Border Regimes and Security in an Enlarged European Community: Implications of the Entry into Force of the Amsterdam Treaty

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Introduction

This paper is forward-looking and largely speculative because it addresses some of the Justice and Home Affairs arguments which may be made over the next decade. Some developments may have specific implications for those countries of East Central Europe negotiating in the next round for entry to the EU. These implications are mentioned where appropriate.

The exact nature of the future developments obviously cannot be known although certain key elements seem, in the absence of a political cataclysm, stable. Amongst these stable elements are:

- The enlargement of the EU to the five East Central European candidate members and Malta - although the date is highly uncertain.

- The maintenance of the Pillar system in the European Union with the consequence that policies involving frontier issues will continue to be divided between the three Pillars

- The reinforcement of police co-operation and judicial co-operation within the EU, including the policing of frontiers, with an increasing political salience of the issues involved in this co-operation

- Continuing pressure towards the formulation of a common external and security policy to address problems which arise in the neighbourhood of the EU

There are five crucial areas of very considerable uncertainty:

- A major short term uncertainty is the exact content, location within the Treaty system of the Schengen *acquis*, and the implications of the new Justice and Home Affairs (JHA) provisions in the Treaty of Amsterdam.

- The entry dates of the applicant states, the transitional arrangements, and the conditions for entry (in the sense of *acquis communautaire*) is a medium term uncertainty.
- The effects of entry on national and cultural identities, the ways in which "identity" politics will be used by the various political forces in play cannot be predicted.

- The evolution of global political and economic balances can have decisive effects on the European Union, its member states, and local situations including border regimes.

More specifically, crises in Eastern Europe and in Russia in particular may create turbulence threatening the interests of the EU and the candidate members. The weakness of the institutions of these countries could create security problems, both internal and external, for the EU and for the candidate members.

This paper does not place these constants and uncertainties within an overall theoretical framework because of scepticism about whether it is intellectually defensible to do so - marxists, post-modernists and some varieties of liberals will obviously disagree. A theoretical pluralism on these questions is desirable, because it corresponds with a world of political practice where very different kinds of discourse are used in political debate and in justifying agreements and arrangements.

A particular notion of a border or frontier regime underlies paper. Frontier regimes consist of agreements with neighbouring states, either bilateral or multilateral, and the practices which have grown up around them, administration and management of frontier controls and related systems of police and customs co-operation, and institutions and arrangements for transfrontier co-operation. Implicit in these regimes are the various conceptions of the functions which are fulfilled or which, it is thought, should be fulfilled by frontiers; also embedded in these regimes are territorial ideologies[1] - perceptions of the meaning and significance of frontiers held by policy making elites, by the population of frontier regions and, more generally, by the inhabitants of a country.

The Structure of the Paper

The complexity of frontiers in general and of the EU internal and external in particular are the subject matter of the first section, "Setting the Scene" - mainly devoted to frontier issues broadly relating to JHA as seen from within the EU. These perspectives have important implications for the candidate members.

The second section is concerned with the Treaty of Amsterdam and the integration of the Schengen *acquis* into the EU, with special reference to the East Central European States designated for the next round of EU enlargement.

The third section of the paper is concerned with a sketch of some of the problems of the Eastern frontier of the EU which impinge on policy on Justice

and Home Affairs to show that co-operation is a response to problems whose source and solution mainly lie outside the scope of JHA co-operation.

The fourth section, is a presentation of three possible scenarios of the development of Justice and Home Affairs co-operation with indications about how the new member states may be effected by each of them. These scenarios are ideal types and the actual outcome may be a mixture of two of the scenarios. As a conclusion, some issues of the timetable of entry of new members to the EU are discussed.

The paper is broad-ranging though not all the issues within the range of fields covered by Justice and Home Affairs, or all the elements of border regimes are discussed, and some are not even mentioned. Co-operation in civil law matters, for example, is completely excluded from consideration despite the tensions generated between member states over issues such as divorce and custody of children, and some property rights. Among the important components of border regimes not treated is the possible role of co-operation at the local and regional level in the field of security because this requires detailed treatment not possible within the limits of this paper.

Setting the Scene

Frontiers are complex multidimensional phenomena because they are institutions regulated by international law, by European law (for trade in goods and services, and for movement of persons) and national law; they are markers of identity; they are filters for the passage of individuals; they are meeting points (and points of friction) of different political, administrative, legal and educational systems; they are barriers which require special institutional arrangements for practical co-operation at the local and regional level to deal with problems of *voisinage.* Recent changes in international frontiers in Europe trigger processes with unexpected and unintended consequences. Different kinds of political discourse are associated with them, often focused on defensive notions of security.

New geopolitical facts of fundamental importance are the establishment of a uniform regime for the external frontier of the European Union and the abolition of frontier controls on persons. These developments have implications for all three EU Pillars established by the Treaties of Maastricht and confirmed by the Treaty of Amsterdam; they have the potential to be fundamental factors in the creation of solidarity between the peoples of Europe and awareness of an European identity; they affect the vital interests of all member States. They are particularly important for the development of policy in the field of Justice and

Home Affairs but an analysis of the implications solely in this domain, without taking into consideration other dimensions, gives a limited and biased picture.

In addition to the changes mentioned in EU frontiers, four general factors in the current European political situation which have profound implications for frontier regimes, should be emphasised. First, states in Europe, subject to new political and economic developments as well as influenced by important new technologies, are going through profound changes but there is no consensus about the significance or the likely outcome of these changes. Faced by this situation, political decision makers are cautious and uncertain in their approach to frontier policy.

Second, the definition of the concept of security or, more precisely, the boundary between external and internal security in Europe is in a continuing process of re-definition. Threats to security of member states coming from outside their frontiers are perceived less as threats of a conventional military kind and more as criminal threats - mafias, drugs, illegal immigrants, traffic in human beings, environmental pollution and terrorism. Frontiers no longer have the role of military defensive lines but the external frontier of the EU has been given a role to exclude these activities from the territory of the Union.

Third, there is uncertainty about the eventual location of the external frontiers of the EU and this makes them very different from the frontiers of the member states. There is much less public and governmental sensitivity about where the external frontier should be than there is about the location of the frontier of a member state. Both the realisation that the location of the external frontier will change over time and the attraction exercised by the EU on the neighbouring states makes the external frontier aspects analogous to old imperial frontiers rather than to those of nation states.

Fourth, "traditional" frontier conflicts of the kind when one state claims territory from a neighbouring state no longer exist within the EU or exist only in an attenuated form (Gibraltar, Northern Ireland). But these conflicts have recently taken place and are likely to re-occur in the neighbourhood of the EU and may involve applicant countries. These conflicts almost inevitably pose problems for the control of the external frontier of the EU as well as for the formulation of a common foreign and security policy. Two candidate states, Slovenia and the Czech Republic, have come into being as a result of recent re-drawing of national frontiers.

Shared Perceptions of Frontiers?

Strictly speaking, the governments of the EU no longer have a doctrine about frontiers because their frontiers are regarded, above all, as legacies of history. An explanation of the reasons for official positions adopted on frontier policy are usually brief and have the nature of assertions rather than explanations. In the British case, examples are Prime Minister Thatcher's assertion in her Bruges speech that the maintenance of frontier controls are "plain common sense" to the Labour Party's terse commitment in its election manifesto that "we intend to retain controls on persons at our frontiers". The reasons given are that Britain is an island and therefore its frontiers are easy to control, it is the traditional way of doing things and avoids controls in the interior of the country which, *inter alia*, might damage race relations.[2]

There are nonetheless five features common to all the member states:

• Since the Second World War, there has been deeply-rooted dispositions in favour of the inviolability and intangibility of frontiers, whilst accepting the principle of the self-determination of peoples when this becomes necessary (recognition of the "velvet divorce "in Czechoslovakia, acceptance by the UK of the right of secession of Northern Ireland). The principle of intangibility of frontiers may merit serious re-appraisal for some tensions but, as the Kosovo case demonstrates, states are likely to be extremely cautious about this.

