Police and Judicial Cooperation in Criminal Matters

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1. On 25th March last the European Council held its usual Spring session in Brussels, a session, moreover, occurring a mere two weeks after the massacre of Madrid, which nobody could regard as routine. In fact, a renewed and energetic commitment to the struggle against terrorism came out of this meeting. As expressed in the final "Declaration," there was an intention to adopt new measures in this field (starting with the nomination there and then of a Coordinator to lead this struggle).

   The Declaration was published at a time when this general report was almost complete: from which, for my part, there was a feeling of being, in a certain sense, overtaken. In other words, I am very conscious that the results of my work run the risk of appearing vague in the light of the new prospect of activity by the Union and that, in spite of the references which my report seeks to make to the Declaration, it

is obviously, very far from what one would have had the right to claim if the available time had been longer.

In any event, I think that, much more than my words, it will be for the debates of the Congress to bring home a consciousness of what the attacks of 11th March mean and will lead to – barbaric and cowardly, as they are described by the Declaration itself, their dark cloud weighs on our present and on our future – as well as the reactions to this tragedy, without, on the other hand, accepting that any false justifications can be offered, which distorted responses to pre-existing serious and controversial problems.

I have accepted the task with which I have been honoured, in the spirit of attentiveness to the developments which have marked the challenges of terrorism and grave cross-border crime. It was necessary to be conscious of the emergencies of our time without, at the same time, forgetting the complex requirements of fidelity to values which come to us from far back and which we are bound, looking ahead, to keep in high regard.

2. Without doubt, the subject which the Congress is called to debate in our section is, in itself, of no of small importance and I have found it difficult to limit the drafting of the questionnaire to certain particularly sensitive issues.

As for the work accomplished by the European institutions in the field of judicial cooperation in criminal matters, it would not be wrong to describe it as impressive. Indisputably, there is a manifest desire for closer cooperation in this respect between the Member States and the Union, not merely at the level of the fight against terrorism, but also concerning drug trafficking, organised crime, economic crime…..

At a general level, one should not lose sight, if nothing else, of an aspect of the convention on mutual assistance in criminal matters signed in 2000, besides the

various conventions concerning extradition, to which are added and, in a certain sense, are superimposed, the very recent framework decision on the European Arrest Warrant, in addition to acts concerning the creation of certain common institutions such as Europol and Eurojust. With all this, we should not forget the efforts aimed at making of the European Union, as such, an entity capable of entering into agreements with foreign states, such as the agreements negotiated recently with the United states concerning mutual assistance in criminal matters and extradition, agreements destined to replace to a large extent the bilateral agreements in force in these fields between Member States of the Union and the American Nation.

Nevertheless, there are widespread impressions of inadequacy, to a point where more or less serious failures are identified, while, on the other hand, fears are emerging in relation to the repercussions which the maintenance of adequate standards of safeguard of individual rights may suffer as a consequence of definite increase in cooperation. Tensions engendered by opposing pressures in the short term, while these are not necessarily evidence of hostile feelings. They are tensions, at the same time, which should be regulated and accommodated, in order to avoid the disappointment of hopes for effective and reasonable responses to the challenges which Europe will have to face more and more, where it risks losing its identity as an area where freedom, security and justice are enemies one of the other.

It is not the ambition of this report either to set the balance or, less still, to put forward definitive solutions in order to find effective and conciliatory ways out of these numerous difficulties. More simply, following an inevitably hurried reading of the national reports, I have tried to explain my personal views of certain problems and of certain sensitivities in these respects, merely adding some reflections based on my perspective, and for the remainder, in this respect also, being fully conscious that I have no right to claim the capacity of “euro-expert.” In consequence, I can presume to enjoy the freedom of a simple “amateur,” similar to what has always been expected from jesters and fools.

3. A first observation. In recent years, efforts aimed at the achievement of common European programmes in the area of "liberty-security-justice" have taken the form of "framework decisions" rather than the traditional way, via multilateral conventions.

