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# Sharing Criminal Records: The United States, the European Union and Interpol Compared

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The IT revolution has massively increased governmental ability to collect, store and retrieve criminal records and to match those records reliably to individual identities. Collecting information on criminals is vital to crime control and, more recently, terrorism prevention. Decision makers at every stage of the criminal justice process recognize the relevance and importance of criminal records. The longer and more serious the criminal record, the more it weighs against the subject of the record in decisions relating to arrests,<sup>1</sup> charges, diversions, pre-trial releases, plea bargains, sentences and paroles. In effect, criminal justice system officials treat criminal records as strong indicators of character and future conduct; that is, they consider people who have committed crimes in the past to be more likely to commit crimes in the future.

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1. In this article by "arrest" we mean, pursuant to legal authority, to take or hold a suspected criminal, as by a law enforcement officer. In the United States, an arrest may be made legally based on a warrant issued by a court after receiving a sworn statement of probable cause to believe that a person has committed a crime or, without a warrant, based upon a police officer having probable cause to believe a crime has been committed by that person. But an arrest without a warrant has to be approved by a magistrate or judge after the fact. The Free Online Law Dictionary, Legal Definition of Arrest, <http://legal-dictionary.thefreedictionary.com/arrest> [hereinafter Definition of Arrest] (last visited Nov. 14, 2008).

Interest in individual criminal history records is not limited to domestic convictions. Increasingly, criminal justice officials want to know about the criminal background of visitors to their country and about their own citizens' criminal activities abroad. The post-9/11 terrorist threat has caused the United States, the EU and its Member States, and the International Police Organization (Interpol) to step up their efforts to establish more effective mechanisms for cross-national criminal information sharing.

Accelerating globalization has resulted in more people moving across national boundaries, creating a growing challenge for immigration and border security agencies and police. Increasingly, there is a need for access to information regarding the criminal and terroristic proclivities of both foreign nationals and citizens who cross borders. Practically every international conference on terrorism, organized crime, or policing produces recommendations for enhanced cooperation, beginning with information sharing.<sup>2</sup> In the last few years much has been accomplished by means of mutual legal assistance treaties (MLATs). Interpol has been active and creative in exploiting new technologies that allow extensive international data sharing on terrorism and a number of crime problems.<sup>3</sup> The EU has also been moving aggressively to enhance police and judicial cooperation in

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2. See e.g., Press Release, Interpol, Interpol European Conference Urged to Think Globally (June 1, 2007), available at <http://www.interpol.int/Public/ICPO/PressReleases/PR2007/PR200720.asp> [hereinafter Interpol Press Release, Interpol, European Conference Urged to Think Globally]; Press Release, United Kingdom Home Office, Conclusions of the October 2006 Meeting of the Interior Ministers of the UK, France, Germany, Italy, Poland and Spain, (Nov. 1, 2006), available at <http://press.homeoffice.gov.uk/press-releases/g6-meeting-conclusions>; Denmark Ministry of Foreign Affairs, Chair's Summary of the Fourth ASEM Conference on Counter-Terrorism (June 26 - 27, 2006), available at <http://www.um.dk/NR/rdonlyres/C895DACE-5605-4A1F-B6AF-16871012E17C/0/ASEMChairsummary.pdf>; Interpol, Final Communiqué and Summary of Conclusions: 32nd Interpol European Regional Conference in Noordwijk, Netherlands (May 14-16, 2003), available at <http://www.interpol.com/Public/Region/Europe/conference/erc32/finalCom.asp> [hereinafter Interpol, Final Communiqué]; U.S. Dep't of State, Results of the OAS Special Conference on Security (Oct. 29, 2003), available at <http://www.state.gov/t/pm/rls/fs/26001.htm> [hereinafter U.S. Dep't of State, Results of the OAS Special Conference on Security].

3. Interpol, Final Communiqué, *supra* note 2. See also Interpol, Secure Global Police Communications Services, available at <http://www.interpol.com/Public/ICPO/corefunctions/securecom.asp> (last visited Nov. 14, 2008); Interpol, Interpol's Four Core Functions, available at <http://www.interpol.com/Public/icpo/about.asp> (last visited Nov. 14, 2008).

criminal matters (the “third pillar”) among its Member States.<sup>4</sup> This article seeks to evaluate the current state of “institution building” in cross-jurisdictional sharing of criminal intelligence and criminal records.