• There is a widely-held view that frontiers are inseparable from the entities which they enclose. This conviction was expressed in 1997 by Danes who attempted to form a human chain along the frontier with Germany under the slogan "the frontier must stay". For the majority of Danes, the frontier is the limit and the symbol of the nation and of national sovereignty; the maintenance of sovereignty is the necessary condition of a true democracy. This conviction, which is difficult to defend when the problems facing Denmark cannot be managed within the national framework, is nonetheless shared by large populations within the EU.

• A widely diffused attitude among the populations of Europe links frontiers to the notion of defence, in a broad definition of the term, against unwanted foreign intrusion - defence of physical and

• psychological security, of economic interests, of languages and cultures. This attitude persists even after the frontier can no longer be used for these purposes - on the Franco-Italian and Franco-Spanish frontiers

frequently voices are raised that the French state ought to protect specific interests affected by the economic activities of Italians and Spaniards, despite the existence of the Single Market.

- A consensus exists among governments, supported by large majorities in public opinion, that the external frontier of the EU should be an effective barrier against illegal immigration. Non-members of the Schengen system, participate in this consensus. Although the dominant rhetoric about immigration varies according to time and according to country, restrictive attitudes predominate and is amply illustrated by the ways in which asylum seekers are viewed and treated.[3]

- In very general terms, member states share certain basic principles (rule of law, parliamentary democracy, respect for human rights, private property as the basis of market economies ...). The significance of the external frontier is different according to the degree to which the neighbouring state adheres to these principles. For example, the external frontier with Switzerland and Norway is viewed differently from that of Morocco and Russia.

Variations in General Perceptions of the External Frontier (including some aspects of internal frontiers)

These variations are rooted in very diverse political traditions, historical experiences and geographical situations. Any attempt to categorise these variations is necessarily a simplification but some simplifications are necessary to gain an understanding of a very complex reality.

- The imperial and colonial past has created, sometimes very strong, links between member states and third countries. These links have had an impact on linguistic geography with the creation of Spanish speaking, French speaking and English speaking worlds. The influence of German language and culture in east central Europe was very strong in the past and may well revive. Linguistic and cultural frontiers do not coincide with the present external frontier of the EU. Cultural and linguistic bridges across the frontier influence inter-personal relations and support beliefs that the frontiers between people who speak the same language should be less important barriers than those who speak different languages. These links affect judicial and police co-operation.

- The great religious divisions of the past still play a role in the formation of political cultures and the perception of frontiers. Despite well-founded

criticisms of the thesis of Samuel Huntingdon on the "clash of civilisations" and despite close historical links between countries bordering the Mediterranean, there is a perception that the frontiers of Europe coincide with the frontiers of countries with a Christian tradition. Also the great schisms in Christendom have a continuing influence, with Greece, distinct from all member states, belonging to the Orthodox world (for example, in a major speech on the bases of Greek foreign policy in 1994 Andreas Papandreou emphasised Orthodoxy and did not mention the EU). The different attitude, in Greek public opinion to that in western Europe, to the current crisis in Kosovo is another example. There is also a north-south division in the EU which roughly corresponds to the countries of Catholic and Protestant tradition. The different traditions have an effect on political culture. Even though there are major differences between countries which share the same religious tradition, there is, for example, a more spontaneous police co-operation between countries on the same side of this historic frontier.

• States which are the most exposed to the sensitive sections of the external frontier share an unease about their exposed position but this unease is about different things and is expressed by different, and sometimes eccentric, foreign policy positions. Governments and dominant sections of public opinion in the Mediterranean states have a different view of the problems of the external frontier than the Scandinavian states. The most extreme case is Greece which has adopted positions on Turkey, Macedonia and Serbia which are shared neither by other states situated on sensitive external frontiers nor by any other member state. These sensitive situations have implications, for the countries concerned, on the whole range of internal/external security issues.

• Member states are sensitive to the control of territory and of national frontiers for the purpose of maintaining cultures and linguistic practices. Insecurities can be triggered if it is thought that these are under threat. Attempts are made to use the EU in a variety of ways to bolster cultural defence, including support for the exemption of cultural goods from WTO rules of international trade. Language use and cultural difference have wide impact, including effects on legal systems and police practices. Frontiers are the limits of school and educational systems, and other institutions for the transmission of cultural values. The evidence from communities close to the frontiers is that national and cultural differences remain very strong and that the role of the educational systems and the media is fundamental in the maintenance of cultural difference. The frontiers of states as cultural frontiers may become relatively more important as the other functions of

frontiers decline. There is likely to be a persistence of different ways of behaving and reacting in the field of Justice and Home Affairs based on different cultural values.

- Transfrontier co-operation (on both internal and external frontiers) at the local and regional level is perceived differently in different countries and localities. This co-operation has been re-activated by the two Interreg programmes assisted by the Phare programme for the eastern external frontier, and, less certainly, by the Euromed partnership. Different perceptions are linked, among other things, to the different territorial organisation of states, different central-local relations and different histories of transfrontier relations. Security issues are often important in frontier regions but no local plan for security co-operation (except liaison of emergency services) has yet been integrated into these arrangements for transfrontier co-operation.[4]

- The problems posed by the frontiers of each member state have specifities which affect the perceptions of political decision makers and cause them to adopt different policies of partnership with neighbouring states. All member states can be analysed from this point of view, but Italy provides an example. As a result of its Adriatic coast and complicated relationships with Croatia and Slovenia, Italy is directly involved in the problems of the Balkans and Central Europe. In 1989, Italy launched the "Central European Initiative" to promote positive relations with its neighbours; this initiative was known as the Pentagonal and then as the Hexagonal after Poland joined in 1991. This outreach towards Central Europe is strengthened and complicated by the activity of *Alpe Adrea* an association of regional authorities which still includes Croatia and Slovenia, even after they became sovereign states.

Problems of Control of the External Frontier Seen from the Point of View of the EU Member States

Several problems of controlling the external frontier are likely to persist and some issues of frontier control have already created damaging suspicions between member states. The problems may be grouped under five headings - the impossibility of controlling migratory flows purely by police methods, burden sharing and the general problem of costs of policing the external frontier, mutual understanding the problems of member states, the co-ordination of police control of the frontier and other systems of police co-operation, and the repression of fraud.

- The Italian example can again be used to illustrate the most sensitive aspects of the impossibility of controlling the external frontier by police methods. The Straits of Otranto marks the deepest gulf between the standards of living of two European countries. The inevitable result is a strong desire by Albanians to cross to Italy. The professional smugglers have acquired very fast boats to deposit migrants on the Italian coast. This facility has attracted immigrants from other parts of the world who wish to take their chances and enter the EU. Despite the use of high technology surveillance and tracking devices, the mobilisation of the Italian customs and navy, and surveillance operations in Albanian ports, a high proportion of these illegal immigrants reach the Italian coast. Italy has a similar problem with immigrants arriving from Africa on the islands of Lampedusa and Sicily. In addition, large and unseaworthy vessels packed with illegal immigrants arrive in Italian coastal waters from the Middle East. Italy cannot stop forcibly this flow of immigrants except by using methods which conflict with any reasonable interpretation of human rights. On the Slovenian frontier, the practice of frontier controls shows that the Schengen norms are inevitably adapted to take account of local situations. In this case, reliance is often placed on the efficiency of Slovenia's borders to the east to check the flow of illegal immigrants. Whether over the land frontier or the sea frontier illegal immigrants enter Italy and turn up in other EU member states. Italy, like any transit country for illegal immigrants, has been accused of being lax.