Delays which have been observed in the putting into effect of several of these conventions (including the general convention on mutual assistance in criminal maters whose innovative openings are well known, such as those concerning the permitted use of advanced technological resources, such as videoconferences) have led more and more to a preference for another instrument, of more direct application and one based on a commitment to pursue the objectives rather than impose totally common rules with regard to means. That has not, nonetheless, caused all difficulties to disappear.

In reality, normative technical resources- or, to express it better, of normative "engineering"-while important, are not enough to overcome problems which can be traced back to the roots. One can see this above all in respect of the area traditionally covered by extradition procedures.

4. In this respect, debates are concentrated precisely on the framework decision establishing the European Arrest Warrant, by which, within the European Union, the classical form of extradition has been replaced in general terms by the direct surrender of a person from one state to another: even more, then, from the context of the Conventions of 1977 (for the fight against terrorism), of 1995 (establishing a simplified procedure or extradition between the Member States of the European Union), of 1996 (concerning extradition between these States).

The outcome of a unanimous willingness of the Council of the EU- though preceded by certain largely contrived opposition, at least to the extent that they were influenced by political controversy, internal to one particular state (my own…) on

subjects apart from the issue – the framework decision has received powerful encouragement and essential support but still meets strong internal opposition in several states. The result is less rapid progress than desired in its general application within the Union, as is shown by the fact that, three months after the expiration of the date fixed for the purpose by Article 34 of the framework decision a third of the Member States had not adopted the measures necessary to conform to the new European provisions.

Therefore, it is not surprising that the above Declaration of the European Council of the Union places this framework decision at the head of the list of legislative measures to be put into effect without delay, specifically, at the latest in June 2004 and "in their entirety."

The causes of doubt and perplexity are, nonetheless, numerous, while it would not be appropriate to combine them in a single block, they are capable of obstructing fundamentally the objective, in my opinion, perfectly worthy of being pursued, of the framework decision, in other words, more concrete and effective justice in Europe, particularly in the face of growing transnational crime.

5. A certain number of states were confronted with a very specific difficulty by reason of the fact that the framework decision does not allow the status of being a citizen or national of one of the states as sufficient, in itself, to prevent the execution of the warrant in question.

From this point of view, a general awareness of a "European citizenship" superimposed on national citizenships has perhaps reinforced the conviction that it is necessary to avoid giving the benefit, in the name of possession of a nationality, to criminals' of their ability to travel freely. It follows that there is a willingness, also very widespread, to overcome obstacles to the adoption of legislative change (sometimes, including changes to the Constitutions of states) necessary to ensure, in this respect, the compatibility of national law with the framework decision.

Certainly, on this point, the increase in such awareness should not be limited. If common citizenship did not, above all, signify common enjoyment of rights and participation, any sacrifice of the legal heritage of the separate nations would be (or would be seen to be) unacceptable.

On the other hand, it is clear that the balance which inspired the framework decision from this point of view is not merely abstract. Rather, it is remarkable that many states have availed of the clause of Article 5.3, which allows the surrender of nationals of the requested state to be made subject "to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."

A more sensitive question, in my opinion, is that of political offences, which is associated with a long history of the protection of dissent under authoritarian and anti-democratic regimes. Nonetheless, even on this subject it seems that the obstacles to the radical solution adopted by the framework decision are not insurmountable. Rules which are compatible with this solution should be settled at the national level, and where appropriate by means of a constitutional amendment.

In this regard, two considerations should not be left out of account. From one point of view, it is indisputable that the principle of the exception to extradition for political offences has already undergone progressive erosion in international treaty law (notable in the European area) and, even if not by legislation then by judicial means, within states where the exception is formally recognized even at present in its strictest form. From another point of view, one should not ignore the highlight which one form of guarantee, the non-discrimination clause, has come more and more to provide, as a substantial substitute for the exception. This is a highlight which the preamble of the text expressly recognizes, where it proclaims (point 12) that "nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest

warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons."

Moreover, on this last proposition, one should reflect upon a paradoxical consequence of the replacement of one clause by another. In effect, it is true that the non-discrimination clause occurs more directly in the context of the protection of human rights than the former exception from extradition for "political offenders." Precisely for that reason, nonetheless, when the competent authority of the requested state wishes to refuse extradition or surrender by reference to the first clause, that refusal might sound more critical of the requesting state than if its justification were was based on the objective "political" nature of the offence. What would this mean for the reciprocal trust between the Member States of the Union upon which the entire superstructure of the European Arrest Warrant is based?

