

**Report on the
Second Annual Hague Programme Debate, The Hague, 7 June 2006**
Matti Joutsen, EU Coordinator Ministry of Justice Finland

Organisation of the Second Annual Hague Programme Debate

1. The Second Annual Hague Programme Debate was organized by the International Criminal Law Network (ICLN), with financial support from the European Commission, Eurojust, the Ministry of Justice of the Netherlands, The Ministry of the Interior and Kingdom Relations of the Netherlands and the Austrian Presidency of the European Union. Support was also provided by the General Secretariat of the European Council, the incoming Finnish Presidency of the European Union and Europol. The Debate was attended by some 80 persons from almost all Member States of the European Union, Schengen countries, European Union institutions, non-governmental organisations and the academic world.

Opening of the Second Debate

2. The Debate was opened by Mr Hans Nilsson of the General Secretariat of the European Council. He noted that the Debate provided an opportunity to look back and take stock of the progress that has been achieved in implementing the Hague Multi-annual Programme on the development of a European area of freedom, security and justice, and to look to the future. He expressed his gratitude to the ICLN for having organised the Debate.

3. Ms Maartje Jansen, Scientific Co-ordinator of the ICLN, introduced the work of the ICLN. She noted that the ICLN focuses in particular on supranational criminal law, counter-terrorism, and international cooperation in criminal law. The organization of a Debate dealing with the review of implementation of the Hague Programme is in line with this. The Debate is to be held under the so-called Chatham House rule, according to which participants may subsequently freely refer to opinions expressed at the Debate, but should not identify individual speakers. This contributes to the openness of the discussion. She expressed the gratitude of the ICLN to those who had provided support for the Debate.

4. Mr Nilsson stressed that the Debate was not among institutions or states, but among individuals interested in the topic. He explained that the Debate would begin with an introductory session, followed by two consecutive sets of two "break-out sessions." During the morning, the sessions are on internal security and on mutual recognition. The afternoon sessions are on evaluation and implementation and on improvement of decision-making. During the concluding session of the Debate, reports shall be given on the work of the break-out sessions and conclusions are to be drawn.

Opening session

5. The speakers and participants in the opening session noted that the Hague Programme is intended to strengthen the European area of freedom, security and justice. It combines pragmatism with ambition. The Hague Programme included a provision calling for a mid-term review at the end of 2006. However, this was connected with the assumption that the Constitutional Treaty would enter into force on 1 November 2006, an assumption that has not been realised. There is a need to consider what this implies.

6. The Hague Programme is accompanied by an action plan, which comprises some 270 different action points. The Programme and the action plan deal with a number of topics, such as a common European asylum system, the integration of third country nationals, migration, visas, border policy, the strengthening of security (including the improvement of the exchange of information, the response to terrorism, police cooperation, the preparation of organized crime threat assess-

ments, internal crisis management, the strengthening of crime prevention, the strategy on responding to drugs), the strengthening of justice, mutual recognition, dealing with trans-border civil disputes and enforcement of decisions, the progressive development of a European judicial culture based on mutual trust, the coordination of investigations (for example by Eurojust), approximation, the coherence of laws, and external relations. The Hague Programme and the action plan also call for evaluation of implementation.

7. It was noted that progress had been achieved in, for example, criminal law, as shown by the adoption of several instruments on the approximation of material criminal law. However, progress has subsequently become slower. One reason is the ruling of the European Court of Justice of 13 September 2005 on case C-176/03. The implications of this ruling on the borderline between the first and the third pillar still need to be studied. Another reason is the need for consensus, which in the opinion of some speakers leads to the adopted text reflecting the “least common denominator”, in other words a relatively low level of ambition. As for mutual recognition in criminal justice, four instruments have been adopted, and a fifth (the European evidence warrant) is close to finalization. Also here, therefore, there has been some progress, but again, progress has become slower. Various difficulties have arisen in national implementation. The Commission has noted that there are differences in how the instruments have been transposed into national law, and in addition constitutional court decisions in Germany, Poland and Cyprus have faulted the way in which national implementation has been carried out.

8. An example of the slow progress is the negotiations on the proposal for minimum procedural safeguards. Although many Member States support the proposal and note the need for a balance between the elements of freedom, security and justice in the work of the EU, it has been pointed out by other Member States that Europe already has a high degree of approximation through the European Human Rights Convention and the jurisprudence of the Strasbourg court. Some of the latter Member States have noted concern that there will be discrepancies between the jurisprudence of the Strasbourg court and the European Court of Justice. In this connection, it was suggested that the Council of Europe and the European Union should cooperate more closely, for example by the Strasbourg court beginning to look at the entire chain of international cooperation.

9. One speaker noted that a number of questions need to be addressed when discussing implementation of the Hague Programme. Among these are

- the discrepancy between the ambitions of the Hague Programme, and the real achievements;
- why the negotiation of individual instruments requires such a long time (for example three years);
- is there sufficient agreement on priorities;
- should we prioritize our priorities in order to achieve quicker progress;
- how can the decision-making process be improved;
- can the so-called *passerelle* option based on article 42 of the Treaty on the European Union be used;
- can improvements be made to the first stage of the decision-making process, when proposals for new legal instruments are first being considered;
- is there consistency among the substantive criminal law instruments, for example in respect of requirements for double criminality, or of sanctions, and should a more horizontal approach be sought;
- is the Commission consistent in its proposals, and is there consistency in the overall approach among the Member States, the Council and the Commission; and
- is there consistency in the actions of the national legislator implementing EU instruments..