- The specific problems of flows of illegal immigrants which are impossible to stop by conventional frontier controls are interpreted differently by different member states, usually as a function of whether the flow is likely to affect them. Unwelcome influxes of immigrants affect the interests of all other member states but the problems on the ground are often poorly understood or misinterpreted. For example, a major technical problem is to determine the nationality of illegal immigrants who arrive having destroyed all identity documents, in order to return them to their country of origin. In general, a rapid and co-ordinated EU political, economic and diplomatic reaction to specific immigration problems has not yet been achieved.

The arrival of clandestine immigrants either hidden in lorries at the land frontiers or on the coasts attracts media attention but there are not yet reliable and comparable statistics on the ways in which illegal immigrants gain entry. Such statistics are essential for an accurate evaluation of the costs of controlling illegal immigration and efforts are being made to establish them. The majority of EU countries risk, like Italy, becoming either the destinations of unexpected flows of

illegal immigrants or transit countries to other destinations. But the dominant tendency at present is towards a certain national egoism. This is already the case for EU candidate countries.

- The systems for exchange of information - Interpol, Europol and Schengen - about criminal activity which involves traversing the external frontier (drug trafficking, money laundering, trafficking in human beings, organised and large scale theft, financial fraud) are not at the moment co-ordinated except, sometimes, at the national level. Europol and Schengen are in their infancy and there are legal, political and technical problems in the way of systematic co-ordination between them, let alone between them and Interpol.

- The problems of customs fraud (e.g. fraudulent certificates of origin on agricultural products are made to obtain EU subsidies, and many other minor traffics such as the import and clandestine re-export of cigarettes) are regarded with varying degrees of seriousness across the EU. Problems of fraud change over time according to the criminal opportunities provided by national and European legislation. Customs powers vary - French customs have powers across the whole national territory whereas German customs only have powers over goods attracting the common tariff at the external frontier. Harmonised customs powers have been discussed for some time.

The Treaty of Amsterdam

Two aspects of the Treaty have received much commentary. It made very little progress on the kind of institutional reform necessary for enlargement (which affects the possible date of entry for the East Central European countries) and the Pillar structure of the Union was confirmed. However, the Justice and Home Affairs provisions are potentially of considerable importance because of the Treaty basis for Europol and, above all, the integration of the Schengen *acquis* into the Union. There is, however, institutional complexity in the general area of policy to do with frontiers and frontier security.

Frontier policy, broadly conceived, is distributed across Pillar I (immigration, asylum, visa policy, free movement, trade), Pillar II (common foreign and security policy) and Pillar III (police co-operation). The one claim to major advancement in the Treaty is in the sphere of judicial co-operation in criminal matters. Police co-operation - Europol was given a treaty basis (as opposed to a Pillar III convention) - and judicial co-operation were strengthened

particularly by articles K 1, 2 and 3 (See Appendix). The integration of the Schengen *acquis* is the most important change in terms of frontier regime.

In Pillar I there is a federalist dynamic since policy is subject to the community process of initiative by the commission, approval by the Council and Parliament and adjudication by the Court. In the area of free movement Pillar I will assume greater importance and the potential for a considerable advance in the federal element of the EU is present. This is the domain which the candidate countries have to take seriously (see the next section).

Pillar II policy making could be the main locus of general policy concerning border regimes on the eastern frontier. The prospects of this happening are, at the moment, not good. Political will is essential to infuse some substance to the aspiration to a common foreign and security policy for the eastern borderlands. This may emerge as a result of external challenges, which collectively affect the interests of the major member states. Since the disintegration of the communist bloc, there is now a lack of a clearly defined and menacing military security threat. It has therefore been difficult to establish a new security doctrine and even a sufficiently precise definition of security interests which find widespread support among security establishments and broad sections of public opinion. The Kosovo intervention has shown how dependent the EU member states are on the military strength of the United States when intervention becomes necessary.

When the term "insecurity" is used by EU member states, with the exception of Greece, it generally refers to concerns about crime such as drug trafficking and traffic in illegal immigrants, the impact of social tensions and problems of crime and disorder from fractured societies "spilling over" into the EU. In particular cases it refers to the effects of armed conflict in the wider neighbourhood of the EU - in Algeria, Bosnia, Kosovo, and the Kurdish regions of Turkey and Iraq. The criminal problems and political violence can all be regarded as Pillar III matters. Current uncertainty about the very concept of security has been a contributing factor to the extremely hesitant development of the common external and security policy. Also the existence of NATO, the relative ease with which members from East Central Europe could be accepted by NATO and the bridge built between NATO and Russia have eased the pressure which would have otherwise been felt by the EU to develop a security policy. Whether the security guarantee provided by NATO will survive unchanged by the Kosovo intervention is uncertain.

The Blair initiative in 1998 (the Anglo-French St Malo Declaration) suggesting a re-launch of a common security policy, by proposing that EU military forces could be committed outside the NATO framework, has yet to be

put to the test but has very important potential implications for independent EU action in the neighbourhood of the Union's frontiers. The possibility of rapid intervention in situations of crisis and disorder in the so-called "shatter zone" between the Baltic and the Balkans could give an impetus to the development of the EU as a genuine independent force in international politics. This is unlikely in the short term because of the lack of a common political outlook and because defence expenditure in the EU member states is insufficient. It is not yet a factor in the border regimes of the eastern frontier of the EU and a dramatic external shock must occur before it emerges as an important element.

Well known attempts, by Barry Buzan and others[5], have been made to extend the scope of the understanding of security into what has been described as "societal security" - threats to the environment, to human rights and to cultures. This adds further confusion to the security debate but has particular relevance to the eastern frontier of the EU. Since the Chernobyl disaster of 1986, there have been insistent voices raised to press for the inclusion of environmental threats in the area of security policy. The Finnish President Marrti Ahtisaari said in November 1997[6] that the threat from Russian pollution was his greatest security problem and added "I would be much happier if I could clean up the Baltic and swim in the sea than join NATO". He complained that 70 to 80 percent of Baltic Sea pollution was created by St Petersburg and that there was an urgent need to clean up the military and civil nuclear facilities along the 1,340 kms frontier, especially in the Kola peninsula. The EU had to see the importance of the northern dimension by a better co-ordination of EU policies and activities, and co-operate with other Arctic powers such as the US and Canada. However, in terms of EU policy making, environmental policy belongs squarely within Pillar I, the co-ordination of international efforts of multilateral co-operation to Pillar II and the repression of criminal acts which lead to pollution in Pillar III.

A Common Foreign and Security Policy is an aspiration but not yet a reality which may result in undue weight being given to JHA co-operation to protect the security of the EU.

The First Pillar, Schengen - its Integration into the EU, and Europol

Policy made under the first Pillar, because of the federalist dynamic already referred to, is the area in which candidate members have already experienced, in the pre-accession period, and will continue to feel, the loss of independence and sovereign control of certain policies. The Schengen system, whose locus in the Pillar system is at the moment uncertain, may well be perceived by the candidate members as an imposed regime. Reticence, anxieties and fears about the European Union will be focused on Pillar I matters and the Schengen *acquis*. It is

the key common element in the border regimes which are being established on both internal and external frontiers. Europol, because of its objective to fight transfrontier crime is also an element, although less important in terms of incipient conflict or tension with the EU candidate states.

The Schengen Agreement and Convention, from discreet and unpublicised beginnings, are now matters of some notoriety. The Schengen system can be represented as developing out of the merger of a number of Common Travel Areas among European states. The original Schengen Agreement, in 1985, brought together the Benelux Common Travel Area with the proposed open frontier agreement between France and Germany. The long-standing Nordic Common Travel Area provides for open frontiers between Denmark, Sweden, Finland (now all members of the European Union), Norway and Iceland; its merger with the Schengen Common Travel Area has necessitated special arrangements with the two non-European Union states. The United Kingdom has maintained a Common Travel Area with Ireland since before entry to the European Community. The Irish Government has made it clear that its opt-out from full participation in Schengen is due only to its commitment to maintaining an open frontier with the United Kingdom.