7. Some lively critics often concentrate on the provision of Article 2.2 of the framework decision, which excludes the principle of double criminality, on the basis of surrender by reference to a long list of offences, provided that they are "punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State," while the condition of double criminality remains in effect- Article 2.4 – though in an optional form in relation to other offences.

Long inscribed among the traditional guarantees in extradition, the principle in question has nonetheless been able to provide a valuable weapon, in the hands of the most devious criminals, enabling them to escape justice by exploiting the differences between national criminal laws. For that reason, counter-measures were necessary, even if the solution adopted does not appear capable of entirely satisfying the need for perfect balance between different requirements.

At the same time, in order to avoid the most paradoxical of the far-fetched (and, one assumes, unintended) consequences of the partial abolition of the condition, a possible "reasonable" interpretation has been suggested, with regard to the resulting system, which would tend to enhance the basis of pre-existing mutual trust between the Member States, on which the abolition is based. In reliance on this foundation it is considered that it would be legitimate to refuse surrender when it is indisputable that the facts alleged do not have a criminal quality in the requested state (which would happen, for example, where an arrest warrant is issued in the case of euthanasia, but euthanasia has been decriminalized in the Member State of execution).

I do not know if this interpretation will be applied in practice. In its favour, at the same time, an argument could be based on Article 3 of the framework decision, in view of the fact that it permits the refusal of execution if the offence (thus, if the act is considered as an offence by the law of *each state*) "is covered by amnesty in the executing Member State."

There remain, in any event, areas of debate in other respects, above all because the "list" of offences entirely excluded from the condition of double criminality comprises categories described in totally general terms (like "computer-related crime" or "environmental crime"). Thus, it is true that the definitions provided by international agreements can often greatly reduce (if not eliminate) uncertainty in the areas referred to, but a difficulty can remain, which may justify distrust in the executing state of an arrest warrant. The reason may be found in the disproportion between the penalties which may be provided and imposed, respectively in the law of that state and that of the issuing state, in relation to one offence or another, even though included in the general category. There is the further fact that the framework decision only takes into account the law of the latter state, as a reference table to measure the seriousness of the offence and to relate its appearance in the "list" for automatic execution of the warrant.

This objection suggests to me a consideration of broader importance. It is a fact that

international agreements display a tendency to commit states rather to punish by severe penalties one or another type of behaviour than to fix, conversely, common lower limits in relation to the subject of the punishment for offences which the differing sensitivity of the various countries consider of greater or less gravity. But deeper pursuit of the second possibility could help to avoid a worry which, otherwise, I consider to be very real. In summary, I can envisage, in this regard, a sort of central control of proportionality of punishment in relation to the crime, and I think that could not merely help to overcome certain objections to the European Arrest Warrant, but more generally would contribute to rendering more visible a commitment to achieving an area which would indisputably tend towards "security" but in time towards "freedom" and "justice."

Elsewhere, an opening in this direction can be read in the draft European Constitution, where Article III-172 does not limit itself to permitting specifically that "European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis." (section 1). More generally, (section 2), it recognizes the possibility of the adoption, by means of a European framework law, of minimum rules with regard to the definition of criminal offences *and sanctions* in the area concerned," if "the approximation of criminal legislation proves essential to ensure the effective implementation of a Union policy in an area which has been the subject of harmonisation measures."

8. Another group of doubts and perplexities, formulated against the European Arrest Warrant, seem to me to reflect fears of a more markedly "political" (in the narrow sense of the word) imprint.

Above all the rule establishing a relationship, in principle direct, between the judicial authorities of the requesting country and the requested state (Article 9.1), which provokes opposition, even though it does not represent a complete

innovation. Opposition is sometimes open, but, in reality, even more it is hidden or underground. All this can be fed, in each country, by the fear of being subjected to authorities within the framework of a foreign organisation, where some guarantees (particularly, a sufficient degree of independence) may be lacking. The anxiety concerning inter-institutional relations can thus become mixed with the care for the protection of the rights of citizens.