Criminal intelligence comes in many shapes and sizes. It may consist, for example, of information obtained from police interviews, observations and record checks, as well as from tips, confidential informants, surveillance, electronic eavesdropping and undercover police operations.<sup>5</sup> Criminal intelligence, which has not yet resulted in formal arrests or charges, may include unsubstantiated and anonymous tips and allegations or information from victims and undercover police officers and intercepted conversations.<sup>6</sup> Because law enforcement officials are reluctant to share such information, even with their own colleagues, for fear of compromising confidential sources, undercover investigatory methods, and alerting the targets of investigations.<sup>7</sup> The best chance of sharing confidential or sensitive information is through joint task forces and working groups, or

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4. The three “pillars” form the basic structure of the European Union. The first pillar corresponds to the three communities: the European Community, the European Atomic Energy Community, and the former European Coal and Steel Community. The second pillar is devoted to the common foreign and security policy, and the third pillar is devoted to police and judicial cooperation in criminal matters. Europa, Glossary – Pillars of the European Union, [http://europa.eu/scadplus/glossary/eu\\_pillars\\_en.htm](http://europa.eu/scadplus/glossary/eu_pillars_en.htm) (last visited Nov. 14, 2008).

5. Frederick T. Martens, *The Intelligence Function*, in MAJOR ISSUES IN ORGANIZED CRIME CONTROL: SYMPOSIUM PROCEEDINGS (Herbert Edelhertz, ed., 1986) [hereinafter Martens, *The Intelligence Function*].

6. One popular definition of “criminal intelligence” is “the identification of and provision of insight into the relationship between crime data and other potentially relevant data with a view to police and judicial practice.” Interpol, Criminal Intelligence Analysis, <http://www.interpol.int/Public/Drugs/default.asp> (last visited Nov. 14, 2008). The U.S. Code of Federal Regulations defines “criminal intelligence system” as “the arrangements, equipment, facilities and procedures used for the receipt, storage, interagency exchange, or dissemination and analysis of criminal intelligence information.” 28 C.F.R. § 23.3 (2007). See also JUSTIN J. DINTINO & FREDERICK T. MARTENS, POLICE INTELLIGENCE IN CRIME CONTROL: MAINTAINING A DELICATE BALANCE IN A LIBERAL DEMOCRACY (1983); Martens, *The Intelligence Function*, supra note 5; Frederick T. Martens, *Uses, Abuses and Misuses of Intelligence*, in INTELLIGENCE 2000: REVISING THE BASIC ELEMENTS 37-47 (Marilyn B. Peterson et al. eds., 2000).

7. James I. Walsh, *Intelligence Sharing in the European Union: Institutions Are Not Enough*, 44 J. COMMON MKT. STUD. 625, 629 (2006); Dilip K. Kas & Peter C. Kratcoski, *International Police Co-operation: A World Perspective*, 22 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 214, 225, 227 (1999).

between police officials who have developed mutual trust through a long-standing working relationship.<sup>8</sup>

At the opposite end of the criminal justice information continuum are routine individual criminal history records created and held by police, judicial authorities, prison officials, and other agencies.<sup>9</sup> This article focuses on these routine criminal records, which in the United States are called “rap sheets” (an acronym derived from “record of arrest and prosecution”). They constitute the chronological history of an individual’s formal contacts with police, prosecutors, courts and corrections (arrests, convictions, sentences, incarcerations and paroles).<sup>10</sup> This article aims to identify the forces generating momentum toward greater information sharing and the factors resisting this momentum. Where do things stand and where are they headed?

To begin addressing these questions, it is useful to review the range of current international and inter-jurisdictional criminal records sharing strategies. Toward this end, we treat the United States as a multi-jurisdictional entity of over fifty different jurisdictions,<sup>11</sup> each with its own penal code, state and local police, court system(s), prison(s), and state-level criminal records repository. Fifty years ago, the individual states’ criminal justice

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8. Kas & Kratcoski, *supra* note 7, at 235.