The Schengen *acquis* is now in the process of integration into the EU framework after the Treaty of Amsterdam. These *acquis* are the Schengen Agreement and Convention, together with all the decisions and rules which have been adopted by the executive committee of Schengen. There has been a genuine difficulty in discovering the content of these *acquis*[7] and the Schengen countries have not formally published them. There is, however, an April 1999 deadline for incorporating them into the Treaty Framework and the content must then, in principle, be announced. The main difficulty in the negotiation has been the allocation of the *acquis* between the First and the Third Pillar. The core of the difficulty is the Schengen Information System (SIS) which is partly in the Pillar I (for immigration and asylum matters) and partly in Pillar III (for police and judicial co-operation).[8] The solution to this may be the creation of an independent agency outside the Pillar system. If no solution is found the whole of the Schengen *acquis* will remain in Pillar III. This will create considerable legal complexity in the fields of asylum and immigration policy, a complexity which is exacerbated by the British opt-out.

The Schengen system was developed in an untidy way and is likely to remain a complicated matter for the new entrants. The debate on Schengen has focussed on the strict control of immigration and the number of asylum seekers, the alleged creation of a "Fortress Europe", and the controversial links made between security, criminality and immigration. In the candidate countries, the main issue has been the implication that the Schengen external frontier is a "hard" frontier, a serious and potentially disruptive barrier between countries. This affected, or potentially affected, the relations between the candidate countries and the EU in the first instance and, as these countries became integrated into the EU, it affects the relations between these countries and their eastern neighbours. The candidate countries experience Schengen very much as an imposed system created in the interests of existing member states. These points are discussed further in the next section of this paper.

The main outlines of the Schengen system are easily described. In brief, the 1985 Schengen Agreement and 1990 Convention have as their aim the creation of an area without internal border controls, with compensatory measures to increase security at the external frontier and supporting measures to fight illegal immigration and increase co-operation between police forces. The Schengen agreements intended to be "compensatory measures" for the "security deficit" resulting from the abolition of frontier controls at the internal frontiers. This involved the setting up of the Schengen Information System (SIS) which, through the intermediary of national information systems, makes available on-line to law enforcement agencies details of wanted persons, persons who are unwelcome in other members states, persons in need of protection, persons suspected of criminal acts, and stolen goods. This information is subject to a data protection control; additional information and advice which may be required is supplied by national offices (SIRENE - *Supplément d'information Requis à l'Entrée Nationale*). Schengen states may also have intensive mobile patrols in a 20-kilometre (30 kilometres in the case of the German Länder) to check on persons suspected of illegal acts but static control points to check persons entering a member state are not permissible.

A key objective of the European Union, once the Amsterdam Treaty enters into force, is to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. The overriding objective of the Schengen arrangements is to create an area of free movement by removing controls at the common borders of the participating states; to compensate for the lifting of these controls, external frontiers controls are strengthened and standardised, and are accompanied by an array of "flanking" measures designed

to enhance security and improve co-operation within the Schengen area. The Schengen countries also explicitly recognise that they should move towards a common visa, asylum and immigration policy.

A co-ordinating committee and technical inspections ensure that member countries meet the standards required for controlling the common external frontier. A Task Force of senior law enforcement officers has been set up to exchange information about clandestine immigration with a view to dismantling organised rings which smuggle people into the EU (this Task Force has achieved only modest results probably because smuggling is less organised than had been supposed). In addition, the press and television services of other member states are quick to point out deficiencies in other countries' policing of the external frontier.

From the policing point of view, the great advantage of Schengen is on-line access to national Schengen data bases which communicate and receive information and enquiries from the central data base in Strasbourg (which has about 8 million entries). All significant ports of entry have to have this on-line facility and in some countries it is widely spread - in France, for example, there are 14,000 access points.

Europol is, for the time being, a less constraining and problematic form of co-operation for the candidate states. It is still in an early stage of development and, at the moment, goes little further than being a European equivalent of Interpol. It was formally initiated by the setting up in 1992 of a Europol preparatory group in Strasbourg by an EC ministerial agreement. This group drew up a brief for the terms of reference of a European law enforcement body and its methods of operating. Although it was hailed by Paul Quilès, the French Minister of the Interior at the time, as the "embryo of a European Police" subsequent progress was slow. A further ministerial agreement reached in Copenhagen on 2 June 1993 to establish a Europol Drugs Unit "to act as a non-operational team for the exchange and analysis of intelligence in relation to illicit drug-trafficking, the criminal organisations involved and associated money laundering activities affecting two or more states". It was, however, explicitly stated that this was a first step on the road to address "other forms of international organised crime".

Eventually, after difficult negotiations concerning accountability, judicial control, management, staffing levels, financial arrangements, communications infrastructure, information technology requirements, as well as data protection, the Europol Convention was agreed in 1995.[9] The UK was the first to ratify the Convention (with an important, and potentially troublesome, opt-out concerning

the role of the European Court of Justice) and all other member states have now done so - making it the only Pillar III Convention to be ratified so far. In essence, it is an office for exchange of information, analysis of criminal intelligence and for making suggestions about lines of enquiry to national authorities - but there is important (German) pressure to emphasise an operational role, a concept which is open to more than one interpretation.

Although there is potential for further development, Europol will not be for some time a centrally important instrument in assisting enquiries into complex criminal conspiracies. The reasons for this are first, it has modest resources in terms of professional personnel which are not on the scale of criminal investigation departments of medium sized European cities. Second, the list of crimes in which Europol may be involved, ranging from financial crime to (in the near future) terrorism, from drug trafficking to pedophilia, from theft of works of art to arms trafficking, from illegal movement nuclear materials to trafficking in body parts is extremely ambitious and it is difficult to envisage how Europol can make more than a marginal impact on the efforts to repress them. Third, the holding of data on individuals and historic data is severely circumscribed by data protection rules. Fourth, there is only a small chance that Europol, in the foreseeable future, will lead or participate in a major way in criminal investigations because its officials lack police powers and have not yet been invited by national authorities to participate in investigations as advisers. Fifth, although analysis of criminal intelligence is envisaged as a major role, there are serious practical difficulties in transnational sharing of sensitive intelligence.

The difficulties for the candidate countries posed by EU law enforcement co-operation are of various kinds. The first difficulty is the existence of various systems of law enforcement co-operation - Interpol, Europol, other multilateral systems such as the Cross Channel Intelligence Conference, and bilateral arrangements - and the absence (although a partial change of policy was announced on 12 March, 1999) of the United Kingdom and Ireland from Schengen suggests that an incoherent and complicated system of police co-operation is developing. New members have even greater difficulty than established members of coming to grips with this complexity.

The second difficulty for the candidate states is that the Schengen *acquis* will continue to develop in the coming years. The opportunities for the candidate countries to influence the content of the Schengen *acquis* will be strictly limited. Unlike most of the political, legal and economic reforms necessitated by joining the EU, which can be represented as having beneficial effects for the citizens of the candidate countries, Schengen is often regarded as an imposed system. It can be perceived as a system which has been set up to defend the interests of

existing members which does not sufficiently take into account the specific requirements of candidate members.

The third difficulty is that all institutionalised forms of police co-operation inevitably encourage a penumbra of informal arrangements. This is a large theme with many different aspects. Without some informal channels of communication, it is difficult for institutionalised forms of co-operation to function with any degree of efficiency. But informal systems of co-operation necessarily involve privileged and exclusive relationships. These are likely to develop in three main ways. First, an elite network will influence the general policy of co-operation - this is likely to be composed of the same European elements which have had most influence within Interpol.[10] Second, networks dealing with particular criminal problems - fraud, money laundering, drug trafficking and so on - are a feature of the current system. Third, networks based on geographical proximity to confront a series of local/regional problems are already common. Criminal investigators are highly pragmatic and form alliances where they must, but informal networks are likely to be led by people from countries with strong police traditions and long practice in international contact-making. These are not likely to include people from the EU candidate countries.