10. Another speaker noted further questions that need to be addressed specifically in regard to the *passerelle* option: if used, should the transfer from the third to the first pillar be partial or full? What would the voting conditions be? Should Member States retain a right of initiative? Should there be an “emergency brake” (by which a Member State that considers a decision to violate its fundamental legal principles can call for reconsideration of this decision), and what should be done in respect of the special situation of Denmark, Ireland and the United Kingdom, that have a right of opting in / opting out? In general, how much flexibility can be applied in improving decision-making on the basis of the existing Treaties? The same speaker noted that the shifting to qualified majority voting has its own risks. One such risk is that a Member State that finds itself in the minority may simply refuse to implement the decision, or at the very least be less than enthusiastic about implementation.

11. The reference to the decision of the European Court of Justice decision of 13 September 2005, annulling the Council’s framework decision on the protection of the environment through criminal law, led to a discussion on the extent to which the borderline between the first and third pillars is in fact moving. It was argued that the Court’s decision of 30 May 2006 annulling the agreement between the EU and the United States on the transfer of passenger name records to some extent seemed to move the border line back again. Also the Court decision of 16 June 2005 in the Pupino case seemed to strengthen the third pillar. The Pupino case has been identified by some observers as causing a stumbling block in negotiations on subsequent framework decisions. In general, the shifting and ambiguous borderline between the first and the third pillars was seen to cause uncertainty, a point that led one participant to argue for eliminating the distinction between the pillars. It was, in turn, pointed out that even this would not eliminate all uncertainty. Because of the different legal bases that are applied, and because of the differences in instruments that can be used, borderlines would continue to exist even within pillars. One participant gave as an example the apparent use of enhanced cooperation in civil law.

12. As part of the preparations for the review of the implementation of the Hague Programme, the Commission had been requested to submit reports and proposals, connected with entry into force of the Constitutional Treaty. Even though the Constitutional Treaty shall not enter into force at the date originally foreseen, it would be useful to review implementation of the Hague Programme. The Commission shall therefore submit a Scoreboard on the progress achieved, building on past practice with the Tampere Programme. This time, attention shall also be paid to implementation on the national level.

13. In order for the Scoreboard Plus to succeed, it should be based on an objective evaluation. In the discussion, it was pointed out that some evaluation mechanisms already exist (such as the Schengen evaluation mechanism, the organized crime mutual evaluation mechanism, the terrorism mutual evaluation mechanism and the drug mutual evaluation mechanism). However, many other areas lack evaluation mechanisms. There is thus a need for developing a comprehensive evaluation mechanism, which would collect and assess relevant information, identify areas where information is lacking, supplement the available information, and consult with Member States on the information that has been obtained. Such a system, however, should not place an excessive burden on, for example, Member States or the EU institutions. An announcement was made that on 26-27 October 2006, a general conference shall be organized in Brussels on evaluation.

14. The evaluation mechanism should be used to to assess progress and suggest ways to go forward. Areas where more work needs to be done should be identified, and what needs to be done should also be identified. It was stressed that this does not mean that “priorities over priorities” should be identified from among the Hague Programme priorities. Instead, attention needs to be paid to areas in which the original ambitions are not being met, and where thus more work is

required. It was tentatively suggested that among such areas are asylum, mutual recognition, the future of Europol and police cooperation.

Working group on The Hague Programme and Internal Security

Maartje Jansen, Scientific Coordinator ICLN

The problems in the 3rd pillar from a practitioner's point of view have three aspects:

- *relevance*
- *awareness*
- *effectiveness*

The Hague Programme is seen by practitioners as a clear concept and a strong program. However, there is a need to evaluate and prioritize. Instruments are seen as overtly complex and need to be clarified in order to be implemented and used. How far can we go in preventing terrorism, think of the balance between freedom and security.

Awareness: communication about the decision-making process and achievements are deficient. There is a lack of information and perhaps at a national level a lack of political will. External and internal framing is done on a national and international level.

The EPCTF should collect and take stock of best practices. Informal meetings for top level practitioners would help to improve cooperation. With regard to OCTA a well defined role is needed in order to be useful.

One should realize that there is a distance between operational and political/policy level.

Working group on mutual recognition

[15.] In the discussion on mutual recognition, it was noted that the Tampere European Council in October 1999, during the previous Finnish Presidency, had laid down the principle that mutual recognition is cornerstone of judicial cooperation in both civil and criminal matters. The Council adopted an extensive programme of measures along these lines, including feasibility studies. The substance of mutual recognition is that the decision of a judicial authority of one Member State is recognized as such by judicial authorities of another Member State, without any need for examining the substance of the decision. The EU arrest warrant decision was cited as an example of mutual recognition. EU arrest warrants have worked well in practice and the period required for the extradition / surrender of suspects and convicted offenders has shortened considerably. One participant noted that during 2005, some 1,500 persons had been arrested on the basis of an EU arrest warrant. Of these, some 1,300 had in fact been surrendered, and there had been about 160 refusals. So far no analysis was available on the reasons for the refusals, just anecdotal evidence. The low rate of refusals, however, was cited as further evidence that the EU arrest warrant works quite well in practice.

[16.] One speaker noted that it should be recalled that mutual recognition is not in itself anything new. Indeed, extradition, which has been used widely since the 1800s, is in itself a form of mutual recognition. Historically, mutual recognition has evolved more rapidly in civil law, where it appears to function quite well.

