to Reinforcing the Fight Against

It seems, in fact, that the only domain of European social life that is still untouched by EU data protection law is intelligence-gathering by national intelligence agencies. National agencies such as Germany's Office for the Protection of the Constitution and Federal Intelligence Service generally do not come within the reach of EU law at all. These agencies have been expressly excluded from the ambit of the European Union's Third Pillar. There is no equivalent of the FBI, CIA or MI5 and MI6 at EU level.

In addition to the databases above, further measures have been adopted which have a considerable impact on private data. These will now be considered.

(a) Data Retention

One earlier initiative was the controversial Directive 2002/58/EC,[41] Article 15 of which permitted the adoption of legislation by Member States allowing for the retention of data for the purposes of the prevention, investigation, detection or prosecution of crime and criminal offences. This Directive was amended in 2006 by Directive 2006/24/EC,[42] which now obliges, rather than merely permits, operators of public telephone services and internet service providers to retain personal data such as the calling number, the user ID and the identity of a user of an IP address for a period of between six months and two years. The aim is, of course, to ensure that the data retained is available for the purpose of the investigation of criminal acts which involve the use of electronic communications systems. Notably, the measure involves the retention of *all* communications data and not just the data of crime suspects.[43]

This Directive was the subject of a very negative opinion by the European Data Protection Supervisor, Peter Hustinx (the independent supervisory authority devoted to protecting personal data and privacy and promoting good practice in the EU institutions and bodies), who asserted that its possible benefits in the fight against crime were outweighed by the infringements

Serious Crime, OJ 2002 L63/1, Art 5; Council Regulation 515/97 On Mutual Assistance Between the Administrative Authorities of the Member States and Cooperation Between the Latter and the Commission to Ensure the Correct application of the Law on Customs and Agricultural Matters, OJ 1997 L82/1, Art 30.

[41] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ('Directive on privacy and electronic communications'), OJ 2002 L201/37.

[42] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, amending Directive 2002/58/EC, OJ 2002 L105/54.

[43] Implemented in the UK by the Data Retention (EC Directive) Regulations 2007 and 2009. Note that in the UK the Anti-Terrorism Crime and Security Act 2001, Part 11: Retention of Communications Data set up an almost identical 'voluntary' data retention scheme.

of the right to private life.[44] Article 8 of the European Convention on Human Rights specifies that public authorities may only interfere with this right in narrowly-defined circumstances, none of which would appear to apply to such a blanket authorisation of retention of all data. This Directive was subject to legal challenges: one brought against it in the Irish courts by the human rights group Digital Rights Ireland,[45] as well as another action brought against it by the Irish government itself, which claimed that the Data Retention Directive was not adopted on an appropriate legal basis, which latter was rejected by the ECJ.[46] Ireland had argued that the Directive could not be based on Article 95 EC since its 'centre of gravity' did not concern the functioning of the Internal Market but rather the investigation, detection and prosecution of crime, and that measures of this kind ought therefore to have been adopted on the basis of the articles of the EU Treaty relating to police and judicial co-operation in criminal matters. The Court rejected this argument, holding that it been properly adopted on the basis of Article 95 EC.[47] This action, as the Court noted, related solely to the choice of legal basis and not to any possible infringement by the Directive of fundamental rights resulting from interference with the exercise of the right to privacy. The *Digital Rights Ireland* action, which is brought on the basis of fundamental rights arguments, had not been determined at time of writing.

(b) The 'Principle of Availability'

Another key feature of the EU's desire to control and make information available between authorities across borders is the so-called 'principle of availability'. The principle of availability is the idea that information needed to fight crime should be able to cross the borders of the EU without obstacles. Criminals or terrorists are freely able to cross the EU's borders, so it is desirable that information concerning them should travel equally freely. For some time there have existed both bilateral and multilateral agreements whereby law enforcement agencies in one EU Member State

[44] Opinion of the European Data Protection Supervisor of 29 November 2005 on the proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC. See also EDPS: Second opinion of the European Data Protection Supervisor on the review of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ('Directive on privacy and electronic communications'), OJ 2009 C128/28.

[45] More information about this challenge may be obtained at Digital Rights Ireland website: www.digitalrights.ie/category/data-retention/.

[46] Case C-301/06 *Ireland v Council of the European Union, European Parliament*, judgment of 10 February 2009.

[47] In this respect this judgment may be contrasted with that of the PNR case, Joined cases C-317/04 *Parliament v Council* and C-318/04 *Parliament v Commission* ECR [2006] I-4721, on which see further below.

may make requests to those in another EU state on specific cases. These were followed up by the EU Convention on Mutual Assistance in Criminal Matters, adopted on 23 August 2000. However, these procedures take time, involve a formal request and sometimes need judicial authorisation. It was thought preferable for the EU to have its own swifter and more effective means of information exchange.

The need for efficient 'exchange' of information between law enforcement agencies was formalised by the European Council Declaration on 25 March 2004, which followed the Madrid bombings on 11 March 2004. The principle of availability is also one of the key items in the 2005 Hague Programme and the EU has been working hard to put it in action since then. The European Commission produced a draft Framework Decision[48] to implement the principle of availability. Under this draft proposal, the authorities of any Member State would enjoy the same right of access to information held by any other authority in the Union as applies to state authorities within the state where the data are held. Thus, national sovereignty over the collection, retention and manipulation of data would be transformed into an EU-wide right of use of data. National borders would be removed from the principle of data collection, retention and use. Furthermore, as if this were not radical enough, the intention is that exchange should cover information on all types of crime, as with data retention, not only terrorism (which provided the impetus for its introduction following the Madrid bombings).

While efficient exchange of data and information between EU states might seem desirable in the current world of cross-border crime, the principle raises a number of serious data protection issues, notably because of the sensitivity of the data and the reduced control of the use of the information. It will become very difficult for individuals to track and trace information held about them and passed from one Member State to another (and even to third countries) or even to determine if the information held about them is accurate.