Problems of the EU Eastern Frontier and the EU Candidate Countries

Central and East Central Europe is a complex cultural and political region, making generalisation about it hazardous. An abundant literature already exists on the transition from communism, nationalism, minorities, migratory movements, economic reform and re-structuring, the disintegration of Yugoslavia, security questions and the enlargement of NATO, and relations with the EU. This section of the paper does not attempt to review this literature; it does no more than provide a list of some frontier-related problems, relating to Justice and Home Affairs, which are likely to remain or to appear on the agenda during the next decade. The reason for making such a list is to demonstrate that JHA co-operation does not and cannot provide the solutions to these problems.

Most of the issues, each of which requires a paper in itself, are related to the economic glacis represented by the existing eastern frontier of the EU and could be much attenuated if the economic differentials disappear. Economic differences do not explain all the political and social forms which problems may take; these are heavily influenced by cultural and historical factors, as well as by unforeseen events.

The nature of this glacis can be represented by key statistics (although international comparisons of this sort can give a distorted picture). In 1997, of the countries under consideration for rapid admission to the European Union, Poland was the largest in terms of population (with 38.6 million, it was almost twice as big as the other five combined) but in terms of gross domestic product per head, according to European Commission figures, it reached only 31 percent of the EU average. The two smallest applicants, Cyprus (0.7 million inhabitants) and Slovenia (2 million) had the highest GDP per head with 59 percent of the EU average, followed by the Czech Republic (10.3 million) with 55 percent, Hungary (10.2 million) 37 percent and Estonia (1.5 million) 23 percent. The five other candidates Bulgaria, Lithuania, Latvia, Romania and Slovakia all had GDP per head of less than a quarter of the EU average with the exception of Slovakia which had 41 percent. There is, therefore, a very significant gradient between the existing EU members, their immediate neighbours who will be in the first wave of new entrants and the outer circle of applicant states. All of these countries face economic re-structuring - some are much further advanced than others but all have to confront social dislocation and dislocation as a result of re-structuring.

During the pre-accession and accession period, amongst the most salient problems are likely to be migration of people (which is easily the most important in terms of political debate) into the existing member states, stereotyping of the poorer by the richer, transfrontier criminality, fears of subordination of the poorer by the richer (both leading to national tensions), regional tensions within the new members, and severe practical problems of frontier control. All these are related to, although they are not exclusively based on, the economic glacis and all, to varying degrees, can trigger violent reactions.

Migration of people is likely to dominate the political agenda and has been, and will continue to be, perceived in EU countries as, above all, a problem for receiving countries. It has progressively been conceived as a security problem[11] because of links made between immigrants and illegal trafficking, crime, violence and urban decay. Without doubt, security problems are connected with some migratory movements but these problems should be set in a complex psycho-social, political and economic environment.

There have been cyclical anxieties in the EU member states about a "flood" of immigrants from the east, fuelled partly by the actual arrival of immigrants, partly by hypothetical analyses of possible arrivals and partly by debates over the attempts to tackle the problem of illegal immigration. The dismantling of the Berlin wall and the heavily guarded frontier dividing the two Germanies enormously increased the flow of asylum seekers and illegal immigrants into Germany. This resulted in a rise of racist attacks, severe

restriction on immigrants and asylum seekers, and an agonised debate on the German naturalisation laws.

Five points should be taken into consideration, especially if in the context of proposals for the phased introduction of free movement of persons between the new members and the rest of the EU.

- The attempt to phase free movement may not work because of enforcement problems. The movement of Portuguese into France, before Portuguese accession and before the free movement provision of the accession Treaty came into effect, remained largely unchecked because it is difficult, depending on the character of the immigrants (i.e., if they are law abiding, discreet and perform useful jobs), to enforce strictly regulations which are about to disappear.

- "Floods" of immigrants do not necessarily take place when they are confidently predicted. Alarming reports were published in the early 1990s of the potential flow of immigrants from the former Soviet Union and assessments both by the Russian authorities and by western commentators. This exodus did not happen. The most recent concern, at the end of 1997 and the beginning 1998, was triggered by the opening of negotiations with the candidate countries for the EU, and by a report of the International Migration Office concerning the number of immigrants both from Africa and Asia, and from the countries of the former Soviet Union apparently waiting for an opportunity to enter the EU.[12]

- The propensity to emigrate may be high in Eastern and East Central Europe but the preferred countries of destination are not, according to the International Migration Office, in western Europe but in North America and in Australasia. The immigration policies of the countries of these latter regions, early in the next century, could be an important factor in the movement of people into the existing members of the EU. It is likely that they will be successful in "creaming off" the best qualified and trained migrants.

- For demographic reasons, labour shortages may appear in Europe, between 2005 and 2015. The EU may have to develop a voluntarist immigration policy to take this into account.

- Migration can be a benefit and a problem for sender countries as well as receiving countries. Temporary migration can bring revenues and know-how

to sender countries - both can stimulate economic activity. Against this, sender countries can suffer skill shortages if migration is massive and permanent. The discourse of cost benefit is "crowded out" of public debate by a security discourse, to the disadvantage of both receiver and sender countries. Cost benefit approaches can sometimes be conceived as politically embarrassing as when a 1998 report, by Sami Nair to Prime Minister Jospin suggesting controlled immigration as an aid to development, was not published.

Since the 1980s all the EU member states (the UK from the 1960s, France from the 1970s) have hardened their position on immigration and now a consensus has been reached on a policy of closure of frontiers to further immigration. But policy of regularisation of undocumented immigrants already in the EU has varied considerably, with a rough divide between north and south. The northern countries have adopted a policy of individual examination of cases; by contrast the southern countries have offered amnesty to existing undocumented immigrants before embarking on stricter control measures.[13] A common immigration policy has yet to emerge but is likely to emerge before the accession of the new members.

The whole of immigration, asylum and free movement policy poses serious problems for the East Central European countries and, in particular for policing and frontier control. One issue is the degree of co-operation which they can get from their eastern neighbours because effective management and policing of frontiers is only possible if neighbouring countries are agreed on policy and have put in place working systems of co-operation. At an international conference in Prague in October 1997 on migratory movements General Andrej Wasiuk, deputy commander of the Polish frontier guards, gave a pessimistic assessment of the situation on the eastern frontier of Poland, with good reason. The length, topography and political factors of the Polish and Hungarian frontiers make these frontiers very expensive to police, in terms of patrols, other forms of surveillance, and administration of frontier controls. In the Polish case lack of a stable political relationship with Belarus and the extreme financial difficulties of Ukraine resulting, for example, in non-payment of Ukrainian frontier guards are crucial contributory factors to the difficulties. The EU has, therefore, a well-recognised interest in the financial and political stability of countries which have not yet applied for membership.

The EU rules on asylum, immigration and frontier controls cannot but place heavy burdens on the countries of East Central Europe. The "first safe haven" principle concerning asylum means that many Asian asylum seekers trying to reach the EU overland are, and will continue to be "trapped", in the candidate

states. All now have re-admission agreements with their western neighbours - that is they agree to accept the return of undocumented immigrants if they have crossed their territory in order to gain entry to, for example, Germany. Although the candidate members have succeeded in negotiating re-admission agreements with some of their eastern neighbours but the degree to which these will be respected is uncertain.