[17.] The Hague programme was seen as a continuation of the Tampere programme. The question was posed whether the mutual recognition measures called for in the Hague Programme had been carried out, and if so, whether they have been effective. It was also asked whether mutual recognition amounts to intergovernmental cooperation in disguise, or whether it represents a real change in paradigm. Slow progress in itself was not seen as a negative characteristic. Much preparation and negotiation was required in the negotiation and implementation of the mutual recognition instruments.

[18.] Some speakers stressed that the Tampere meeting had also noted that work should continue on the approximation of legislation necessary to facilitate international cooperation. These speakers argued that mutual recognition cannot function effectively unless there is a harmonized basis. At present, there are structural differences between the legal systems. As long as the scope of criminalization and the outlines of criminal procedure vary from one country to another, there will be difficulties in mutual recognition. Other speakers noted that it has proven to be very difficult to reach agreement even on the simple basics of criminal procedure. They questioned the need for harmonization, the need to “step over the legal systems of Member States.”

[19.] In this connection, there was a discussion on the concept of the “free movement of evidence.” It was noted that there were fundamentally two different approaches to the use of evidence, the common law (where evidence is produced during the trial) and the French model (where the evidence is usually collected into the file). It was questioned whether States even agree on what constitutes evidence. It was noted, in turn, that some elements of procedure are recognized in all Member States, such as legal assistance during the first contact between the suspect and the police. They suggested that the latter could be harmonized, but that there appeared at present to be insufficient political will to do so.

[20.] In the discussion, the question was raised if the concept of mutual recognition had evolved since the time of the Tampere meeting in 1999. It was also suggested that although mutual recognition has an extremely high theoretical importance, it may in fact have little practical importance in international cooperation. Other speakers also wondered about the implication of mutual recognition in an area of freedom, security and justice. These speakers argued that a person should ordinarily be prosecuted in the country where the offence is committed, or where it has its effect.

[21.] Several speakers referred to the importance of taking the human rights dimension into sufficient consideration when new instruments on mutual recognition are being developed. There was a need for a common base-line on procedural rights. It was noted that national parliaments in particular have been concerned with the perceived lack of human rights safeguards in mutual recognition instruments, which has led to difficulties in implementation in some Member States, and may also have led to the hesitancy of members of the judiciary to use these instruments.

[22.] The participants recalled that one of the difficulties in negotiations on mutual recognition instruments has been the requirement of double criminality. According to some, this requirement is not in line with the concept of mutual recognition. However, there has been sufficiently wide support for such a list that it has been included in all instruments so far adopted in criminal law. Other speakers justified the use of the requirement by questioning whether it was fair that a person, who acts according to the laws of his or her environment, is then subjected to sanctions on the grounds that the act is an offence abroad. It was also pointed out that the requirement of double criminality appears to have more theoretical than practical importance, since in almost all cases, the offence in question has been alleged to have been committed (at least in part) in the requesting State.

[23.] Some speakers noted that the effectiveness of mutual recognition instruments should be judged on the basis of how much mutual trust and confidence there is. Accurate implementation of the instruments leads to better legal certainty, to more trust and confidence, and to greater consistency. They emphasized that what is agreed should in fact be implemented. However, some speakers argued that the implementation periods may have been unrealistically short from the outset.

[24.] It was agreed that mutual recognition works more smoothly when there is mutual trust. The question was raised whether mutual trust is something that can be compelled, or whether one should take a more relaxed attitude and assume that mutual trust will evolve from extended use of mutual recognition. It was suggested that, to support implementation and the fostering of mutual trust, we need a system for assessment of what happens “after the fact”, after legal assistance has been provided. Such an assessment should also look at the proper length of the implementation period. Some participants stressed that this assessment should be part of a learning process, and should not be based on a “naming and shaming” approach. One speaker noted that this is in fact what is being done in respect of the EU arrest warrant. The organized crime mutual evaluation (peer evaluation) model is being used in this assessment. The process has just begun with the first visits of experts, and is scheduled to continue over the next two years.

[25.] Reference was made in passing to the role of Eurojust in promoting mutual trust. Practice has shown that cooperation works well in connection with the “headline” cases, such as homicide and terrorism. It has proven to be more difficult to get national prosecutors to cooperate when dealing with the more complex and mundane offences such as fraud.

[26.] The participants agreed that, fundamentally, mutual trust is based on shared values. However, difficulties arise on the level of the individual case, since procedures are not harmonized. Some participants argued that judges and prosecutors must have the discretionary right in some cases to look at the background of the decision given in the requesting State, and not trust blindly. Others disagreed, and emphasised that due process should be ensured in the requesting State. It was also noted that in practice judges do seem to trust their colleagues, the judicial authorities in other Member States.

***The principle of mutual recognition,
How far have we come, how far can we go?***

Prof.dr. Matthias J. Borgers (Free University of Amsterdam)

The current stage of the principle of mutual recognition was discussed in the second workshop. This discussion was very sprightly because of the different views on this topic. Several questions were discussed. To what extent has mutual cooperation been developed at present? Can a change of paradigm already be seen, or is this, as one speaker put it, actually intergovernmental cooperation in disguise? Attention was also devoted to the future prospects of mutual recognition. In what direction and in what way will mutual recognition develop in the near future?