Although negotiations on this draft Framework Decision seem to have stalled for the time being, initiatives taken by EU states under the Treaty of Prüm, and by the EU G6, discussed above, have had a strong impact on the fast implementation of the principle of availability. That the EU is progressing by these extra-EU (and undemocratic) means to implement key policies is highly undesirable and heightens the need for a data protection measure (see below). In 2006 the Council adopted a Framework Decision

[48] Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC, COM(2005) 438 final.

on simplifying the exchange of information between Member States.[49] This act more moderately facilitates exchange of information by setting down a common procedure through which police in one EU state may request information from police in another EU state, establishing a duty to co-operate with such requests, as well as listing an exhaustive set of reasons for denying co-operation.

The desire for swift implementation of the principle of availability and achievement of a 'free market' in access to information in national or EU databases are good examples of how EU governments have used the 'war on terror' to increase the number of security measures available by introducing sweeping powers of surveillance and control, going far beyond the need to control terrorism, while neglecting counterbalancing rights such as data protection.

(c) Biometric Regulation

The Italian philosopher Giorgio Agamben sparked a debate when he published an article in the *Süddeutsche Zeitung* (and later in the *German Law Journal*[50]) describing how he had cancelled his trip to New York University to give guest lectures in 2004. Agamben's ground for doing this was his unwillingness to subject himself to new biometric measures applying to foreign citizens travelling to the United States. These measures require non-US citizens to undergo data registration, as well as have fingerprints and iris records taken. Agamben said that his protestations went beyond individual sensitivity, claiming that this involved the appropriation of the most private and unsheltered element of human beings—the biological life of bodies. This, said Agamben, was nothing more than *normalisation of a biopolitical status* in so-called democratic states of procedures previously considered exceptional and inhumane. He saw this as a key step over the threshold into what Foucault had described as the progressive animalisation of man—the taking of fingerprints, electronic tattoos. This, he stated, should not be seen as being justified by security reasons.

Such measures are not singular to the United States. The EU has adopted its own biometric measures, resulting in a normalisation which will, at the very least, require a counterpoint in a strong sense of Freedom and Justice. In 2004 the Council adopted a Regulation[51] on standards for security

[49] EU Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities, OJ 2006 L386/89, which must be implemented in all Member States by 18 December 2008. It is commonly known as the 'Swedish Initiative', having arisen from a proposal from Sweden in 2004.

[50] G Agamben, 'Bodies Without Words: Against the Biopolitical Tattoo' (2004) 5 *German Law Journal* 2.

[51] Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ 2004 L385/1.

features and biometrics in passports and travel documents issued by Member States. This Regulation requires Member States to introduce biometric identifiers for passports issued by them. The aim is to establish a reliable link between the document and its genuine holder and to facilitate checks at external borders.

This is a significant step—the 'normalising' of biometric requirements such as fingerprinting connotes a rather dystopian vision. It seems likely that this Regulation will lead to an EU-wide database containing biometric information of passport applicants and probably other relevant data needed for a proper management of the system. The risk is that such a centralised EU database could become a mass surveillance operation tracking the movements of all residents and citizens. Plans to give access to all law enforcement and internal security agencies also risk the misuse of sensitive personal information. Yet it has even been doubted if the EC had the competence to adopt this Regulation: the measure was adopted under Article 62(2)(a) of the EC Treaty, but it has been suggested that the Regulation exceeds the legal powers conferred upon the Community to adopt measures concerning checks at external borders.[52]

Once again, at the very least, there is a great need for countervailing data protection measures to be put in place.

(d) PNR Agreement between the EU and the US

After the September 11 terrorist attacks, the US authorities determined that airlines flying into the United States should be required to give the US Bureau of Customs and Border Protection (CBP) access to the passenger name records (PNR data) in their computer systems. The PNR data were to be extracted by the CBP and stored in the CBP's own computer system. This was designed to allow the CBP to check on any terrorist connections of passengers before their arrival in the United States, as well as to enable it to preserve the data for future investigations. However, this system placed EU airlines in a difficult position given the extensive nature of the data required: details of up to 35 types of passenger information, including, for example, the passenger's choice of in-flight meals. They could submit to the US rules—but at the risk of a breach of data protection rules of individual EU states, some of which provide greater protection of individual data than does US law. Alternatively, they could refuse to provide the information—and find themselves in breach of US law, and subject to heavy fines or even unable to land in the United States.

In order to remedy this awkward situation, it was determined that the EU should adopt an agreement with the United States on the handover

[52] See, eg, S Peers, 'The Legality of the Regulation on EU Citizens' Passports' on: www.statewatch.org/news/2004/nov/11biometric-legal-analysis-htm.htm.

of PNR records, thus binding the airlines at EU level, as well as setting certain standards as to the types of data which could be handed over. The low level of data protection in the US had been subject to criticism, so, after some investigation of the matter, the Commission adopted a decision on adequacy[53] of US standards of protection of data on 14 May 2004—a decision that was highly controversial, given widespread criticism of US levels of protection of personal data. This in turn enabled the EU Council to adopt the agreement of 17 May 2004 on the exchange of PNR between the European Community and United States.[54] The legal basis for these acts was the EC Data Protection Directive 95/46,[55] in force since 1998, which standardises data protection rules for all market actors in the EC.

The European Parliament challenged in the ECJ both the Commission's and the Council's decisions on PNR with the United States. There were numerous legal grounds for the Parliament's challenge, most of which went to the inadequate protection of privacy, but which included the competence of the EC to adopt the agreement under the First Pillar.

The Court of Justice found for the European Parliament.[56] However, the ECJ chose not to ground its judgment on lack of data protection and violations of privacy by the PNR agreement; in fact, the Court of Justice did not consider any of the privacy-related claims. Instead, it found that neither the Commission nor the Council had the power to enter into the PNR agreement under the EC Treaty. It determined the case on the issue of EC competence.