9. See generally James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387 (2006); James B. Jacobs & Tamara Crepet, *The Expanding Scope and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2008).

10. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION 9 (2001) [hereinafter NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION] (“Criminal justice information” is defined broadly to include all information obtained, maintained, or generated about an individual by the courts or a criminal justice agency as a result of suspicion that the individual may be engaging in criminal activity or in relation to his or her arrest and the subsequent disposition of this arrest. Criminal justice information includes: criminal history record information (CHRI); criminal investigative information; disposition information; identification record information; non-conviction [arrest] information; and wanted person information.” [citing SEARCH: THE NATIONAL CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, TECHNICAL REPORT NO. 13: STANDARDS FOR THE SECURITY AND PRIVACY OF CRIMINAL HISTORY RECORD INFORMATION 8-9 (3d ed. 1988)]).

11. See THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 279 (1967) (There are more than fifty independent jurisdictions within the United States, including the fifty states as well as Washington, D.C., Puerto Rico, Guam, the Virgin Islands and the federal criminal justice system).

systems were substantially autonomous.<sup>12</sup> The evolution of the U.S.'s integrated criminal records system may shed light on the potential and limits of inter-jurisdictional criminal records sharing among other countries.

This article compares the criminal record systems in the United States to the EU. While inter-jurisdictional criminal record sharing has been substantially achieved in the United States, the EU is very much in the midst of an evolving process. Much progress has been made, especially in the last five years, but much remains to be done if the EU is to achieve the full benefits of an integrated criminal records system.

Part I explains the evolution of the U.S. and the EU criminal records regimes. Part II examines the way that criminal records are used in the United States and the EU by border security personnel, courts, police, and private organizations. Part III reviews Interpol's initiatives in making certain criminal record information available to practically all police agencies in the world. Part IV points out some of the factors inhibiting international criminal information and record sharing. Part V concludes by reflecting on where matters stand with respect to the sharing of criminal records in the United States, the EU, and worldwide.

## I. CRIMINAL RECORD SYSTEMS IN THE UNITED STATES AND THE EU

### A. *U.S. Criminal Records System*

Until the 1960s, the United States did not have a nationally coordinated criminal records system. Rather, each state collected and stored records on crimes and criminals within its borders.<sup>13</sup> In most states, these records were not effectively centralized; thus, even in the same state, one police agency's information was often not available to another agency.<sup>14</sup> The U.S. Federal Bureau of Investigation (FBI) encouraged state and local police departments to send the FBI copies of arrestee photos, fingerprints and other

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12. *See id.*

13. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 26 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf> [hereinafter U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, 2001 UPDATE].

14. *Id.* at 74.

arrest information, but compliance was spotty.<sup>15</sup> Police in each state could find out about an individual's criminal record in other states only via a request to the FBI or a time-consuming inquiry to officials in other states. In 1968, this situation began to change after the President's Commission on Crime and the Administration of Justice released its seminal report, *The Challenge of Crime in a Free Society*.<sup>16</sup> The report urged national criminal record information sharing by use of new computer technology as a key strategy for combating the spiraling crime problem.<sup>17</sup> Since then, the United States has come a long way toward integrating its fifty state and federal criminal records databases, thereby facilitating cooperation and coordination among police organizations, court systems, prosecutors' offices, and penal systems.<sup>18</sup>

The U.S. criminal records system is based on arrests. A rap sheet is created when, following an arrest, the police "book" a suspect.<sup>19</sup> After booking, the police transmit (today electronically) the arrestee's fingerprints and facts about the arrest and the arrestee to the state's criminal records repository.<sup>20</sup> The repository maintains each state's computerized database of rap sheets.<sup>21</sup> Personnel can then quickly determine by means of fingerprint comparison whether the arrestee already has a rap sheet in the

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15. *Id.* at 75.

16. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *supra* note 11.