Nonetheless, I am not at all convinced of the fact that the retention, by the political authority of the requested country, of a filtering role, which is always necessary in these procedures, would be, in itself, the most certain guarantee against possible abuse. Besides, the framework decision does not absolutely exclude the involvement of political authorities in the procedure but it seeks to encase it within the perspective of global cooperation, while excluding in general any discretionary power to block requests. That is the sense, in general, of Article 7, in providing for the possibility that the states may designate one or more central authorities to assist the competent judicial authorities (a possibility which certain states have used even to ensure a centralized service for the translation of warrants), to the point of allowing that the states which wish to continue to channel requests using this central authority.

A fortiori, I believe there is nothing to prevent national law from obliging the judicial authorities, to which a European Arrest Warrant is sent directly, from informing the central authority for the purpose of general coordination and even more so in order that the latter can make appropriate representations (by political and diplomatic means) where the warrant presents extra-judicial problems.

9. There is another development which excites the concerns of the critics of the European Arrest Warrant. It is the risk that the new procedure, in comparison with the traditional extradition procedures, leads to a loss of the more strictly individual guarantees for the requested person.

The problem is complex and is not entirely resolved either by the reference (in very general terms) which the preamble of the framework decision makes to the protection of constitutional guarantees relating to due process, or by the exposition of certain (minimal) "rights of the requested person" (Article 11) or, again, by the clause which authorises a surrender subject to conditions in the case of a decision pronounced *in absentia* (Article 5.1). There are reservations about the exclusion of any examination of the evidence (or of "probable cause") which should be the basis of the warrant when it is discovered before a definitive arrest is pronounced. In relation to this, at the same time, there is the reply that it is precisely on this point that the specific reasons justifying "mutual confidence" between European states should enable mistrust to be overcome. One should say that this examination is never considered indispensable either by the treaties or by extradition laws.

Otherwise, the theme of individual guarantees during the procedure for execution of the warrant becomes mixed with that of the periods of time which the judicial authorities of the requested country enjoy according to the provisions of sections 2-4 of Article 17 of the framework decision.

In fact, these difficulties are by no means imaginary. Here, taking account of the minimum guarantees for the defence which the same decision provides, but above all the guarantees at the later stage which are provided by the national laws (often at the level of constitutional principles), particularly in regard to rights of appeal. I do not know if it will be possible to adopt legislative measures to resolve or surmount them. In my opinion, it is above all at the level of judicial organisation that it will be necessary to find a point of equilibrium between the need for the new system of surrender not to put at risk what one could call the corner stone of guarantees and the requirement – equally important, even from the point of view of a fair protection for the person concerned – to ensure that the question of the execution of the warrant should not remain in doubt over a long period. For example, it should not be impossible to ensure that there is an order of examination of appeals against decisions about European Arrest Warrants, by fixing particular time limits for relevant decisions, without putting in question the general context where they occur.

In any event, an evaluation should be carried out by the Council of Ministers, in accordance with the terms of Article 17.7 of the framework decision, in relation to measures taken by the different states in order to address this type of problem. One can expect that prudence and tolerance will in the immediate term guide the European authorities in this regard. Following on, - and unless there is a reconsideration of the rules at present in force in sections 2-4 of Article 17 of the framework decision in case it appears that there is a general difficulty about their observance – unacceptable failings of internal reorganisation should be assessed more severely.

10. If the European Arrest Warrant represents, at present, the most advanced stage of development of willingness to make Europe, in many respects, a "common legal area," it is Europol and Eurojust which represent, equally at present, the most tangible forms of the willingness to put into operation institutions properly described as European, for the purpose of coordinating the struggle against criminality

This involves, in short, two realities which – despite the nature of their competences (which are, taking everything into account, at present very limited) – represent the most visible signs of the attempt to succeed in this struggle, from the dimension of simple inter-state collaboration to that of the work of common organisations and that of the creation of common structures.