Since the PNR agreement involved private, commercial European air carriers, the Commission and the Council believed they could adopt the measure under the EC Pillar, which is used as a basis for such regulation of air transport as there is in the EU. However, the Court of Justice disagreed, stating that since the text of the Data Protection Directive expressly does not cover '[data] processing operations concerning public security … and the activities of the State in areas of criminal law' (that is, matters which fall under the Third Pillar), and since the PNR agreement covered 'processing

[53] Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection, OJ 2004 L235/11.

[54] Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ 2004 L183/83, and corrigendum at OJ 2005 L255/168.

[55] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

[56] Joined cases C-317/04 *Parliament v Council* and C-318/04 *Parliament v Commission* ECR [2006] I-4721. However, not to cause too much turmoil for the governments and the airlines, the Court of Justice allowed the Commission's decision—and, therefore, the PNR agreement too—to stay effective until 30 September 2006.

operations concerning public security and the activities of the State in areas of criminal law', the Commission's decision could not be based on the Data Protection Directive. It applied a similar logic to annul the Council's decision. The Court therefore clearly regarded these measures concerning the transfer of PNR data as squarely within the Third Pillar, stating that the data transfer covered by that agreement was 'not data processing necessary for a supply of services, but data processing regarded as necessary for safeguarding public security and for law enforcement purposes'.[57]

However, what is disappointing is the refusal of the ECJ to address the Parliament's arguments based on human rights, as well as the total absence in the ECJ's judgment of any reference to fundamental rights outside of the Data Protection Directive—that is to say, no reference to the ECHR Article 8 nor to the Charter of Fundamental Rights (which it had not yet referred to at all at this date).[58] Indeed, the practical result was that a new PNR agreement was adopted in October 2006,[59] this time under the Third Pillar, which is even less protective of personal data than the one annulled by the Court. For example, under the new agreement, data can be shared with third countries. There have also been practical problems in the accessing of data from the US Department of Homeland Security: individual requests in the United States for such PNR data have typically taken more than a year to answer—many times longer than the legal time limits in the US Privacy Act and Freedom of Information Act. Further, when individuals have requested 'all data' about them held by the DHS, often they have not been given any of their PNR data.[60] This lack of a clear remedy for wrongful use and transmission of personal information under PNR sits very uncomfortably with the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights. It has also proved very difficult to establish if records such as PNR do in fact contribute to the fight against terrorism or organised crime—the House of Lords European Union Select Committee complained that it was not given enough information of, for example, counter-terrorism operations in which PNR data had been relied on.[61]

However, since the EU-US agreement, the EU has proposed its own Framework Decision on the retention of PNR data.[62] If adopted, this

[57] *Ibid*, para 57.

[58] It should be noted that such a response was not unique from the ECJ—it similarly failed to respond to human rights concerns in addressing the legality of the Family re-Unification Directive: Case C-540/03 *Parliament v Council (Family Reunification)* [2006] ECR I-5769.

[59] Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, OJ 2006 L298/29.

[60] www.papersplease.org/wp/2008/12/24/dhs-admits-problems-in-discl.

[61] EU/US Passenger Name Record (PNR) Agreement, House of Lords European Union Committee, 21st Report of Session 2006/07.

[62] Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, COM(2007) 654 final.

measure would establish immense databases tracking the travel of every individual, by logging details of every individual flight. Such information could be retained for 13 years. The information could also be accessed by other EU countries without any prerequisite of individual suspicion, nor of a warrant or prior permission. The proposal envisages using this information for 'profiling' of all passengers. As originally proposed, the database would apply only to international flights (meaning those entering or leaving the EU), but some EU states wish to extend this to include all flights within the EU. Indeed, the United Kingdom seeks to expand on this by creating a database of all ferry and rail traffic within the EU. The Commission's proposal has already been the subject of criticism across Europe from, for example, the European Data Protection Supervisor, who stated that it did not represent 'a proper balance between the need to combat such illegality and the rights of the innocent majority to go about their daily lives without undue interference by the State'.[63]

(e) Lack of Countervailing Measures Protecting Fundamental Rights

These are only four measures out of an alarmingly large group adopted by the EU which have serious consequences for human rights protection. What is also notable is that many of these measures relate to data collection by the private sector, namely, airlines in the case of PNR, and telecommunications companies in the case of data retention.[64] All sorts of issues arise as to how and by whom these huge flows of information are to be controlled—and indeed as to who owns the data, who is to be held accountable and responsible for exchange and passing on of data, whether it can be sold and how it can be tracked. There is no body with overall control, just a fragmented collecting and processing of information. Very basic questions as to what exactly constitutes information also remain unanswered.

A surely crucial question is whether there is any quantifiable benefit from this immense collection and retention of data and biometrics (at, it should not be forgotten, great financial cost). More information is not necessarily preferable. Is it necessary? Is it proportionate to any threats we face? Can it help anticipate or prevent dangerous activities? Does it make us more secure? Or does it invade our privacy and increase surveillance of

[63] Opinion of the European Data Protection Supervisor on the draft Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, OJ 2008 C110/1.

[64] Additionally, SWIFT (The Society for Worldwide Interbank Financial Telecommunications), which coordinates payments between financial institutions and has its headquarters in Brussels and offices in the US, and was revealed in 2006 to have breached privacy laws in passing details of European banking transactions involving the US to the US Government since the terrorist attacks in the US of 11 September 2001. See, eg, the Article 29 Data Protection Working Party 01935/06/EN WP128 Opinion of 22 November 2006 on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT).

individuals without promoting individual and collective safety? Does it increase suspicion, and undermine social cohesion?