17. *Id.*

18. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, REPORT OF THE NATIONAL TASK FORCE ON COURT AUTOMATION AND INTEGRATION 2-3 (1999) ("Integration of justice information systems is best defined as the electronic sharing of information by two or more distinct justice entities within a system. The degree to which information systems are considered 'integrated' depends on who participates, what information is shared or exchanged, and how data [is] shared or exchanged within the system."). It is also important to understand what integration is not. Integration is not the mere linkage or connection of distributed or dispersed databases. *Id.* Nor is integration the amalgamation of private data in a particular information system. *Id.* There are two distinguishable forms of integration: a) vertical integration e.g., police forces at local, state and national levels; and b) horizontal integration, e.g., all/many criminal justice agencies at the same governmental level (i.e., local). *Id.*

19. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, *supra* note 9, at 392.

20. Paul E. Leuba, *Demand for Criminal History Records by Non-criminal Justice Agencies*, in BUREAU OF JUSTICE/SEARCH CONFERENCE ON OPEN V. CONFIDENTIAL RECORDS 25, 25 (Nov. 1988) ("The first central repository . . . was established in 1917. By 1930, there were a total of nine and by 1940, eighteen central repositories. . . . By 1980, [there were] 43. By 1988 there were 50.").

21. Leuba, *supra* note 20.

state, even if under an alias.<sup>22</sup> If the criminal background check reveals that the arrestee already has a rap sheet in the state where he or she has just been arrested, the current arrest will be added to that rap sheet.<sup>23</sup> If he or she has no in-state criminal record, a rap sheet linked to his or her name and fingerprints will be created.<sup>24</sup> The current arrest will be assigned a number.<sup>25</sup> The state repository forwards the fingerprints and arrest information to the FBI in order to determine whether the arrestee has a criminal record or is wanted in another state.<sup>26</sup> The FBI's Integrated Identification Index ("III") informs the requesting police agency which other jurisdictions, if any, hold rap sheets for the person of interest. The requesting agency can then directly and instantly access these out-of-state records.<sup>27</sup> Moreover, any police officer with access to a laptop computer can use the III to find out within minutes whether the person he has just stopped/arrested has a prior criminal record or is wanted anywhere in the United States.

In the United States, as a "case" proceeds through the criminal justice system, prosecutors and court clerks are supposed to send to the state's records repository information on formal charges and dispositions so that the rap sheet will represent a complete, albeit abbreviated, account of the case's progression.<sup>28</sup> For most of the twentieth century, state record repositories were requested to send information on the arrest's disposition to the FBI, which would then update the original arrest information.<sup>29</sup> Unfortunately, prosecutors and courts were not reliable in sending

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22. See Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, *supra* note 9, at 393.

23. *Id.*

24. *Id.*

25. See *id.*

26. See *id.*

27. *Id.* See also SEARCH: THE NATIONAL CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA, 6 n.20 (2005) [hereinafter REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA], available at <http://www.search.org/files/pdf/ReportofNTFCBA.pdf>; U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, 2001 UPDATE, *supra* note 13.

28. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT (1993), available at <http://www.ojp.gov/bjs/pub/pdf/cchuse.pdf> [hereinafter U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, 1993 REPORT].

29. See U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, 2001 UPDATE, *supra* note 13, at 2-3.



this follow-up information on dispositions.<sup>30</sup> Even when they did send such information, the over-burdened repositories did not always input the information and did not always pass it on to the FBI.<sup>31</sup> The FBI's rap sheets were, therefore, quite incomplete. If the requesting agency needed detailed information about case disposition, it had to follow-up with phone calls or faxes to the law enforcement agencies and courts that handled the case.

In the mid 1970s, SEARCH—the state consortium on criminal justice statistics and information—and the FBI decided that the dual record keeping system was inefficient, and decided to replace it with the Interstate Identification Index (Interstate Index), an “index-pointer system.”<sup>32</sup> The states must now send the FBI the arrest information and fingerprints of every first time arrestee.<sup>33</sup> This information is keyed to the FBI's master fingerprint file (NFF). Information about subsequent arrests need not be sent; the III will find a match based on the first arrest and refer the inquiring agency to the relevant state repository for the suspect's full record.<sup>34</sup> States that are participating in the Interstate Index system no longer need to send the FBI dispositional data.<sup>35</sup> The Interstate Index can be searched by federal, state and local criminal justice agencies by name or by fingerprints.<sup>36</sup> If a particular individual has a criminal record anywhere in the country, the system points to the federal or state database that holds the record. The record can then be accessed online.<sup>37</sup>