Though less far from models already tried – a reference to Interpol springs to mind – but at the same time endowed with unprecedented characteristics, Europol was not free, at the time of its creation, from opposition of principle. At the same time, the general body of the reports prepared for the meeting in Dublin seems to testify to a general acceptance of the organisation, at least so far as concerns its original competences as a depositary of records and for the promotion of exchange of information. The national Units established are composed almost everywhere of

links between different elements of the network. Even the attitude of the new Member States of the Union – most often already associated in some way with Europol by cooperation agreements – display a feeling generally and fundamentally favourable to this institution. Rather, the observations concentrate on the practical obstacles which the accomplishment of the tasks conferred on the institution will encounter in practice, obstacles due to many causes, among which one should not forget the real failings in cooperation by national police authorities.

It is the increase in the powers of Europol, in order to make of it an organisation endowed with definite operational and not simply informational functions, which continues to meet opposition or serious resistance, even though it is provided for in the most recent Protocols to the Convention which established it.

11. The European Council seems to have no doubts about the strategic importance of the institution, since the Declaration of 25th March does not stop at emphasising in a general way the need to reinforce its role, in particular in "reinforcing its counter-terrorism capacities and reactivating the Counter-Terrorism Task Force" established for the purpose of that struggle, and also that "Europol is provided by Member States law enforcement authorities with all relevant criminal intelligence related to terrorism as soon as it is available." It includes among the priorities of the struggle against terrorism rapid and integrated action on the framework decision concerning Joint Investigation Teams, in which Europol agents are authorised to participate by the Protocol of 2002 amending the Europol Convention, and calls on the Member States to ensure that "representatives of Europol…. are associated with the work" of these teams "as far as possible."

Again more clearly, the draft European Constitution, as formulated by the *ad hoc* Convention, since it affirms in express terms that the tasks which a European law will be authorised to confer on Europol comprise not only " the collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the Member States or third countries or bodies.." but also "the

coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams.." (Article III-177.2).

Certainly, the more Europol develops the features of a centre which is to a certain extent operational (and not simply informational), and the stronger the requirements for effective democratic and judicial review become, and, if the first aspect puts in question particularly the relations between that institution and the European parliament in connection with the national parliaments (cf. Article III-177-2 cited above of the draft European Constitution), the second concerns the future of the second institution to which reference has been made, namely Eurojust.

12. It is particularly in connection with Eurojust that one can measure the distance already covered in the development of a European spirit in the matter of justice but also take account of the opposition – not always unreasonable – to its full blossoming. In fact, Eurojust is designed for a more ambitious project than Europol, because it implicates aspects of cooperation which do not stop at the level of inter-police relations but affect also more especially relations with judicial authorities.

Thus, this institution seems to live at present – and in spite of the passage from the preliminary stage represented by the Pro-just experiment to the stage of full regime – with the wanderings of an organisation in search of its own *ubi consistam* and on which the political authorities of the states look with considerable circumspection.

There is no doubt about the services which this institution is capable of rendering in terms of information and valuable explanations in relation to this or that case, and especially in terms of helpful clarifications of reciprocal knowledge of the legal systems of the different states. The fact that persons who have the benefit of direct experience of investigations, are required to work together, and in the capacity of official representatives of the different Member States of the Union, goes beyond the specific results of each intervention. That enables them to capitalize on their

heritage of mutual knowledge and sensitivity which would have been difficult to acquire otherwise and which spreads usefully through the contacts of each Member State with colleagues in his or her own country.

Having said that, the need to refer to the national legislation of each state for the definition of the nature and the range of powers conferred on its national member in the territory of the state contributes to placing the institution in a sort of limbo. Without saying that the heterogeneous character, which the decision establishing Eurojust permits with regard to its composition, can present some other problems, although the large majority of the national members are in fact constituted National Prosecutors, these are very diversely described in respect of their relations with the executive and the judiciary at the national level.

13. Certainly, Eurojust is considered as a pillar of judicial cooperation in the most recent documents concerning European commitment, notably in connection with the object of effective struggle against terrorism and organized crime.