(f) Counterbalancing Data Protection Measures

All four measures discussed above create a risk of misuse of personal data, including data of innocent citizens who are not suspects in criminal proceedings of any kind. These initiatives, apart from raising the spectre of an Orwellian Big Brother state, do require, by way of complement, stringent measures to protect human rights against possible abuse. Notably, implementation of the above privacy-infringing measures has been far swifter than introduction of any complementary data protective measures. The only currently operational (at time of writing) data protection measure within the EU, the Data Protection Directive,[65] does not apply to the processing of personal data in measures under the EU Third Pillar, nor in any case to processing operations concerning public security, defence, State security and the activities of the State in areas of criminal law.

However, after several years of discussions and debates with the EU institutions, the Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters was adopted by the Council on 27 November 2008.[66] This is a step forward, even if it is not totally satisfactory in the protection it provides. Once again we may look to the European Data Protection Supervisor for informative critical comment,[67] who, after having noted that he welcomed its adoption, as an important first step forward in a field where common standards for data protection are very much needed, also stated that he did not see the level of data protection achieved in the final text as fully satisfactory. In particular, he regretted that the Framework Decision only covers police and judicial data exchanged between Member States, EU authorities and systems, and does not include domestic data. He also regretted that no distinction is made between different categories of data subjects, such as suspects, criminals, witnesses and victims, and saw a need for an adequate level of protection for exchanges with third countries according to a common EU standard as well as a need for consistency with the First Pillar's Data Protection Directive 95/46/EC, in particular by limiting the purposes for which personal data may be further processed.

[65] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281/31).

[66] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ 2008 L350/60).

[67] European Data Protection Supervisor (EDPS): Press release 28 November 2008.

Data protection in the EU is highly unsatisfactory. At the very least, what is needed is for overarching rules to be built into measures and programmes controlling EU databases, which would ensure respect for privacy.[68] These must include the automatic deletion of data at the end of the collection period, the prohibition of copying of data for any purpose, prevention of unauthorised access and duplication, and measures to ensure that sensitive information regarding ethnic origin, religion, race and other matters covered by EU non-discrimination law is not revealed.[69]

(ii) Suspects' Procedural Rights

Privacy is not the only area in which protection is lacking. Another area in which counterbalancing provisions to protect individuals are necessary is in the area of suspects' rights.

Criminal laws and procedures differ substantially between EU Member States, particularly between common law and civil law groups. EU Member States adopt different approaches to offences such as abortion, euthanasia, blasphemy and inciting race hatred. Criminal investigations may also take different procedural forms within different EU Member States. The harmonisation of such different approaches would take many years and is generally seen as undesirable; in any case, existing EU law allows for no such harmonisation. However, continued differences between systems can lead to a lack of mutual trust. For example, advocates of common law systems sometimes complain that the civil law emphasis on written evidence does not give defendants adequate rights and protections. Conversely, civil law proponents allege that the adversarial nature of the common law prejudices those defendants who cannot afford expensive lawyers to act for them.

It is important for the judicial authorities of each Member State to have confidence in the judicial systems of the other Member States. Such faith and mutual trust was, for example, supposedly the basis for the adoption of the European arrest warrant (EAW),[70] which abolished the practice

[68] Notably, in the case of *S and Marper v United Kingdom* (App Nos 30562/04 and 30566/04) (2009) 48 EHRR 50, the European Court of Human Rights was highly critical of the EU for its obsessive collection and retention of personal data.

[69] Elspeth Guild, Kees Groenendijk and Sergio Carrera, CEPS Policy brief No 173, October 2008, 'Ten Recommendations on Freedom, Security and Justice for the European Parliament Elections'.

[70] Mutual recognition is also the basis of other measures; an example is the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ 2008 L327/27, which will enable sentenced persons to be transferred to another member State for enforcement of their sentences. A further example is the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ 2008 L337/102.

of extradition between EU states, making surrender automatic on the fulfilment of certain procedural conditions. It has also been cited frequently by the European Court of Justice as the basis for the enforcement of the *ne bis in idem* system on forbearance of prosecutions.

Yet the results of undemocratic lawmaking procedures and the dangers of pressing ahead with measures which strengthen security without considering too deeply fundamental rights implications can be seen in the operation of the European arrest warrant, and in the flurry of legal actions brought once the European arrest warrant was implemented into national law—litigation in national courts over points that could have been handled at the pre-legislative stage if national parliaments had been more involved. It also illustrates deep problems in the EU regarding lack of mutual trust in each other's legal systems and in the lack of protection of individual rights.

The European arrest warrant[71] is used to secure the arrest and surrender of an individual for the purpose of conducting criminal proceedings against them in another Member State. The requesting state does not have to show that there is a case to answer and the merits of the request are taken on trust—there are limited grounds for refusing enforcement. Traditional exceptions for political, military and revenue offences have been abolished. Further, for a long list of 32 offences, Article 2(2) of the Framework Decision removes the principle of double criminality, which is only satisfied when the act in respect of which extradition is sought is recognised as criminal in both the requesting and extraditing state. In 2007, EAWs were used in over 9400 cases. In its report the Commission describes the EAW as 'the first, and most symbolic, measure applying the principle of mutual recognition'.[72]

However, its application has not been without problems. A specific problem concerns Member States surrendering their own nationals. Some EU Member States have provisions in their constitutions restricting the extradition of their own nationals and the EAW has come under attack in a number of national courts on this basis. In April 2005 the Polish Constitutional Tribunal found that the EAW offended the Polish Constitution's ban on extraditing Polish nationals.[73] In July 2005 the German Constitutional Court annulled Germany's law transposing the Framework Decision

[71] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/1.

[72] Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), COM(2006) 8 final.