The imposition of Schengen norms at the eastern frontier of the candidate states, which must be put in place in the pre-adhesion stage, is likely also to put strain on these countries for six reasons. First, these frontiers are high risk, insofar as this can be predicted, in terms of large numbers of refugees seeking to cross them to find haven from violence, poverty and economic disaster further east. Second, there is almost bound to be leakage of clandestine immigrants through these frontiers which will attract criticism from western governments of the countries concerned, and possibly press and political campaigns against them. Third, as the Polish government has already complained, tight frontier controls will affect local and regional markets to the detriment of economic activity in the eastern borderlands. Fourth, as the Hungarian government, and an active lobby within Hungary, have pointed out a closed frontier could have adverse consequences for the Magyar speaking minorities in Slovakia, Romania and Yugoslavia in that their contacts with Hungary could be made more difficult.[14] There are also close historical connections between some of the Ukrainian population and Poland. The Czechs and the Slovaks although now separated by the external frontier have close personal and cultural ties. The external frontier controls, visa requirements (especially for neighbouring states) and the Schengen system taken together represent a psychological and symbolic separation which is keenly felt by some citizens of the candidate states. Fifth, the cost of the external frontier controls which, at the moment fall entirely on national budgets, will be high having regard to the relative wealth of these countries. Sixth, effective frontier control is not practical unless there is co-operation between the neighbouring states. This co-operation is highly uncertain in cases where the neighbouring states are unhappy about the EU frontier control regime (Belarus, Ukraine and Romania are obvious examples where this may continue to be the case).

Some of the movement of people westwards, whether from the candidate members or from countries further to the east is bound to be associated with criminality. The causes of crime continue to provoke controversy but wealth differentials are certainly a major factor which encourages certain forms of crime - crimes against property, prostitution (which is not always classified as illegal although deriving profit from it usually is), illegal traffics, especially in drugs. The Agenda 2000 reports of the European Commission on the candidate members all

pay some attention to crime problems. On Poland for example, it noted that organised crime had developed considerably since 1989 especially in the fields of economic crime, production and trafficking in drugs, forgery, arms trafficking, traffic in women, money-laundering, theft of motor vehicles and extortion. It highlighted the supply of synthetic drugs from Poland to Scandinavia and the role of Poland as a transit country for cocaine and heroin.[15]

Many of these criminal activities are linked directly to the western neighbours of Poland. If wage rates in Poland remain in an alleged ratio of 1:7 with those of Germany, these problems are likely to remain intractable. There is a high risk that the dominant discourse about these crime problems will emphasise, to the exclusion of all else, the importance of repression. This "security first" discourse is dangerous because it will identify criminality with Poles and not with structural economic problems. The solution, as the relations of the United States with its southern neighbours have amply demonstrated, does not reside in political pressure on countries to take more repressive action, heavy-handed policing including direct intervention in neighbouring states, flanked by increased foreign aid to domestic police agencies. This policy may paradoxically help to embed criminal organisations in societies in which many people feel alienated both by foreign interference and police repression.

Criminality is one element which contributes to negative German attitudes to Poles, Polish attitudes to Russians and in generally hostile attitudes toward the Roma. Continuing relative differences in living standards, especially if people from poorer countries are regularly seeking menial occupations in the richer countries, can result in attitudes *de haut en bas*, in which the competence, integrity, initiative, sense of organisation, level of culture of the poorer is consistently questioned by the richer. The irritations of everyday contact may encourage more extreme reactions and feed the violence which Poles have already encountered from neo-Nazi youths in the new German Länder. At this point, the problems become issues of enforcement of the criminal law. Unless there is close co-operation between national governments concerned, and local and regional governments in the frontier regions, populist political movements using crude nationalist propaganda will be able to exploit these incidents making the maintenance of public order problematic.

The problems resulting from economic inequality are not limited to negative stereotyping. The dominant role of the western partners, in particular Germany, in trade and direct investment, in the countries of East Central Europe, has had and will continue to have positive economic effects. The two major risks are the continuing disparity between living standards of the old and new members of the EU and a cultural division of labour. If catching up with the old members

no longer seems to be an achievable goal and, despite extensive de-localisation of manufacturing capacity from west to east, none of the levers of command of economic activity shift eastwards - and most of the high prestige "intellectual" activities in forward planning, research and development, as well as related, and extremely lucrative, financial and consultancy services, remain concentrated in the west - this will provide a basis for nationalist reactions. When issues arise such as factory closures, changes of sub-contracting patterns, technological change necessitating re-structuring of enterprises, and the like, movements of social protest are likely to emerge which will have pronounced nationalist features whose targets may not simply be foreign firms and foreign nationals but the European Union itself.

Finally there is the legacy (or legacies) of history in the Eastern borderlands of the EU and in the candidate countries, and their possible implications of these legacies in EU enlargement. The most obvious problems are on the German-Polish and German-Czech frontiers.[16] The expulsion of perhaps 12 million Germans from Central Europe at the end of the Second World War, has left these two frontiers as clearer national boundaries than they were in the past, although perhaps 500,000 Germans remain in Poland and 50, 000 in the Czech Republic. The justice of what happened is bound to be viewed differently on different sides of the frontier; painful and strong sentiments are bound to arise on specific matters (such as German cemeteries where there are no longer Germans). These sentiments enter into controversies over what to do about practical matters such as property rights. What is done or not done could create problems of public order. The restoration of individual German property rights for those dispossessed in the immediate post war period would seem to pose greater problems than benefits - including having to deal with the possible violent actions against Germans in the Sudetenland and western Poland. Direct German investment in these areas has been limited, probably because of awareness of sensitivities, but the possibility exists of individual Germans wishing to acquire houses and properties in places with a strong German historical background such as Gdansk. This can be a highly emotive issue and one which leads to measures, such as restrictions on the rights to acquire property along the lines imposed by Denmark, which infringe the spirit of the single market.

This, and the many other legacies of history, create fertile ground for political mobilisation around old, re-created and possibly new identities. The integration of new member states into the EU will broaden the perception within these states, as it has for example in Scotland, of what is feasible especially if there are marked regional imbalances in the benefits of EU membership. There are always losers as well as gainers in transformation processes which inevitably provokes conflict and can re-ignite old animosities. The exacerbation of minority

questions[17] may create public order problems which, at the very least, complicate co-operation in the Justice and Home Affairs.

Scenarios for Future Development of Co-operation in Justice and Home Affairs

There are political limits to possible JHA co-operation in the EU at the moment. No member state, despite the ambition of the Amsterdam Treaty to create an area of freedom, security and justice, will consent to hand over to the EU the responsibility for public order on its territory without a firm guarantee of the unreserved solidarity of the other member states. For a variety of reasons the member states do not at the moment consider that this is the case for a variety of reasons (which are not explored in this paper). Whether a sense of solidarity will increase or diminish as a result of enlargement is an open question.

In the light of this uncertainty, there are three possible scenarios for the first decade or so of the next century. One scenario, beloved by eurosceptics - regression to a system of competing states in which the EU is either marginalised or disintegrates - is excluded as unrealistic.

In considering these scenarios, there are three elements which will be present whichever scenario approximates more closely to events as they unfold. The first is the theme of reinforced co-operation between certain member states - a recurrent theme of the Treaty. This allows a group of states going further and faster than the others in JHA co-operation. The acceptance of UK, Irish and Danish opt-outs was an example of the kind of flexibility which the contracting parties envisaged. This "flexibility" will certainly affect the new member states, even though they have to accept all the *acquis*, because faster development of co-operation between core member states may exclude them or they may exclude themselves. In the former case it may be either that the older members may consider the systems of the new members are not sufficiently trustworthy or that they lack certain technical capacities; in the latter, it may be that either because the new members are unwilling to give up too much of their recently re-acquired sovereignty and independence of action or because specific immigration and internal security issues require local solutions.

The second element stems from the principles of rule of law and respect for human rights which are written into the Treaty of Amsterdam. This opens up the possibility of ECJ action in areas concerning the status of individuals, the independence of the judiciary and behaviour of executive officials in the field of public order. The implications of the integration of fundamental rights into the EU framework are potentially very great because it may allow the ECJ to decide on

the legality of actions in criminal matters by courts and police in the member states. For candidate members this introduced another area of uncertainty about what they are committing themselves to, in joining the EU.