In the short term, the Declaration of 25th March commits the states to overcoming the opposition and reservations which have prevented the achievement of the tasks already conferred on Eurojust, while underlining the requirement that "Eurojust national correspondents for terrorist matters are designated by all Member States and Eurojust is used to the maximum extent fro the purpose of cooperation in cross-border terrorism cases." The same Declaration, besides, mentions Eurojust, in the same way as Europol as an institution whose representatives "are associated with the work of Joint Investigating Teams."

No less clearly, the draft European Constitution (Article III-174) redefines "Eurojust's mission" (section 1) as being to "support and strengthen cooperation and coordination between national prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the

Member States' authorities and by Europol." It leaves it to a European law to determine "Eurojust's structure, working, scope of action and tasks" of which the draft itself draws the outline, by mentioning "the initiation and coordination of criminal prosecutions conducted by national authorities, particularly those relating to offences against the financial interests of the Union" as well as "the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European judicial network." Section 3 of the same Article specifies that, in the context of the prosecutions in question, and without prejudice to the institution of the European Public Prosecutor (of which I will speak later) "formal acts of judicial procedure shall be carried out by competent national officials."

14. Apart from that, it is clear that there can be problems between Europol and Eurojust, in relation to the objective of better conduct of their activities, and apart from useless and harmful duplication. For the rest, in the Declaration of 25th March already cited, we find a perception – even if very discreet – of the need for closer cooperation between the institutions for police and judicial cooperation of the Union, where the states are required to ensure that "the Europol/Eurojust agreement is adopted by May 2004."

The question, nonetheless, is of greater importance and the European Council, precisely by means of the very concrete measure adopted on 25th March (that is to say by the immediate establishment and nomination of a single Coordinator of the struggle against terrorism), has introduced a new element into a complex system, whose presence is precisely aimed at cooperation but which, on the other hand, demands long-term collective commitment to a disposition in favour of inter-institutional cooperation.

It is indisputable, besides, that there exists the question of the relations between the organisations for judicial cooperation (no less than that of the relations of organisations for police cooperation) with the representative of the democratic will

of the Union and the Member States. It is a question to which the draft Constitution shows that it is not insensitive, even if it is true that it leaves it to a European law to "determine arrangements for involving the European Parliament and Member States' national parliaments in the evaluation of Eurojust's activities."(Article III-174.2). From this, one can clearly read the scrupulous care not to forget the distinction between an organisation for police cooperation and an organisation for judicial cooperation.

15. What is there to say, in this context, of the prospect of the institution of a European Public Prosecutor?

On this subject, the draft Constitution seems to display considerable prudence, since it leaves in suspense the decision to create this organism. (Article III-175.1 "a European law of the Council of Ministers *may* establish….the Council of Ministers shall act *unanimously*…."). At the same time, if we are conscious of the debates provoked by this initiative of which the "Green Paper" of the Commission of the European Communities gives an account at a high cultural level but at the same time not without operational credibility, the position taken by the draft appears less "agnostic" than at first sight.

In this context, two facts seem to me to be particularly significant: on the one side, the indication of an attachment to Eurojust ("from Eurojust"), which could be suggestive of a wish to proceed step by step by using to their limit the existing resources before assigning new ones to novel institutions; on the other hand - and this is a matter, perhaps, for an important choice – there is the overstepping of the original vision of the European Public Prosecutor, limited to the protection of the financial interests of the Union, since he is conceived as being competent, more generally, "for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators and accomplices in serious crimes affecting more than one Member State…"(Article III-175.2).

There are numerous remaining questions, obviously, concerning the structure of this institution, of the status of its members, the rules which it should follow concerning the criteria for initiating prosecutions…In this last respect, I will content myself with an expression of my agreement with the solution proposed by the authors of the Corpus Juris," which is based on the adoption in principle of a rule of legality for prosecutions. I agree also, however, with the acceptance of certain exceptions, provided these exceptions do not endanger the independence of the members of the institution.