Since the Tampere European Council, proposals have continually been made for framework decisions to realise mutual recognition in criminal matters. In practice, mutual recognition is limited for the time being to the European arrest warrant, and recently the order freezing property and evidence. The framework decision on the execution of financial penalties must be implemented within a year. A political agreement has been in place for some time on the execution of confiscation orders, and recently the Council reached a general approach on the European evidence warrant. Negotiations are also in progress on a European enforcement order. Other proposals for framework decisions have been made as well as proposals for the further facilitation of mutual recognition. These proposals relate to certain procedural rights in criminal proceedings, taking account of convictions in Member States and the exchange of information extracted from criminal records. Apart from the contents of these (draft) framework decisions, it can at any rate be said that mutual recognition takes a prominent place in the European legislative programme.

However, not just the number of framework decisions and draft framework decisions indicates the extent to which mutual recognition has now been developed. A criterion is also the degree to which mutual recognition is still linked to grounds for refusal. After all, the aim is formulated in many documents of the European institutions that mutual recognition should run automatically – without formalities, judicial review or other forms of review. Anyone who examines the current framework decisions and the negotiations on the proposals for framework decisions relating to a European evidence warrant and a European enforcement order, must ascertain that this ideal is by far not a reality. All framework decisions and proposals for framework decisions contain grounds for refusal and some form of review, be it judicial review or review by the executing state.

A frequently recurring topic of discussion during negotiations on framework decisions, and also in the workshop, is double criminality. The course usually taken in this regard is that the requirement of double criminality may be set unless listed offences are concerned. Although it can be argued that the requirement of double criminality is in conflict with the principle of mutual recognition and should therefore be completely eliminated, the current approach seems to be quite workable. Nevertheless, the question was raised whether double criminality should be eliminated completely as a ground for refusal. According to some participants it is not in line with the concept of mutual trust between the member states not to cooperate, only because the offence is not punishable under the law of the executing state. But not everyone agreed with this point of view and it seems that a lot more discussion on this topic is needed. As one participant has remarked, double criminality is not very important as seen from a practical point of view, but it has an important symbolic value for many member states. It embodies the own rules and values – or the own legal culture – and it is not easy to give up the idea that one only cooperates in cases in which an offence has been committed that is also a criminal act according to the own rules and values.

In the Hague Programme, the accent is placed firmly on facilitating mutual trust. This is for the most part self-evident: it is easier to recognise decisions of other Member States if there is great trust in the functioning of those Member States' legal systems. One should realise, however, that mutual trust can be facilitated in all kinds of ways, but that it must ultimately be the result of a successful implementation of instruments based on mutual recognition. Positive experiences in individual cases with cooperation on the basis of current instruments can thus form the basis for further development and strengthening of mutual recognition. This is good news in itself, but it also means that mutual trust cannot simply be compelled in the short term by a set of measures. It needs some time. It was also stressed in the workshop that the legislators and the judicial authorities of the member states need some time to get used to mutual recognition and to implement the instruments properly.

Mutual evaluation is therefore very important. Evaluation cannot only give a better view of the existence of such practice, but can also enable Member States to learn from one another. The evaluation should also be positive and not negative of nature. We don't need distrust.

The Hague Programme also devotes much attention to the harmonisation of the law of criminal procedure with a view to mutual recognition. A now classical topic of discussion is the question whether harmonisation is indeed necessary to achieve mutual recognition. Mutual recognition can, after all, be considered as a concept that does not affect the autonomy of the Member States, but rather guarantees an unhindered cooperation. The conclusion of the workshop might be that the success of mutual recognition stands or falls with the (political) will to accept and enforce decisions which might have turned out differently under national law. If such will exists, harmonisation is not really necessary. At the same time, if such will does not exist, it is doubtful whether harmonisation of the law of criminal procedure would be the most appropriate solution. Should mutual recognition fail because of (too) great differences among the Member States' law of criminal procedure, it would by no means be certain that the agreement needed for harmonisation could be reached. In this context, the negotiations about a framework decision on certain procedural rights in criminal proceedings show that it can be very difficult to reach agreement on relatively basic rules of criminal procedure. Maybe it would be a lot easier if the European Union becomes a party to the European Convention on Human Rights.

In conclusion, it can be said that mutual recognition has been given a prominent place in the European legislative programme and has clearly acquired a position in the practice of judicial cooperation. In that respect, the Hague Programme is being implemented diligently. Nevertheless, if the 'ideal' model of mutual recognition – no formalities and no (judicial) review – is to be realised, a few more fundamental choices will have to be made, including in particular the elimination of grounds for refusal. There must also be much more will to overlook differences. A real change of paradigm may not yet have taken place in this regard, but it is not correct either to call this intergovernmental cooperation in disguise. The current and forthcoming instruments of mutual recognition have, after all, effected the necessary innovation in the area of judicial cooperation. As it was expressed by Mr. Kennedy: mutual recognition has already come a long way, but its development still has a long way to go.

Working group on Evaluation and Implementation

Maartje Jansen, Scientific Coordinator ICLN

There is a need for a political debate on the matters to be dealt with by this instrument. Currently, there is too little political discussion. The difficulties in decision-making concern on the one side the need for a national policy/position and on the other side European decision-making. There is a lack of implementation of 3rd pillar instruments in national systems and the impossibility of the ECJ to decide on infringement procedures.