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30. *Id.* at 2, 30-31. See also JAMES M. TIEN, STRUCTURED DECISIONS CORP. [SDC], MEASURING THE PERFORMANCE OF CRIMINAL HISTORY SYSTEMS: THE RECORDS QUALITY INDEX (2005), available at [http://www.sdcorp.net/public/Pub\\_RQI\\_Report.pdf](http://www.sdcorp.net/public/Pub_RQI_Report.pdf); Patricia M. Harris & Kimberly S. Keller, *Ex-Offenders Need Not Apply*, 20.1 J. CONTEMP. CRIM. JUST. 6, 15 (2005).

31. See U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, 2001 UPDATE, *supra* note 13, at 2, 30-31.

32. The 1998 National Crime Prevention and Privacy Compact mandated transformation of the FBI's criminal records system into a more efficient Interstate Identification System, known as the 'Triple I'. Crime Identification Technology Act of 1998, 42 U.S.C. § 14601 (1998).

33. See U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, 2001 UPDATE, *supra* note 13, at 76-77.

34. *See id.*

35. *See id.*

36. *Id.* at 77.

37. *Id.*

States can participate in the Interstate Index system in two phases.<sup>38</sup> In the first phase, states agree to make their rap sheets available electronically to federal and state criminal justice personnel for criminal justice purposes.<sup>39</sup> During this phase, the FBI continues to maintain duplicate records in order to meet the needs of federal and out-of-state non-criminal justice agencies requesting information for non-criminal justice purposes (e.g., employment screening).<sup>40</sup> The second phase of the Interstate Index system requires participating states to make their indexed records available for both criminal justice and non-criminal justice purposes.<sup>41</sup> About half the states have achieved second phase compliance.<sup>42</sup>

The 1993 “Brady” Handgun Violence Prevention Act had a huge impact on the evolution of the U.S. criminal records system.<sup>43</sup> The Act required the Department of Justice to create a National Instant Criminal Background Check System (NICS) within five years.<sup>44</sup> The task of creating NICS was assigned to the FBI’s Criminal Information Division. NICS’s objective was to permit a federally licensed firearms dealer to find out immediately from a national database whether a prospective firearms purchaser was ineligible to purchase a firearm on account of a disqualifying criminal or other record.<sup>45</sup> At the time the law was passed, many Congressmen and observers thought it unlikely, if not impossible, that such a system could be achieved within the five-year time frame.<sup>46</sup> The project, however, was accomplished by 1998 due to hundreds of millions of dollars in federal aid, the Criminal History Records Improvement Program (CHRI), and its successor, the National Criminal History Improvement Program (NCHIP).<sup>47</sup>

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38. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME PREVENTION AND PRIVACY COMPACT: RESOURCE MATERIALS 2 (1998), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ncppcrm.pdf> [hereinafter U.S. DEP’T OF JUSTICE, NATIONAL CRIME PREVENTION AND PRIVACY COMPACT].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See Congressional Research Service, Summary of H.R. 1025, 103d Cong. (Brady Handgun Violence Prevention Act of 1993), *available at* <http://thomas.loc.gov>.

44. *Id.*

45. *Id.*

46. JAMES B. JACOBS, CAN GUN CONTROL WORK? 80 (2002).

47. See *id.* See also GERARD F. RAMKER, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROGRAM REPORT: NAT’L CRIMINAL HISTORY IMPROVEMENT

CHRI dates back to Section 6213(a) of the Anti-Drug Abuse Act of 1988.<sup>48</sup> That law required the attorney general, in consultation with the secretary of the treasury, to develop a system for the immediate and accurate identification of felons who attempt to purchase firearms.<sup>49</sup> Administered by the Bureau of Justice Statistics, CHRI made eighty-one awards between fiscal years 1990 through 1993 to all fifty states, the District of Columbia, American Samoa and the Northern Mariana Islands.<sup>50</sup> An amendment to the Crime Control Act of 1990 required states to spend five percent of their annual Bureau of Justice Assistance (BJA) grant on improving the quality of criminal history records.<sup>51</sup> The Brady Law authorized \$200 million for fiscal year 1994 and all fiscal years thereafter for the improvement of criminal history records.<sup>52</sup> By the late 1990s, the U.S. criminal records system had become a nationally integrated system that permitted any police officer with a computer terminal to instantly find out whether a suspect or arrestee has a criminal record anywhere in the United States.<sup>53</sup>

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PROGRAM – IMPROVING CRIM. HISTORY RECORDS FOR BACKGROUND CHECKS, 2005 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ichrbc05.pdf>.

48. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, EARLY EXPERIENCES WITH CRIMINAL HISTORY RECORDS IMPROVEMENT iii, xii (1997) [hereinafter U.S. DEP'T OF JUSTICE, CRIMINAL HISTORY RECORDS IMPROVEMENT].

49. Congressional Research Service Summary of H.R. 5210, 100th Cong. (Anti-Drug Abuse Act of 1988), available at <http://thomas.loc.gov>.

50. U.S. DEP'T OF JUSTICE, CRIMINAL HISTORY RECORDS IMPROVEMENT, *supra* note 48, at xi, 3.

51. *Id.* at 5.

52. *Id.* at 13. See also U.S. Dep't of Justice, Bureau of Justice Statistics, Justice Statistics Improvement Program: National Criminal History Improvement Program (NCHIP), <http://www.ojp.usdoj.gov/bjs/nchip.htm> (last visited Nov. 14, 2008) (website provides a general summary of the NCHIP, including its funding history); U.S. ATT'Y GEN., THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 17-18 (2006), available at [http://www.usdoj.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.usdoj.gov/olp/ag_bgchecks_report.pdf) ("NCHIP awards totaled \$465 million between 1995 and 2005 and the states spent approximately \$30 million in matching funds . . . . Despite the tremendous progress made toward criminal record improvements since 1995, significant shortcomings in record completeness remain, most significantly the fact that approximately one half of III arrests are missing dispositions.").

53. See *National Crime Information Center: 30 Years on the Beat*, INVESTIGATOR (U.S. Dep't of Justice, FBI, Washington, D.C.), Dec. 1996 – Jan. 1997, available at <http://permanent.access.gpo.gov/lps3213/ncicinv.htm>; U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, 1993 REPORT, *supra* note 28, at 25 ("According to the 1992 survey, which was conducted by SEARCH for the Bureau of Justice Statistics, more than 47.3 million individual offenders were in the criminal history files of the State central repositories as of December 31, 1992. In comparison, eight years earlier, the repositories held only 30.3 million subjects in their

The realization of the National Instant Background Check System (NICS),<sup>54</sup> however, did not mark the end of national investment in the criminal records system. In 1998, Congress, recognizing the vital role of criminal justice information, identification, and communication technologies, enacted the Crime Identification Technology Act of 1998 (CITA).<sup>55</sup> CITA authorized \$1.25 billion over five years for grants to states to upgrade criminal justice and criminal history record systems, improve criminal justice identification, and promote the compatibility and integration of national, state, and local criminal records systems.<sup>56</sup>

In 1998, in order to encourage state participation in the III, Congress passed the National Crime Prevention and Privacy Compact (Compact), an interstate compact for the exchange of criminal records for authorized non-criminal justice purposes.<sup>57</sup> The Compact was meant to be “privacy-neutral” because it provided inquiring states no more information than what they

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criminal history files, and three years earlier in 1989, the number was 42.4 million—an increase of 56 percent from 1984 to 1992. Similarly, more than 4.7 million dispositions were reported in 1992 to 33 State repositories providing disposition data for the 1992 survey, compared with 3.5 million dispositions reported by the 34 States that provided data to a similar survey in 1989. At the Federal level, the FBI’s Identification Division maintains fingerprint-based criminal history record information with respect to about 25 million individuals.”) See also Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, *supra* note 9, at 391-405.