I could not fail to observe that the draft Constitution does not depart from the "taboo" that criminal jurisdiction belongs to the national states (Article III-175.2: "It shall exercise the functions of prosecutor in the competent courts of the Member States…"). Is it too soon to think of federal criminal Courts, if strong opposition persists to the extent of the common public prosecutor? In my opinion, at the same time, gradualism is not, from this point of view a synonym for realism. On the contrary, to leave the right to prosecute without a jurisdictional official at the same level runs the risk of aggravating the opposition (according to what one of our national rapporteurs does not fail to emphasise).

16. The crossing of the limits of traditional extradition, the putting into effect of transnational organisms (Europol, Eurojust, perhaps the European Public Prosecutor)….. The scenario will, undoubtedly, become broader. But, as for the creation of a true European criminal law….?

There also, one should think and operate with daring. Certainly, I am not so naïve as to imagine that it will be possible (and even not desirable) to draft a common criminal code for all the states of Europe. Even less should it be conceivable that there will be a single code of criminal procedure.

Nonetheless, progress towards the adoption of certain common principles seems to me to be both possible and appropriate, going beyond the efforts and results already

achieved concerning the definition of certain types of offence and concerning the recognition of the European Convention on Human Rights as an entity to be protected. In the absence of the development of a commitment at this level, judicial cooperation between the Member States of the Union will itself be hindered.

I have already referred to, from a particular point of view, to the subject of the limits (higher and lower) of punishment for certain offences. But this observation applies equally – perhaps to a greater extent – to the law of procedure.

The differences between the national laws are here so marked, under many headings, so that the principle of "mutual confidence" cannot entirely satisfy the requirements of a cooperation which is not designed to live with the nightmare of the renunciation of important principles, especially in respect of the rights of individuals.

As for the roots of these differences (especially concerning the law of evidence), they frequently arise in the c*ivil law--common law* dualism or perhaps, and more specifically, in the other dualism of the "accusatorial model—inquisitorial model." Sometimes the latter is intersects with the former. But neither of these antitheses sufficiently explains all the important differences. It suffices to reflect on the panorama which is being opened up in Europe relative to the choice between the legality principle and the discretion principle concerning prosecutions or concerning the problem of procedures *in absentia.* The attitude to follow so far as the rights of the victim are concerned provides another example worthy of consideration.

In order to create a sort of "table of intermediate principles," the case law of the European Court of Human Rights – which has extracted from the Rome Convention of 1950, and especially from the notion of "fair trial", authentic rules of "judge-made law" – could provide important, though non-exhaustive points of reference. In any event, it would involve the establishment of minimum common rules, to be observed when it is intended to seek the cooperation of another state.

There also, the draft European Constitution offers some openings, insofar as it does not limit itself to considering necessary the establishment, by European law or framework-law, of "measures aimed" among others to "establish rules and procedures to ensure recognition throughout the Union of all forms of judgments and judicial decisions." More specifically and more significantly, it also provides for the possibility of a European framework law "in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension," to "establish minimum rules concerning: a) the mutual admissibility of evidence between Member States; b) the rights of individuals in criminal procedure; c) the rights of victims of crime; d) any other specific aspects of criminal procedure, which the council of Ministers has identified in advance…….unanimously after obtaining the consent of the European Parliament."

17. Prudence, even in this case, is obvious, as much by reason of the use of the simple permissive form of the clause as by the provision for very limited rules, at the procedural level, for the enlargement of the fields of application of the clause itself. And we have observed that this prudence – above all concerning the maintenance of the rule of unanimity in matters concerning normative choices – characterises also several other positions adopted by the draft Constitution on the subject.

Nevertheless, it is another thing to distinguish between the third and the first "pillar", which has made it possible to regard the area of "freedom, security and justice" as a poor relation in respect of the commitment of the European countries. The abandonment of this former distinction is an important turning point.

In this context, new perspectives seem to open equally for the European Court of Justice. This is a subject which would deserve separate treatment and in respect of which the limits of my expertise are obvious, and not only vis-à-vis the persons present at the Congress (beginning with its President). That is the reason why, in this regard, I rely on the various observations flowing from the national reports,

commencing with the references (be they explicit or implicit) to the changes which the abolition of the specific character of the “third pillar” should lead to with regard to the purely optional acceptance of jurisdiction of the Court in this field.