Solutions in improving implementation at the national level:

- *progress achieved under the Constitution / bridging clause*
- *improvement of political discussion*
- *involvement of national parliaments to help with implementation of EU legislation in national systems*
- *Focus on priorities, prioritize the priorities*
- *Use of naming and shaming, this may prove counter-productive in the long term*
- *Peer-evaluation mechanism: in full compliance with commission and member states*
- *Strong need for more data and fact sheets*

It is put forward that implementation of new legislation usually takes two years except for 'crisis' implementation after a shock (terrorist attack, nature disaster).

Working group on the improvement of decision-making

[27.] In the discussion in the working group, it was suggested that the approach taken by the Constitutional Treaty to decision making (elimination of the distinction between the pillars; adoption of the Community co-decision method; full involvement of the European Parliament; use of qualified majorities) had sought to respond to four major problems:

- 1) the effectiveness of legislation: at present, there is no infringement procedure in the third pillar (Member States do not effectively implement decisions, or implement them on time)
- 2) the efficiency of the decision-making process (the need in the third pillar for unanimity; the many exceptions written into decisions, the use of opt-outs; the slowness of the negotiating process; the framing of decisions on the basis of the "lowest common denominator")
- 3) complexity
- 4) lack of legitimacy: the problem of the weak involvement of the European Parliament (for example, the European Parliament was not consulted on the EU-US mutual legal assistance and extradition agreements; in addition, some national parliaments were also not consulted) (the absence of an infringement procedure; no access of citizens to court; no reference by many states to the Court of Justice)

[28.] It was also noted that there are few such difficulties in the first pillar, and that votes are rare. It was further argued that the attitude that Member States take towards negotiations under the first and the third pillars is different. Under the first pillar, a Member State may think that it is left in the minority very quickly, and thus has no effective input into the decision. This induces more flexibility and willingness to compromise.

[29.] It was suggested that these difficulties in the third pillar need to be addressed. The only alternatives seen were to rely on external events to give political impetus (such as the impact of various terrorist strikes on work on the EU arrest warrant; this was admittedly an exception); to rely on the leadership of strong, visionary Ministers (a difficulty in particular at present, when many key Ministers are facing elections); and to rely on the Court of Justice (again, however, there is a limit to the extent to which the Court can intervene).

[30.] Because of the difficulties that have been encountered in the third pillar, progress has been slow. Some Member States have turned to enhanced (reinforced) cooperation, which, however, involves dangers of its own, in particular the impact it has on the growing complexity of cooperation in criminal cases. The Prüm treaty was cited as an example of evolving enhanced cooperation.

[31.] It was acknowledged that, now in the midst of the so-called reflection period, the solutions contained in the Constitutional Treaty could not be considered a politically viable frame of refer-

ence. For this reason, participants stressed that any options in improving decision-making had to be found on the basis of the present Treaties. One such option is the *passerelle* option based on article 42 TEU. It was explained that this option

- allows transfer of “action in areas referred to in article 29” to title IV;
- title IV (Treaty of Amsterdam) involves some modification of the Community method (e.g. a specific role for Court of Justice in preliminary rulings);
- use of the option requires a unanimous decision;
- the decision to use the option may require ratification by Member States.

[32.] In the discussion, these and a number of other elements of the *passerelle* option were discussed. In respect of the transfer of actions from article 29, it was noted that the two options are transferring all of Article 29, or only part. The costs and benefits of both possibilities were seen to require study. For example, if only a part was to be transferred, the dividing line between what is transferred and what is not, needs to be formulated clearly. It was also suggested that the transfer could be made in stages, with action on some elements transferred in the first stage, and other elements transferred later.

[33.] On the voting regime, it was suggested that a qualified majority would be the “default option”, but that also other possibilities could be considered. In particular, it was suggested that the possibility of consensus could be maintained for the more sensitive issues, at least for a certain period of time.

[34.] On the question of the co-right of initiative, it was suggested that many options are on the table, and again the costs and benefits of the different options need to be explored.

[35.] The question was raised that if the option is used, what would be the proper instrument to be used subsequently in criminal law, a regulation or directive. It was suggested, for example, that the regulation format should be used for procedural law. Regulations may be more difficult to negotiate, but they would be easier to implement, since they would have direct impact. The question was also raised about what would happen to old framework decisions; what would their legal status be? The Treaty of Amsterdam does not contain any provisions on the amendment of earlier instruments.

[36.] As for flanking measures (such as an “emergency brake” in the event that legislation would affect the fundamental aspects of the criminal justice system of a Member State), there was wide agreement that also this option must be considered. It was suggested that one measure would be that a Member State disagreeing with the fundamental approach of an instrument could refer such an instrument to the European Council.

[37.] The special position of Denmark, Ireland and the United Kingdom was considered. Denmark has a special protocol that keeps it out of the scope of title IV. In the event that the *passerelle* option is used, there would thus apparently be a need for a new agreement between the Community and Denmark. Ireland and the United Kingdom, in turn, have the possibility of opting in on a case-by-case basis. It is also possible for the other Member States, under certain circumstances, to exclude either or both of these States. One participant suggested that this situation could perhaps be dealt with through a declaration by Member States that they would not use this mechanism.

[38.] Participants also asked what the consequences of the *passerelle* option would be for Schengen partners, i.e. Iceland, Norway and Switzerland, which enter the picture through the Council working process.