The third element is that the new member states will have responsibility for eastern frontier of the EU (along with Finland which, unlike them, has long experience of administering, and paying for, a tightly controlled frontier). This poses problems of the maintenance of common standards, trust between member states and financing of an onerous responsibility. This is related to the three scenarios outlines below.

The first scenario envisages the continuation of the status quo in which much has been achieved in the fields of police and judicial co-operation. The arrangements already in place are given time to mature but there are no new transfers of sovereignty to the EU. The basis of co-operation remains inter-governmental and where areas are already subject to community procedures, majority voting is not introduced. The Schengen *acquis* remain in Pillar III and each state remains responsible for the EU external frontier situated on its territory. The safeguard clause (Article 2.2 of the Schengen Convention) which permits states to re-impose systematic controls at the internal frontier stays in force. Informal co-operation on control of frontiers is allowed to develop and exchanges take place between immigration and police officers along the lines already developed for Customs in the Mathaeus programme.

On Asylum and Immigration the unanimity rule continues to apply for EU measures after the expiry of the five year delay for the introduction of majority voting envisaged by the Treaty of Amsterdam. In other words, the implementation of the action plan on asylum and immigration proposed by the European Commission conforms to this scenario - an agreed list of countries from which individuals cannot seek asylum, constitution of a data base of asylum seekers, common regulations for entry and residence including persons from countries which do not require a visa, a uniform visa, a uniform policy for re-admissions and for the return of illegal immigrants, strengthening of solidarity to combat clandestine immigration.

On police co-operation the facilities for cross border surveillance and hot pursuit are implemented, Europol functions according to the Treaty of Amsterdam, with criminal investigations entirely under the control of national authorities and the establishment of observatories (like the Lisbon observatory on drugs) based on new Conventions.

Judicial co-operation would be advanced by the ratification and/or entering into force of Pillar III conventions already negotiated - mutual legal assistance, two conventions on extradition. The action programme of the Council and the Commission also includes the establishment of a European judicial network for criminal matters, strengthening of the measures for the repression of money laundering, mutual recognition of judgements and sentences of courts, facilitating co-operation between ministries of justice and judicial authorities, or equivalent competent authorities in member states.

This scenario does not require reform of national and European institutions. The continuation of the present system can overcome the rigidity of the unanimity rule through co-operation between a restricted number of states. This continuation would strengthen the Council and, to a lesser extent, the Commission (as the repository of information through "observatories" and the collection of statistics) but there would be a persistence of a lack of transparency in the arrangements for co-operation. National parliaments play a key role in the accountability of the agents of co-operation and this is a role which they have not yet exercised effectively. The European Parliament would not have any power of decision except through its budgetary powers and, in the present system, these are not relevant to JHA co-operation.

From the point of view of enlargement, the perspective of accepting new members will certainly stimulate the implementation of measures already negotiated. Their implementation in an enlarged Union is probably dependent on closer co-operation between some states in certain areas and there is a risk that more may be required from new members than from existing members.

The second scenario is the development of new forms of co-operation between national police and judicial agencies, and supranational intelligence agencies; in addition, EU norms in criminal matters and the approximation of national laws would be developed. This scenario corresponds to a "maximalist" interpretation of the Treaty of Amsterdam.

In terms of this scenario, some supranational arrangements for external frontier control can be envisaged in terms of developing qualitative norms for national agencies responsible for the external frontier and sanctions (imposed by a qualified majority) when they are not met. The present Schengen committee which supervises the application of Schengen norms would operate independently of the states and its reports would subsequently be adopted by the states. On asylum and immigration, there would be the passage to qualified majority voting after the transitional period of five years. Rules, with sanctions imposed for non-compliance, would be established not only for entry of

foreigners but on the conditions for long-term residence including rules concerning the family separation, the movement from another member state of third country nationals resident in another member state, the procedures for the reception of asylum seekers and the granting of refugee status, temporary protection for persons fleeing catastrophes in their own countries.

On police co-operation Europol would be given powers for initiating criminal investigations by national authorities, with judicial control to ensure that the national authorities complied; agents of Europol would use the possibility opened up in Article 30 of the TEU to participate in national enquiries; joint police operations between different states would be provided with a legal basis to tackle certain forms of criminality; co-operation in frontier regions would develop beyond the existing joint police stations. European norms of professional police conduct and police efficiency would be developed and inspections would take place to ensure these standards were met. The states would have the right to bring a case against a neighbouring state if the Schengen norms were not respected.

In the field of judicial co-operation there would be a movement towards qualified majority voting after the transitional period of five years. Extradition in its present form would be abolished in favour of a common procedure of charging suspects and the automatic transfer of suspects to the court with jurisdiction in the case. Rogatory commissions would disappear and investigating magistrates could address requests directly to the police of another state. They could also address an EU agency composed of magistrates drawn from all the member states which would assist with the interpretation of legal texts and the translation of requests. This agency would also be charged with supervising the follow up of requests for assistance. There would be a common definition of national interest when it is used to refuse requests for assistance. Harmonisation of law in the fields of organised crime, drug trafficking and terrorism would be possible.

The impact of this scenario on national and European institutions would be considerable. Putting in place sanctions against national agencies and against states would require a revision of the treaties. The Commission would have to create new directorate generals in the fields of police and justice, implying a new culture of European public order. The development of a common system of charging suspects and common procedures in the field of immigration and asylum would have a radical effect on national legal codes.

The possibility of this scenario being realised in the field of police is increased by enlargement because of the necessity of establishing trust in policing throughout the "area of freedom, security and justice". For judicial matters, the

possibility of this scenario occurring depends on the pressures of judicial networks and of public opinion. These could be strong in the medium term. But the stability of this system envisaged by this scenario could be open to doubt because of the possibility of adverse reactions in public opinion to the new arrangements.

The third scenario marks a sharp break with the first two because it would be a decisive move towards federal structures with the establishment of operational instruments at the EU level.

The management of the external frontier would be handed over to a supranational agency with national officials placed under the authority of this agency. The principal responsibility of this agency would be the repression of clandestine immigration and national agencies could have the responsibility for expelling the immigrants found. In the domain of policing, a European police would be established which would enforce a European criminal law. This police, directed by a European Police Chief, would have sole responsibility in its domain of competence but would delegate most of the operational tasks to national police agencies. For certain procedures, such as search and entry, the EU police would need the agreement of the national jurisdictions. The European Court of First instance would adjudicate conflicts of competence.

Judicial co-operation would be defined in areas where criminal activity clearly crossed national boundaries or where offences were committed against the EU itself - drug-trafficking, corruption, money laundering, forging euros, fraud against the EU budget. These matters would be dealt with by Pillar I. The ECJ would be competent for interpreting the European Criminal Law. All the rights presently available to individuals under the European Convention on Human Rights would be incorporated into EU law. A public prosecutor's office would be set up at the European level with access to the office by the European police, national police and victims of crime. The Court of First Instance could adjudicate conflicts between national prosecution services and the European prosecution service. When an enquiry was complete, the accused could be sent for trial before national courts.

This scenario would require very considerable powers of imagination and invention at the level of the European institutions. Procedures for appointing and for the accountability of the European police chief and the European prosecutor's office would have to be established. A European Court of Appeal would almost certainly be necessary. The organisation of the ECJ and, particularly, the Court of First Instance would have to be modified. National

jurisdictions would have to adapt to procedures and structures for which there was no precedent in national arrangements.

The possibility of this scenario in the foreseeable future is remote, particularly as developments to date have been the cumulation of small steps. However, the quest for efficacy could lead the EU to approach this scenario through the increased competence of Europol and the harmonisation of laws. The emergence of a common policy on immigration policy could lead to a federalisation of immigration police. In other words, the adoption of part, rather than the whole, of this scenario is possible. In the absence of a strategic vision shared by all the dominant political forces in Europe, the stability of a system based on the whole scenario would be in doubt. It would require a strong democratic mobilisation and a highly developed sense of European identity to give it legitimacy and, at the moment, this is scarcely conceivable.