[73] An unofficial translation, provided by the Polish Constitutional Tribunal, has been published by the Common Market Law Reports: 'Re Enforcement of a European Arrest Warrant' [2006] 1 CMLR 36.

because it did not adequately protect German citizens' fundamental rights.[74] The Supreme Court of Cyprus has found the EAW to fall foul of a clause in the Constitution of Cyprus prohibiting their citizens from being transferred abroad for prosecution.[75] This has meant that the EAW procedure was for some time not operative in these countries and old cumbersome extradition procedures had to be used instead. Nor has new implementing legislation in these states dramatically changed the situation. Subsequent Polish legislation has not completely abandoned the requirement of dual criminality where warrants are issued in respect of its nationals, nor has it faithfully reproduced the Article 2(2) list in its legislation. Germany still requires dual criminality in certain cases. Ireland requires dual criminality if it issues an EAW which concerns one of its own nationals.[76]

Of critical importance, however, was a challenge brought to the legality of the EAW in the ECJ, because, unlike these other challenges, this was the only action challenging the actual validity of the EU measure itself, rather than specific national implementing measures, and so could have proved fatal to the EAW. A preliminary reference was made to the European Court of Justice from the Belgian Supreme Court (Court of Arbitration) on 13 July 2005, on the issue of whether the EAW Framework Decision itself was null and void for violating human rights, and more specifically the principles of legality, equality and non-discrimination, because it abolishes the double criminality requirement.[77]

The ECJ, following Advocate General Ruiz-Jarabo, took the view that the European arrest warrant does not breach the fundamental rights to equality and to legality in criminal proceedings. However, this was hardly a satisfactory judgment. First, considering its huge importance (illustrated by the fact that 10 Member States gave opinions) it was remarkably brief—a judgment of only 62 paragraphs, only 18 of which dealt with the submissions on the fundamental rights points,[78] although it was in this case that the ECJ explicitly mentioned the Charter of Fundamental Rights for the first time. Secondly, the reasons the Court gave for finding the EAW not to breach fundamental rights were unsatisfactory. The Court simply said that the EAW did not infringe the principle of legality (that is to say, the claim that it would be uncertain what the specific elements of the extradition

[74] Decision of 18 July 2005, upon an application by a German national, Mamoun Darkazanli, whose extradition was sought by the Spanish authorities on alleged Al-Qaeda terrorist charges.

[75] Decision of 7 November 2005.

[76] See annexe to Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2007) 407 final.

[77] Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECR I-3633.

[78] See for example on this F Geyer, 'European Arrest Warrant: *Advocaten voor de Wereld VZW v Leden van de Ministerraad*' (2008) 4 *European Journal of Constitutional law* 149.

offences were because the EAW does not define them) because it was not the intention to harmonise. It held that the responsibility for defining offences rested with the requesting Member States, which must comply with fundamental rights; other Member States would then recognise these laws on the basis of trust. It also stated that there is currently a high level of mutual trust between the Member States. But does such mutual trust actually exist? Furthermore, how should we measure its existence? It would be helpful to have some kind of empirical evidence, but no such data was used by the Court in its judgment. In the *Ramda*[79] case, decided before the coming into operation of the EAW, the English High Court initially refused to surrender, in extradition proceedings, a suspect wanted for the Paris metro bombings, on the basis that evidence against him might have been obtained oppressively—thus illustrating a lack of faith in the French justice system. On the other hand, greater trust in another Member State's legal system was shown in the case of Osman Hussain, one of the perpetrators of the attempted London bombing attacks on 21 July 2005, who was sought in Italy by the British authorities. Hussain had argued that the prosecution and the issued warrant infringed his fundamental rights. The Italian court however found that a violation of the fundamental rights must be deduced from objective circumstances, and the tradition of the issuing state, in this case the United Kingdom, excluded the existence of such breaches. This judgment demonstrates mutual trust even in such a sensitive case in which political issues were at stake.

The abolition of double criminality still presents a problem. Double criminality is no longer required for the list of 32 categories of offences in Article 2(2), as long as they are punishable in the issuing state by a custodial sentence for a period of at least three years. Following the ECJ's *Advocaaten* judgment, it seems that the definition given by the domestic law of the issuing state should prevail. However, there are a number of acts listed in Article 2(2) which are not defined as crimes in every Member State. For example, Belgium has stated that abortion and euthanasia are not to be considered 'murder' for the purposes of the execution of the warrant.[80] However, abortion in Poland is prohibited as murder (and Poland issues about a third of all European arrest warrants received in the United Kingdom, for example).[81] So the ECJ's approach does not in any way

[79] *R v Secretary of State for the Home Department Ex p Ramda* [2002] EWHC 1278. See also *Irrastorza Dorronsoro* (No 238/2003), judgment of 16 May 2003, Cour d'Appel de Pau (France).

[80] Art 5(4) Belgian Law implementing the European arrest warrant—Loi du 19 December 2003: see Moniteur Belge (22 December 2003).

[81] However, it should be noted that the main problem arises when a Member State seeks to assert an *extra-territorial* jurisdiction for something which is not an offence in the executing member state—see J Spencer, 'The European Arrest Warrant' (2003–04) 6 *Cambridge Yearbook of European Law* 201.

remedy the lack of certainty in criminal law. The only thing that matters is, according to the Court, the law of the issuing state, which is supposed to be safeguarded or supervised by the general notion of human rights in the EU and, more specifically, by the Charter.

Regarding the claim that in departing from dual criminality there was an unjustified difference in treatment depending on whether individuals were acting in the executing Member States or outside, the ECJ's approach was even less satisfactory. The ECJ simply stated that comparable situations must not be treated differently but did not take the time to establish whether there was in fact a risk of different treatment. It simply referred to the seriousness of the offences at issue, as a justification for the dropping of double criminality. In effect, the Court's approach was one of proportionality—it saw the measure as no more than necessary, given the serious nature of the crimes, but overall the ECJ did not address the underlying rationale, if any, for abandoning dual criminality.

The problems with the ECJ's approach and remaining lack of legal certainty can be further illustrated in the specific context of the *Toben* case.[82] Many of the offences set out in Article 2(2) of the EAW Framework Decision are uncertain. What constitutes 'racism' or 'xenophobia'? Would it encompass holocaust denial? In *Toben*, a European arrest warrant was issued in Germany in an attempt to detain Frederick Toben, who lives in Australia but was changing planes at Heathrow. Toben was accused of Holocaust denial in Germany (on the basis of material posted on an Australian website but accessible in Germany). Holocaust denial falls under the specific category in the EAW Framework Decision of racism or xenophobia and is one for which dual criminality has been abolished. However, Toben had not committed an offence under British law, nor indeed under the law of 17 of the 27 European Union Member States. The UK magistrates' courts expressed doubt as to their duty to execute the warrant, and Toben was released when German government discontinued the prosecution.