[39.] In the discussion, many speakers noted that the passerelle option was not the only means to improve decision-making. Other avenues should be explored at the same time. One possibility is to focus on improving the quality of legislation, for example through wider and more effective use of impact assessments. Preparing such impact assessments requires human and financial resources. However, properly prepared impact assessments at the outset, when proposals for new legislation are being introduced, were seen to be of fundamental importance in getting Member States to consider the impact of the legislation in their own national systems, and to consider in particular the impact of different ways of formulating the instruments. It was pointed out that no impact assessments have been prepared when Member States have used their rights of initiative.

[40.] Participants also otherwise stressed the need for better preparation of initiatives. Different Member State representatives should be brought in to give their initial agreement to a first draft. It was also pointed out that, in practice, first drafts are subjected solely to negative criticism: representatives point out what they do not like about the draft. Since opinions may well vary widely in this respect, the resulting negotiations focus on different Member States objecting to different sections of the text. It was suggested that, instead of this negative approach, representatives should meet to discuss what they want and need from international cooperation, and that the first text should be based on this more positive approach.

[41.] It was again stressed that the first draft should provide different options, with accompanying impact assessments. The problems to be addressed tend to be both legal and political. For this reason, it was seen to be important to get both legal experts and ministers to commit to the basic principles and orientation of initial proposals. It was pointed out that this is in fact the role of Commission communications and Green Papers, but the process could nonetheless be improved.

[42.] It was also pointed out that psychological factors need also to be taken into consideration when presenting first proposals. It may be that some experts and Member States see change as happening too rapidly, and that they may have doubts about, e.g., the fundamental approach of mutual recognition, or they may be uncertain over the first / third pillar distinction, or to the evolving balance of power between European institutions and the Member States.

[43.] Attention also needs to be focused on the lack of implementation of instruments, or improper implementation, by Member States. One reason for this may be that the legislation was of poor quality, for example because of ambiguities in the legislation (ambiguities which may or may not have been deliberate).

[44.] Yet other participants stressed that more attention should be paid by the Presidency and the General Secretariat to better preparation of meetings. For example, documents should be sent to Member States in sufficient time, in order to allow for fuller discussion and better preparation. More use could be made of written procedures. Participation in meetings should be more disciplined (briefer interventions, and interventions only when necessary). The agenda of meetings could be better constructed, with the focus at the Council level on fewer points, and only on points on which a decision is called for.

Break-out Session: Improvement of decision-making: The Passerelle option

*Tamás Számadó, Ministry of Justice Hungary
Maartje Jansen, Scientific Coordinator ICLN*

Within the framework of preparation for the review of the Hague programme, due to the problems experienced in the field of implementing the Hague programme concerning especially the lack of efficiency in adopting and

implementing new legislation in the areas under Title VI of TEU and taking into account the situation of the Treaty establishing a Constitution for Europe, the idea of applying the options provided by the present Treaties was raised in order, mainly to improve the decision taking in this area.

The aim of the debate was to explore the possibilities (possible means and consequences) and questions raised by using such an option namely the possible application of Article 42 of TEU and – closely related to it – Article 67 (2) of TEC.

1) Problems with:

- 1. efficiency of decision making (unanimity slowness and opt-outs, weak compromises – lowest common denominator, lack of democratic scrutiny)*
- 2. effectiveness of legislation (lack of infringement procedure in the third pillar)*
- 3. complexity because of cross-pillar questions*
- 4. legitimacy, absence of parliamentary control by the European Parliament*

These four problems were very well addressed in the constitution:

- no pillars*
- co-decision with the European Parliament*
- Full competence of the ECJ*
- Qualified majority voting (QMV) for most decisions*

We need to switch to QMV to build a real political will in the European Council. The alternatives are decision-making a) relying on events, b) relying on ministers, c) relying on the European Court of Justice (ECJ).

2) The bridging clause, Passerelle, article 42. This clause provides for a simplified way to decide. It allows moving 3rd pillar competences to 1st pillar decision-making (migration, asylum, civil law, borders). There is a need to move forward with regard to decision-making.

3) Possible options and questions that were raised:

- 5. All or only part of the areas under Art 29. TEU should be covered (choosing only some could make decision making more complex and complicated)*
- 6. how flexible should Art 42. TEU be interpreted (starting hypothesis: as flexible as it is) – “can we change EEC?” by such a decision*
- 7. Moving under Title IV, Part III. of TEC – not only a question of change in decision making procedure – rather a question of communitarization of the area*
- 8. Title IV should be understood as it was when TOA entered into force, or as it is today*
- 9. Decision-making: applying QMV –is a specific QMV possible? and/or possible use of an “emergency brake” (c.f. Art III-271 of Constitution). It is important to get rid of unanimity. Build in a kind of security clause (emergency brake) to ensure that a decision does not conflict with fundamental rights.*
- 10. Right of initiative – should member states’ right of initiative be preserved in some areas and in what form (c.f Art. III-264. of Constitution)*
- 11. Possible legal instruments (different legal nature; use of regulations especially regarding procedural rules, question of direct effect in particular concerning material criminal law) – legal effect of earlier legal acts under Title IV of TEU (ECJ competence, procedure for modification)*
- 12. Court of Justice competence (in this context Art 67 (2) TEC as well as Art 35 (5) TEU and Art. 68 (2) TEC should also be considered in connection with Art 42 TEU) – which court should have the right to refer (all judges or only higher courts) >> taking into account the long duration of cases and workload of the ECJ and the necessity of swiftness and legal security every judge should be competent and not only the highest court.*
- 13. Special situation of Denmark, having an opt-out on title IV (declaration no. 53.), UK & Ireland and the Schengen partners who are not represented in the European Parliament or the Commission.*
- 14. Under Art 33 TEU, Art 64 TEC member states remain responsible for their internal security*
- 15. External relations: ECJ competence; possibility of negotiating bilateral agreements by member states (internal security). Article 67 invites the European Commission to expand the role of the ECJ in the area of asylum, borders e.g.*
- 16. Finance: relation with EC budget. If decision-making is transferred to title IV this has financial implications. The Commission has received a substantial increase in funds for the JLS area.*
- 17. CATS’ role – Will there still be a role for CATS if decision-making is transferred from title VI to title IV? There is the possibility of establishing a special preparatory committee.*
- 18. Role of the EP and national parliaments – democratic scrutiny, subsidiarity and proportionality check (e.g. for specific mechanism in the Constitution), Europol and Eurojust*