54. See generally JACOBS, *CAN GUN CONTROL WORK?*, *supra* note 46, at 80-98 (noting that the NICS draws on three Federal databases that include CHRI, information on wanted persons, and certain other sensitive information, including mental health information, dishonorable discharges from the military, and court orders of protection); U.S. DEP’T OF JUSTICE, FBI, NICS: NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (May 1998), available at <http://ublib.buffalo.edu/libraries/e-resources/ebooks/images/edj1436.pdf>; U.S. DEP’T OF JUSTICE, FBI, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2005 (2006), available at [http://www.fbi.gov/hq/cjisd/nics/ops\\_report2005/ops\\_report2005.pdf](http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf).

55. Crime Identification Technology Act of 1998, 42 U.S.C. § 14601 (1998).

56. NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION, *supra* note 10, at 40.

57. U.S. DEP’T OF JUSTICE, NATIONAL CRIME PREVENTION AND PRIVACY COMPACT, *supra* note 38, at 6-7. “The FBI is beginning a phased launch of the new national Data exchange (N-Dex), an internet-based information system aimed at eventually linking the more than 18,000 law enforcement agencies in the nation electronically in an effort to share information beyond state boundaries. . . . The system is not limited to law enforcement information, but is truly a ‘criminal justice’ information system, which will eventually include probation and parole data as well as law enforcement incident and case reports.” *FBI Begins to Implement a System for Interstate Exchange of Data*, CRIMINAL JUSTICE NEWSLETTER, Mar. 17, 2008, at 3-4.

would otherwise have been able to obtain from the FBI.<sup>58</sup> Although federal officials and members of SEARCH, The National Consortium for Justice Information and Statistics, encouraged states to ratify the Compact, a number of states apparently objected to making their criminal records database accessible on behalf of out-of-state private employers when in-state employers were not permitted access to those criminal records.<sup>59</sup> The FBI continues to make nationwide criminal record information available to authorized non-criminal justice requesters, regardless of whether the record information comes from a state that is a Compact member.<sup>60</sup>

This U.S. experience provides an important lesson for countries considering linking or integrating their criminal record databases with those of other countries. For example, there is likely to be controversy if one jurisdiction makes criminal records available to non-criminal justice entities. In addition, the U.S. experience shows that it takes an enormous commitment of resources to create a fully coordinated and sophisticated IT system, even when integrating jurisdictions with closely related criminal laws and procedures. Building the United States' criminal record system took two decades and hundreds of millions of dollars in federal aid to the states. Needless to say, coordinating the national criminal record databases of many different countries would be much more difficult.

### *B. European Criminal Records System*

EU countries' criminal records systems look quite different from those of the United States. There is no central European system; each country maintains its own criminal register. Almost all EU countries base their criminal register on convictions rather than arrests.<sup>61</sup> Most EU countries' criminal registers operate under

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58. See U.S. DEP'T OF JUSTICE, NATIONAL CRIME PREVENTION AND PRIVACY COMPACT, *supra* note 38, at 2.

59. See *id.*

60. See SEARCH: The National Consortium for Justice Information and Statistics, Programs: Criminal History Policy: Compact Council, <http://www.search.org/programs/policy/compact> (last visited Nov. 14, 2008) (Twenty-seven states are members of the Compact; ten others have formally committed themselves to joining in the near future.).

61. A few EU criminal registers do not record information on all convictions, but only convictions for serious crimes. A few European criminal registers maintain records on dismissals and acquittals. Others include information on decisions by administrative authorities, such as imposition of disciplinary penalties, or prohibitions on working in

the jurisdiction of the Ministry of Justice, but in a few countries the Ministry of Interior or the police maintain the national criminal register.<sup>62</sup> The police also keep their own intelligence files and information on suspects taken into custody.<sup>63</sup> The absence of integrated criminal records systems in EU Member States reflects the European tradition of treating police as distinct from judicial authorities (which includes prosecutors), while in the United States, police and prosecutors are considered as more or less members of the same team. The EU criminal registers rely on courts to provide conviction information. In some countries, such as Finland, this is done electronically,<sup>64</sup> others use mail or fax.<sup>65</sup> The