Given the lack of common definitions and weak mutual trust, there will continue to be problems with the EAW in its current form (although it should be acknowledged that—in view of its extremely wide usage and the vast increase in speed of surrender of suspects—as compared to the old process of extradition, it could be termed a great success). It has been suggested that the list of crimes contained in Article 2(2) be reduced to a few core offences, namely, those for which common criteria for definition and punishment can be more easily found.[83] The litigation over the EAW illustrates that, even if the EU does press ahead with legislation, human

[82] See, eg, 'Holocaust denier Fredrick Toben wins German extradition fight', *The Times*, 20 November 2008.

[83] M Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience? (2009) *European Law Journal* 70.

rights issues will not go away, and even ECJ judgments do not necessarily resolve these matters.

One way to resolve some of these problems and strengthen faith in the fairness of proceedings in other EU states, and thus mutual confidence, would be to have certain minimum common standards throughout the European Union. Such a set of basic procedural safeguards operating throughout the EU would also of course strengthen the protection of the individual. In Spring 2004, the Commission proposed that minimum safeguards for criminal proceedings be agreed by Member States by way of a framework decision on procedural rights.[84] The rights contained in the original draft Framework Decision included the right to legal assistance, the right to interpretation and translation and the right to communicate with consular authorities. The provision of such rights, it was suggested, would bring benefits to citizens facing justice abroad and enhance perceptions of criminal justice systems across the EU.

Unfortunately, progress has been slow and the shape and content of the draft Framework Decision changed quite radically as concerns emerged in the Council. Amendments to the proposal provided for exceptions to rights in cases of terrorism and serious crime, and the removal of certain rights. Alleged difficulties in ensuring compatibility with the European Convention on Human Rights also provoked modifications. All of this consequently caused disagreement among Member States and calls for further amendments. The UK Government even proposed that the draft Framework Decision be dropped in favour of a Resolution on rights (a further whittling down to a non-binding act, indicating slight engagement with the importance of individual rights) as a way of getting at least some action. However, it seems that the Commission intends to re-issue its proposal for a Framework Decision in 2009 and the Swedish Presidency of the Council (due to take place in the second half of 2009) has stated its intention to broker Council agreement.[85] Either way, the watering down of rights and the desire for exceptions to the rights guaranteed has thrown into doubt the utility of concluding the Framework Decision at all.

It has been suggested that adequate protection of suspects' procedural rights already exists under the European Convention on Human Rights and therefore no further action by the EU is really necessary. However, within the ECHR, the standards set are inevitably aimed at securing minimum safeguards at a level acceptable to all its members (which are very diverse

[84] Commission Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final.

[85] On this, see 'Joint Submission from Justice, Amnesty International, and Open Society on the legal basis for a framework decision on procedural rights in criminal proceedings for the experts meeting 26th and 27th March 2009', which is accessible at: www.aieu.be/static/documents/2009/270309CriminalProcedures.pdf.

in nature—from Russia and Turkey to Sweden and Ireland). In contrast, EU co-operation is at a far more advanced stage than that within the members of the Council of Europe. The agreement of a number of measures in the criminal justice sphere on surrender proceedings, organised crime and terrorism has illustrated that action can be achieved across the EU at a level which could not currently be achieved in the Council of Europe and puts the EU in a position to set higher standards. It is therefore disappointing that, five years after announcing the Hague Programme, measures envisaged therein are lacking support from Member States. The European arrest warrant was agreed in just three months, but, seven years on, there is still no agreement on suspects' rights. In the meantime, agreement has been secured on the European evidence warrant, which may cause problems of its own.[86] While Governments have stressed their commitment to the Hague Programme, they nonetheless see a need for what they call 're-prioritisation'—which usually means favouring swift adoption of those measures which prioritise security as a concern.

However, there are problems with the thrust of the Hague Programme itself, which has tended to stress the balancing of freedom and security (an approach not taken by its predecessor, Tampere). The danger is that the use of balance can marginalise fundamental rights and freedom. Suggestions have been made that the Commission Directorate-General for Justice, Freedom and Security should be split up into separate Directorates-General, one for policing and judicial co-operation, one for immigration and asylum and another for fundamental rights, in order to avoid cross-contamination of these policy areas and in order to encourage better co-operation in these areas from the Member States which divide their home departments into diverse departments in this way.[87]

III. HOW DID THIS COME ABOUT?

The above measures illustrate a focus on security at the expense of freedom and justice. Such a focus and imbalance is not singular to the EU but may take a particular significance in the EU context.

For Zygmund Baumann, such a focus on security is a key attribute of late modernity; something which has come about as a result of certain shifts and passages in the way governance is conducted, such as a separation of power from politics. The late modern period has witnessed a shift in power

[86] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ 2008 L350/72.

[87] D Bigo, S Carrera and E Guild, 'What Future for the Area of Freedom, Security and Justice? Recommendations on EU Migration and Borders Policies in a Globalizing World', CEPS policy brief March 2008.

from the political sphere to a more uncontrolled global space.[88] As a result, traditional political institutions appear less relevant. At the same time, states have dropped or contracted out of functions they once performed and these functions have been left to private interests and capricious market forces. There has also been the gradual consistent withdrawal of communal state insurance against individual failure. Such a withdrawal of a minimum social subsistence saps social solidarity and community, resulting in alienation and anomie.