19. *Constitution: should some of its elements be “used” and some put aside?*

The political debate on the possible use of Art. 42 TEU will go parallel with the debate on the future of the Constitution.

The time frame of adopting such a decision under Art. 42 TEU, taking into account the ratification process makes it necessary that beside this debate other possible ways and means of improving decision-making in this area should also be explored. Do not stop working on developing improvements of decision-making alternatives. Institutions cannot replace political will but they can try to improve decision-making. We should try to avoid a compartmentalisation of Europe and aim for union.

Concluding Session

[45.] During the concluding session, reports were given of the discussions in the working groups.

[46.] The first working group dealt with the Hague Programme and internal security: Operational and policy consequences for national and European practitioners. The review of the implementation of the Hague Programme was seen to provide the opportunity for taking stock of the relevance of the Hague Programme, and of efficiency in its implementation. Among the difficulties that were seen to have been encountered were the different political agendas and ambitions of successive Presidencies, the rather wide scope and diversity of the Action Plan, the overly complex nature of the instruments from the point of view of practitioners, the possibility that some questions may have been improperly formulated (for example, also petty crime has an impact on the community and on individuals), and the question of how far we can go in preventing terrorism (e.g. in the case of suicide bombings.)

[47.] One key problem was seen to be a lack of awareness of the contents of the Hague Programme. This could be seen in the lack of an internal dimension and in the lack of political will. Responses to this lack were seen to include the provision of better information, awareness raising, and the provision of external and internal training.

[48.] Among suggestions that were identified for improving efficiency were improving the input provided by practitioners as well as input that reflects actual experience on the ground. Stock should be taken of best practices. For example the Police Chiefs Task Force could contribute to this. It was also suggested that a more horizontal approach could be taken to cooperation, This would require better identification of the role and responsibility of each actor, better definition of the role of the Organized Crime Threat Assessment, and improved information exchange between law enforcement and judicial authorities.

[49.] The working group that dealt with the principle of mutual recognition sought to provide an overview of how far we have progressed with this principle, and how far we can go. It was noted that a number of decisions on mutual recognition had already been taken, and more are pending. Mutual recognition has a prominent place in the Hague Programme, and it has clearly acquired a substantial role in practice.

[50.] However, it was noted that the ideal of mutual recognition – automatic recognition of the decisions taken by the judicial authorities of another Member State - is still far from reality. In practice, a number of grounds for refusal exist. Among these is the absence of double criminality, an issue that is a frequent subject of debate. The current approach of having a list of key offences in respect of which the absence of double criminality can be invoked, was seen to be workable, although some suggested that the absence of double criminality as grounds for refusal should be

completely eliminated. On the other hand, it was pointed out that double criminality is not often cited in practice, even though it has an important symbolic value for some Member States.

[51.] It was also noted that the Hague Programme identifies the importance of mutual trust. This can be facilitated in many ways. Among the best ways was seen to be the successful application of mutual recognition instruments. The legislative and administrative authorities were seen to need time to absorb instruments; it was argued that the time period for implementation should not be overly short. It was also argued that mutual recognition should be balanced with approximation of criminal procedure. The conclusion was drawn by a participant that the success of mutual recognition stands or falls with the political will to enforce decisions that could have turned out differently if national law were to be applied. It may very well be difficult to muster this political will, as has been shown by the negotiation of the proposal on procedural rights.

[52.] The working group on evaluation and assessment began with a discussion of the intention of the Commission to submit a "Scoreboard Plus," a document that would look not only at the record for approval of instruments at the EU level, but also at their implementation on the national level. Several difficulties were noted in implementation, difficulties that could better be assessed through the development of an effective evaluation mechanism. Some of these difficulties have to do with the decision-making process at the EU level, while others were related to national implementation.

[53.] At EU level, there was seen to be a need for a political debate on the substance of proposals. Regret was expressed that a political debate was usually absent from the beginning of the discussion on proposals. For example, had there been such a political debate at the outset of the discussion on the proposal regarding the transfer of prisoners, some of the subsequent difficulties might have been avoided. A second difficulty encountered at the EU level was seen to be the lack of coordination between Council formations that meet in Brussels (working groups, the Article 36 Committee, Coreper and the Council itself) and the national level. For example, papers containing the most recent proposals arrive late. One of the results of the difficulties was seen to be a lowering of the quality of legislation, a search for the "least common denominator." It was suggested that some of these difficulties could be avoided if a shift could be made from unanimity votes to a qualified majority vote.