For new member states the *acquis* which they would have to accept is massive and would probably not have public acceptance.

By Way of Conclusion - The Problem of Timetable

In Agenda 2000, the European Commission reported satisfactory progress in the countries of east central Europe selected for the first round of EU admission whilst noting certain criminal problems, such as the manufacture of synthetic drugs in Poland. The phase of pre-adhesion opened in November 1998; during this phase, the five countries have to adopt all the rules, the whole *acquis communautaire*, of the EU. No opt outs are possible for new member in the way they have been for existing members. The room for manoeuvre to defend national interests is therefore restricted to transitional arrangements. Entry into the EU represents a considerable loss of sovereign independence for countries which have only recently re-acquired it.

But the candidate countries have not yet been given even an approximate date for entry. A pessimistic but realistic assessment is that enlargement will not take place until the end of the first decade of the next century. The informal position of the Commission is that this is not of crucial importance because the EU has made an irrefutable commitment to enlargement. The timetable is not dependent on JHA co-operation but is dependant on the reform of the Common Agricultural Policy, the system of financing the EU and the reform of its institutional framework to allow effective policy making in an enlarged Union. All three dossiers are very difficult and involve crucial national interests of the existing member states. They are also of great importance to the candidate

members who stand to gain from the CAP (even though they cannot enjoy the existing compensation payments) and structural funds but will almost certainly see valuable prizes snatched from them by EU reform before they enter.

The difficulty for the candidate members is that their *de facto* integration into the economy of the EU proceeds apace but preserving majority support by their citizens for EU entry may become more difficult as time passes. This will be particularly the case if the material benefits to be gained from entry become less obvious by comparison with the already existing benefits of proximity to EU markets, direct investment flows from EU member countries, and liberalisation of trade. Parts of the *acquis communautaire* which seemed imposed, rather than beneficial and freely accepted - and Schengen has been singled out in this paper as an example - could produce a lowering of support over time for EU entry in the candidate countries. The problems of phased entry may also cause hostile feelings to emerge. Phasing is most likely in the area of agriculture and structural policy as the EU, which will seem to deprive the candidate members of the fruits of membership. In the area of free movement of persons, a phased entry will appear discriminatory at the level of individual rights. Phased entry for other aspects of JHA co-operation has already been excluded and, as has already been emphasised, the imposition of the Schengen *acquis* has already been a conflictual process.

The main problem is that the longer entry is delayed, the greater becomes the volume of the *acquis communautaires*. Although the *acquis* in the field of JHA has often, in the past, seemed a marginal issue, the scenarios sketched above indicate that this can no longer be regarded as the case. This will be an increasingly important domain of debate and policy in the EU and care should be taken that the development systems of co-operation not appear discriminatory and oppressive to the candidate states. The related Pillar I areas of immigration and free movement are equally sensitive and the concerns of the candidate members in these areas should be listened to with care and consideration.

Malcolm Anderson

APPENDIX

Treaty of Amsterdam (main articles on JHA)

Article K.1

Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

closer co-operation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles K.2 and K.4;

closer co-operation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles K.3(a) to (d) and K.4;

approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article K.3(e).

Article K.2

1. Common action in the field of police co-operation shall include:

(a) operational co-operation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;

(b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports

on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data;

(c) co-operation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;

(d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

2.   The Council shall promote co-operation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam:

(a) enable Europol to facilitate and support the preparation, and to encourage the co-ordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity;

(b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and co-ordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;

(c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close co-operation with Europol;

(d) establish a research, documentation and statistical network on cross-border crime.

<div align="center">Article K.3</div>

Common action on judicial co-operation in criminal matters shall include:

(a) facilitating and accelerating co-operation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

(b) facilitating extradition between Member States;

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation;

(d) preventing conflicts of jurisdiction between Member States;

(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

NOTES

[1] For the notion of a territorial ideology see M. Anderson (1996) *Frontiers. Territory and State Formation in the Modern World*, Cambridge, Polity Press, pp. 34-36.

[2] For the fullest account to date of these reasons see the White Paper *Fairer, Faster, Firmer - A Modern Approach to Immigration and Asylum,* CM 4018, July 1998.

[3] The special number of *Cultures et Conflits*, 23, Autumn 1996 'Circuler, Enfermer, Eloigner" is particularly informative on this topic.

[4] Much as been written on local and regional transfrontier co-operation, see M. Anderson (1998) "Transfrontier Co-operation - History and Theory" in G. Brunn, P. Schmitt-Egner (eds.) *Grenzüberschreitende Zusammenarbeit in Europa*, Baden Baden, Nomos, pp. 77-97, but the relationship between police co-operation and other forms of co-operation has not been explored.

[5] See O. Waever, B. Buzan, Morten Kelstrup, P. Lemaitre (1998) *Identity, Migration and the New Security Agenda in Europe*, London, Pinter, for the concept of societal security. See also the excellent article J. Huysmans (1998) "Dire et écrire la sécurité: le dilemme normatif des études de sécurité", *Cultures et Conflits*, pp. 31-32.

[6] *Financial Times* 25/11/97.

[7] See House of Lords, Select Committee on the European Communities, Session 1997-98 31st Report (The Stationary Office 1998) *Incorporating the Schengen Acquis into the European Union.*

[8] A contingent difficulty is the Spanish dispute with the UK over whether the Spanish-Gibraltar frontier is an external frontier. This could well result in Schengen remaining in Pillar III.

[9] Council Act of 26 July 1995 drawing up the Convention based on Article K 3 of the Treaty of European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27 November 1995, 1-31.

[10] M. Anderson (1989) *Policing the World. Interpol and the Politics of International Police Co-operation*, Oxford, Clarendon Press, pp. 90-100.

[11] For the exploration of this dubious link see the eight contributions to (1998) "Sécurité et Immigration", *Cultures et Conflits,* pp. 31-32

[12] See report in *Le Monde* 3 i 98 on the wave of clandestine immigrants in Central Europe and allegations of weak control of the 1,300 kilometres of the Polish frontier.

[13] OCDE *Tendances des migrations internationales* (1997). Italy amnestied 120,000 in 1987-88, 218,000 in 1990 and 240,000 in 1996; Spain regularised 43,800 in 1985-86, 110,000 in 1991, 50,000 in 1996; and Portugal regularised 40,000 in 1985-86, 35,000 in 1996. In January 1996 Greece implemented a programme for either regularising, subject to stringent conditions, or expelling 500,000 illegal immigrants. The case by case approach has obscured the aggregate number of cases in Belgium and The Netherlands. Germany has rejected any general amnesty and declared since 1993 that it is not a country of immigration but Germany is the country which has received most foreigners, *Aussiedler* from the east, Bosnian refugees and hundreds of thousands of asylum seekers.

[14] Among the solutions canvassed is dual citizenship, a tighter visa regime for the eastern neighbour states involved allowing freer travel between Hungary and its immediate neighbours, and partnership agreements with Schengen along the lines of those reached with Iceland and Norway. All these are problematic. See R. Weber (1998) "The Romanian-Hungarian-Relations within the Legal Frame of the Schengen Agreements" *International Studies* (Bucharest) 4 35-46.

[15] "Avis de la Commission sur la demande d'adhésion de la Pologne à l'Union Européenne", *Bulletin de l'Union Européenne* Supplément 7/97.

[16] See the work of Gilles Lepesant on this frontier, "Dynamiques des Frontières orientales de l'Union Européenne. Le cas des frontières Germano-Polonaise et Germano-Tchèque" in M-C Murel (1998) *Recomposition de l'Europe médiane*, Paris, SEDES and his forthcoming book to be published by Harmattan.

[17] For a useful up-to date survey see A. Liebich (1997) *Les Minorités nationales en Europe centrale et oriental*, Genève, Georg.