As a result of these passages and shifts, suggests Baumann, although in a certain sense most of us are more free than we have ever been (in the sense of there being fewer physical state restraints upon us), this freedom comes at a price—insecurity or the more complex *Unsicherkeit*—often felt most strongly by those who have the most wealth. There has been a transformation and security has become seen as the primary freedom. At the same time, there are also rising expectations that this insecurity is something that can be solved by technology—that a life free from fear can be found. There is a tendency to reduce political dilemmas to technical solutions. Indeed, a lot of commercial capital is to be gained from prompting insecurity and fear, along with the belief that technology can help protect us from it: advertisers deliberately exploit fears of catastrophic terrorism—Baumann gives the example of an advertising shot of a Sport Utility Vehicle driving through a burning city.[89] The media also contributes—choices of newsworthiness or advertising strategies can subject people to largely irrational forces.[90] So fear can be turned to commercial or political profit. Increasingly, security has become understood as the management of risk. The subject of risk engages the discourses of economics and insurance rather than politics and policing. Yet computers cannot stand in for humans, nor can biometrics and database profiles predict future behaviour.

However, now that we are in an era of globalisation and increased mobility of persons, provision of security is not really something which the state can provide by itself. The state cannot compensate for its citizens' insecurities. International or regional co-operation is necessary; and so the legal orders of the west are now halfway in transition from constitutional criminal law to a transnational security order.[91] Such internationalisation was already in existence but became accelerated by the response to the attacks on September 11. Even aside from the EU there exists much intergovernmental coordination and co-operation, and networks of police

[88] Z Baumann, *Liquid fear* (Cambridge, Polity Press, 2006); *Liquid times* (Cambridge, Polity Press, 2007).

[89] Z Baumann, *Liquid Fear* (Cambridge, Polity Press, 2006), 45.

[90] *The Power of Nightmares: the rise of the politics of fear*, BBC documentary, Adam Curtis 2004.

[91] See K Günther, 'World citizens between freedom and security' (2005) 12 *Constellations* 379.

and law enforcement authorities exchanging information, resulting in a transnational security law. International securitisation has been given further justification by the lifting of internal border controls in the context of the EU's Internal Market programme.

If we apply this in the context of the EU, it helps us to understand the growth of a certain type of action within the AFSJ, and how the EU has come to play a major role in the 'securitisation' of its citizens. Indeed, it provides the EU with a role of which it is much in need, at a time when the Internal Market, perhaps by and large achieved, fails to inspire as a motivating force, and there is little general appetite for either a more 'social Europe' or apparently any type of grand 'constitutional' mission. The provision of security is, however, something which the EU can apparently do with approval.[92] EU citizens want to feel secure, and in this field, apparently, a climate of suspicion means that they require special management techniques. They are happy for EU institutions to take action.

Yet such a move to transnational security brings with it considerable adverse consequences, as this article has attempted to demonstrate. It removes many of the constraints of the democratic state. The democratic deficit might not seem to matter too much if we primarily associate the EU with economics and the actions of technocrats, but it takes on a different complexion in the context of great intrusions into individual liberty by biometric regulation, exchanges of data and automatic surrender of suspects without complementary protection of suspects' rights.

But why is the European public so willing to risk forfeiting its freedom? Why is it not more worried by these processes? Clearly there is a perceived need for security, but Ignatieff offers the explanation that strong measures actually appeal because people expect as 'good' citizens that they will not be affected.[93] They do not imagine for themselves the consequences for them as addressees of the law. In terms of a cost-benefit analysis, they accept higher potential restrictions on freedom if what they perceive to be the real scope of their freedom is stabilised.

This approach is both undesirable and unrealistic. Firstly, most of the measures discussed above apply to *all* citizens. All communications data is retained, not just that of criminal suspects. We must all surrender biometric data to obtain passports or visas. We cannot predict what further use will be made of our data, nor to what destinations it will travel. These measures are subject to function creep and use for different purposes from those originally foreseen for them. European arrest warrants may be issued for

[92] Eurobarometer, 'Awareness of key-policies in the area of Freedom, Security and Justice' Analytical report (The Gallup Organization, 2009).

[93] M Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton NJ, Princeton University Press, 2004).

offences which do not exist in the surrendering state, where the surrendered individual is left unprotected by that country's domestic law.

Secondly, the approach highlighted by Ignatieff is undesirable because, as Günther asserts,[94] the assumptions on which it rests annul the social contract. According to Kant, the fundamental rule of the republican constitution is impartial reciprocity of law-making which guarantees the freedom and equality of all citizens. Freedom is identified as 'a warrant to obey no external laws except those to which I have been able to give my consent' and Equality as 'that relationship among citizens whereby no-one can put anyone else under a legal obligation without submitting simultaneously to a law which requires that he can be put under a similar obligation by another'.[95] This social contract does not work if I believe that the freedom-restricting law will not affect me (even if, as illustrated by, for example, EU data measures, they do in fact affect everyone).

In such a society, what happens to mutual trust and mutual recognition? Anyone is liable to become a potential suspect. For laws to be acceptable and function effectively, there must be reciprocity and participation of all in their making, necessitating engagement and dialogue of citizens, not mutual suspicion and lack of trust. Yet engagement and dialogue have not been in evidence in the EU's Area of Freedom, Security and Justice. Instead, the EU has built on a climate of insecurity and created laws which shore it up, threaten social cohesion, and do not increase individual or collective security overall.

IV. WHAT IS TO BE DONE?

The current situation within the EU's Area of Freedom Security and Justice is undesirable. I suggest that there are two possible options to remedy this.