[54.] On the national level, a variety of difficulties or inhibiting factors were identified in the implementation of EU instruments. Several of these had been encountered in respect of implementation of the framework decision on the EU arrest warrant. There has, however, been little systematic debate within the Council on these difficulties, much less on how they can be overcome. Several participants suggested that the decision-making process on the EU level itself has to be improved, for example by taking political decisions already at the outset of the process, so that the political decision-makers are committed to the instrument in question. The political decision-makers should also be given the opportunity to study the assessed impact of the proposals. It was also suggested that national Parliaments should be more closely involved already in the decision-making process; in this respect, there were considerable differences in the practice in the different Member States. It was noted, for example, that systematic reports are provided to the Dutch Parliament every three months on first and third pillar instruments.

[55.] The fourth working group dealt with improvement of the decision-making process. It was noted that this topic had been touched upon also by the third working group. In the fourth working group, attention was paid to the possibility of invoking article 42 TEU (the passerelle option), but also to other ways to improve decision-making.

[56.] Regarding the passerelle option, it was noted that several questions had to be addressed, such as what actions could be transferred, how the border-line should be determined between the first and the third pillars as well as within either the first or the third pillar, what instrument could be used (primarily, regulations or directives), what voting procedure should be applied (qualified majority voting, unanimity or something else), whether or not an “emergency brake” would be needed, how would the European Parliament or national parliaments be involved, would there be the possibility of requesting preliminary rulings from the European Court of Justice, what would happen to the special position of Denmark, Ireland and the United Kingdom, who would be responsible for the external dimension of justice and home affairs, and to what extent would the passerelle option have to be ratified by national Parliaments.

[57.] It was also noted that various technical questions had to be dealt with when considering the improvement of decision-making. Along these are the questions of finances, and of the possible future role of the Article 36 Committee. Several participants emphasized that these questions had to be dealt with, as they saw that there would otherwise be the danger of enhanced cooperation or other solutions which may in themselves open up difficulties.

[58.] In the closing discussion, it was noted that almost all Member States and EU institutions had been represented at the Second Annual Hague Programme Debate, both on the policy-making and the practitioner level. The academic world and non-governmental organizations were also represented. The participants were assessed as being very knowledgeable, and the debate itself very lively and thought-provoking.

[59.] It was noted that the Debate had dealt with a large number of questions. Tentative answers had been suggested to some questions, while others still needed to be explored. What was important was that the debate had been begun.

[60.] The participants agreed that the Hague Programme, in continuing along the path marked by the original Tampere Programme, provided the foundation for work on the European area of freedom, security and justice. The opportunity for reviewing its implementation needs to be used to see if the necessary level of ambition had in fact been achieved in the different sectors and, if not, what could be done to remedy the defect.

[61.] The Second Annual Hague Programme Debate was held at an auspicious time. In a few weeks, the Commission should be submitting three Communications, on the Scoreboard Plus, on an evaluation mechanism, and on the political challenges connected with the Hague Programme. The incoming Finnish Presidency shall be taking this discussion forward, at the JHA Council at the end of July, at the informal JHA Council in Tampere in mid-September, and at subsequent JHA Councils and European Councils. The Debate in the Hague was seen to provide considerable groundwork for the discussions over the next six months.

[62.] It was noted that the review of the implementation of the Hague Programme contained three basic elements: the development of an improved evaluation mechanism in order to better measure progress in implementation; the identification of priority areas in which more work is needed; and the improvement of the decision-making process.

[63.] It was suggested that there was wide agreement on the need to develop the evaluation mechanism, although obviously its structure had to be agreed, and the financial and personnel resources needed for its use had to be secured.

[64.] The Tampere and Hague Programme priorities had received high political affirmation, and there was wide agreement among the participants that no attempt should be made to open the

Programmes, or to identify new priorities. What was important was to identify those few priorities where more work was needed, and to identify exactly what work should be undertaken, when and by whom.

[65.] It was also considered highly important to improve decision-making on home and justice affairs. The Debate had contributed to greater understanding among the participants as to what options exist in this respect. It was agreed that what the passerelle option involves in practice should be more closely identified, so that the debate could be more informed. At the same time, also other, more technical ways to improve decision-making should be explored.

[66.] At the closing of the Second Annual Hague Programme Debate, gratitude was expressed to the International Criminal Law Network, and especially to its Director Frank Zwetsloot and Scientific Coordinator Maartje Jansen for having organised such a successful Debate. Gratitude was also expressed to the Austrian Presidency of the EU and to the incoming Finnish Presidency, to the General Secretariat of the Council, the European Commission, Eurojust, Europol and the Dutch Ministry of Justice. Appreciation was also given to the persons who had served as speakers, chairpersons and rapporteurs, and to all of the participants for their active involvement.

[67.] Following the extensive discussion over the course of the day on, among other topics, the passerelle – the “bridge” or “walkway” – it was suggested in closing that the Second Annual Hague Programme Debate had formed a bridge of its own. Several meetings organized by the International Criminal Law Network had led to constructive action on important EU home and justice topics. In this case, the Debate served as a bridge from the Hague Programme – originally negotiated only a short tram-ride away from the venue of the Debate – to the discussions to be held in September in Tampere. This marked in a way a return to the Tampere Programme of 1999, the beginning of the work on the development of the European Area of Freedom, Security and Justice. The Debate also marked a bridge from the highly successful Austrian Presidency of the EU, to the as yet uncharted waters of the incoming Finnish Presidency. The Debate had, at the same time, laid groundwork that gave greater assurance that the “bridge” will be constructed on a solid foundation – for the benefit of the entire European Union and all its citizens.