A. Repatriate the EU's Area of Freedom, Security and Justice

Within much of the AFSJ, there exists little respect for the rule of law and freedom and justice. Indeed, the EU is in breach of its own treaty—for example, it is in breach of Article 6 TEU, by which it is bound to respect human rights, democracy and the rule of law.[96] The AFSJ was perceived at the time of the

[94] K Günther, 'World citizens between freedom and security' (2005) 12 *Constellations* 379.
[95] I Kant, *Perpetual Peace: A Philosophical Essay*, First Definitive article.
[96] Art 6 of the TEU states that: '1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental

Treaty of Amsterdam as the next big initiative for the EU, to keep it going after the completion of the 1992 Single Market project, to give the EU a sense of identity and its citizens a sense of belonging, and to make the new EU competences in JHA seem more meaningful. However, in fact, it has resulted in a disastrous misuse of democracy, giving rein to the worst excesses of Member States, which, in the intergovernmental Council, have been free to pursue their own gain, relatively free from parliamentary scrutiny.

Given this state of affairs there is at least some sense in the (albeit extreme) notion of the repatriation of these areas to the Member States—at the very least, the PJCC Third Pillar could be repatriated. While it is the case that the Member States themselves do not have a great record on human rights protection in times of emergency (witness successive terrorist legislation in UK since 2000), at least much national legislation is still subject to parliamentary scrutiny and sometimes Parliament takes this scrutiny seriously, as, for example, in the case of the UK Terrorism Acts, in which the government was unable to get its desired 90-day pre-charge detention provisions through.

B. 'Normalisation' of the Third Pillar

Realistically, such a repatriation of the AFSJ to the Member States is unlikely to happen. There is a consensus (including the opinion of the European public it seems) that there is a need to fight crime on a broader scale and that it is appropriate for the EU to be active here. However, if this is to be the case, then the EU must 'normalise' its activities in this area to more standard democratic methods of lawmaking. This means that the 'Community' method must be applied.

Terrorist legislation is incompatible with the protection of human rights—a point that Conor Gearty has made.[97] He suggests that the ordinary criminal justice system will do the job for us, and we do not need a special regime—indeed, we cannot have one, if we are to uphold human rights. If it is the case that there is no need for a special exceptional regime to fight terrorism, then how much more so is it the case in the pursuit of ordinary crime-fighting actions? Nevertheless, the EU uses abnormal methods for these as well.[98]

Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

[97] See C Gearty, *Can Human Rights Survive? Hamlyn lectures 2005* (Cambridge, Cambridge University Press, 2006).

[98] For example, most of the crimes for which a European arrest warrant may be issued are not terrorist measures at all, but ordinary crimes, although it was the terrorist events of 9/11 which provided the conditions of possibility for the EAW's adoption.

What would 'normalisation', or the removal of these abnormal or emergency-like procedures, involve in the context of EU JHA? At the very least, it would involve switching to the 'Community' method—that is to say, to a legislation process in which the European Parliament played a strong part (usually by means of the co-decision procedure)—and it would involve the availability to individuals of access to judicial review in the ECJ for all actions.

However, the failure firstly of the Constitutional treaty, and, subsequently, the Lisbon Treaty, has made it hard to communitise the Third Pillar. We may hope that in future, this may become possible. An attempt of the Finnish Presidency of July-December 2006 to use the 'passerelle' in Article 42 TEU to move areas of JHA to EC also failed as Member States would not agree to do this at the European Council.[99] The result of these failures is that we see instead more and more increasingly opaque initiatives by those who wish to press ahead with rights-violating initiatives in JHA by some states only, such as Prüm or G6, which turns this whole area of EU law into one of Kafkaesque complexity. Such initiatives should be resisted at all costs—and reports such as those of the House of Lords European Union Committee cited earlier are very valuable in this respect.

However, remedying the situation requires not only transferring Third Pillar areas to the EC method but also rethinking the AFSJ. This would involve seeing 'security' less as a good and more as a means towards freedom and justice. This in turn requires thought about what freedom and justice could mean in this context. Justice in this context should not be interpreted in a very narrow way to mean administration of justice, with a concomitant prosecutorial bent (in the Dutch and German translations of the EU treaty, 'justice' is translated as 'Recht', or 'law', encouraging such an interpretation, but this is not the only way to see it). Justice must surely at least incorporate the Rule of Law. How should the Rule of Law be understood? A most basic and minimal interpretation of the Rule of Law is that law should be capable of guiding the behaviour of its subjects and to do this must be prospective, general, clear, public and relatively stable, and also comprise mechanisms of an independent judiciary, open and fair hearings without bias and some review of legislative and administrative officials and limits to police discretion.[100] 'Freedom' incorporates human rights, including

[99] See Finland: Cabinet Committee on European Union Affairs on 24 May 2006, Preliminary Agenda for Finland's Presidency of the EU. Perhaps there is an issue under the Vienna Convention here: once Member States have signed a treaty—such as the Draft Constitution, and in over half of cases EU Member States actually ratified it—there is a duty not to defeat the object and purpose of the treaty. Could it be argued that refusing to use the passerelle does this and thus breaches the Vienna Convention?

[100] J Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195. Raz in fact gives a rather minimal account of the Rule of Law, and others have given it more substantive

those of minorities and suspects, a fact which is being lost in the pursuit of security across the EU.

Such an interpretation, with a strong emphasis on justice, human rights and the rule of law, could encourage a sense of belonging and commonality among European peoples. This has to be the way forward. The EU should take freedom and justice seriously—this might involve taking action against Member States to show it is serious about human rights, such as proceedings under Article 7 TEU against those states who allowed 'rendition' on their territory, or, even more controversially, against states like the UK who engage in flagrant breaches of the ECHR in allowing long periods of pre-trial detention, or against any state which would admit evidence under torture. In this way, the AFSJ could gain a high profile and become meaningful to all EU citizens.

The Laeken Declaration envisaged a Europe that can represent itself to the world as a continent of human values.[101] So far, the EU's Area of Freedom, Security and Justice has not helped to achieve this goal.[102]

content—but we can see that the EU Third Pillar is lacking even according to Raz's rather formal account.

[101] Presidency Conclusions at the Laeken European Council, 14–15 December 2001:

> 'Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilizing role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law'.

[102] In contrast, the other Europe, of Strasbourg and the European Convention on Human Rights, might claim more credit for creating a 'Europe of values'.