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certain occupations or with children. See *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, COM (2005) 10 final (Jan. 25, 2005); *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, at 8-20, COM (2005) 10 final (Jan. 25, 2005). The information that is available to individuals requesting extracts of their own criminal records also varies. Personal Communication with Joanna Piórek, Ministry of Justice, Nat'l Criminal Register (Sept. 24, 2007) (on file with author) (noting that when an individual requests an extract of his criminal record in Poland, he may choose whether arrest information should be included); Personal Communication with Andreea Berechet, Deputy Consul Gen., Consulate Gen. of Rom. in N.Y. (Oct. 3, 2007) (on file with author) (In Romania, the criminal record includes arrest information and data regarding the initiation of criminal proceedings, but this information would not be included on a criminal record extract issued to the subject of the record.); Personal Communication with Andris Stepanovs, Deputy Chief, Div. of Record Keeping on Criminal Offences, Ministry of the Interior, Republic of Lat. (Oct. 3, 2007 and Nov. 20, 2007) (on file with author) (Detention data is included in the criminal record and is available to the detainee. State and municipal authorities or private persons, other than the detainee, may access them as the law permits.).

62. See *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 3-7; *Council Decision on the Exchange of Information Extracted from Criminal Records – Manual of Procedure*, COM (2004) 664 final (Jan. 15, 2007).

63. For example, according to the Slovenian Police Act, the police can keep nineteen different records. These records are kept in the central police computer database called Phonetic Index of Persons. "The data [is] available to police officers in formatted and textual form and they can arrive at the same data by entering the person, event or object. In this platform there is also the record of detained and retained persons, whom the police processed in connection with criminal or minor offences. Police officers cannot access data on persons serving sentences of imprisonment as it is under the responsibility of the Ministry of Justice and is kept in their database. Soon, however, this data will be available to the Police as the Ministry of Public Administration is leading a project which will interconnect all records of different institutions from the moment an offence is perceived to the final judgment." Letter from Slovenian Police, to author (Oct. 11, 2007) (on file with author).

64. Letter from Marjatta Syväterä, to author (July 1, 2008) (on file with author).

national criminal register officials whom we interviewed believe that their country's courts always send conviction information to their national criminal registers.<sup>66</sup> Yet, it is hard to see how the officials could be confident since there appears to be no auditing of local court compliance. Only by sampling criminal court convictions in diverse courts, would it be possible to determine what percentage of convictions are recorded in the national register.

For a criminal records database to be searchable, it must be supported by a comprehensive identification system. The U.S. state and federal criminal record databases are searchable by "soft identifiers," such as name, date of birth, residential address, social

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65. Personal Communication with Joanna Piórek, Ministry of Justice, Nat'l Criminal Register (Apr. 26, 2008) (on file with author).

66. In the UK, all law enforcement agencies can enter information into the Police National Computer. Quality audits are routine. Most bureaus have a policy whereby operators check each other's work before data is entered. Individuals can challenge the accuracy of criminal record information (for example, complaining that a record actually belongs to another individual with the same name or date of birth). Letter from Tony Grace, Manager, UK Central Authority, to author (Oct. 3, 2007) (on file with author). In Denmark, "the Courts return all convictions (copies of judgments) to the main police station where the decisions are updated in the national case database and from which the decisions automatically are transferred to the national criminal register. The prosecutor is responsible for the case and will be reminded each month if the case has not been received from the court office. It is therefore impossible for the court to forget forwarding decisions as the prosecutor is responsible for the case including searching the decision in order to secure that the correct decision has been made by the court." Letter from Mikael Christensen, Interpol Copenhagen, to author (Dec. 6, 2007) (on file with author). In Latvia, courts provide the information regarding adjudications to the Punishment Register. Because the criminal record database is not fully digitalized, it is not possible to perform an analysis with regard to the percentage of courts decisions received. Personal Communication with Andris Stepanovs, Deputy Chief, Div. of Record Keeping on Criminal Offences, Ministry of the Interior, Republic of Lat. (Dec. 13, 2007) (on file with author). German courts have been sending all information on convictions regularly to the German criminal register. It is not known if problems have occurred. From the point of view of the Ministry of Justice, the German criminal register is not incomplete. Letter from Sebastian von Levetzow, Division for Information Technology, Federal Ministry of Justice, Germany, to author (Dec. 10, 2007). In Poland, courts have to send a notification of convictions to the criminal register immediately after the judgment enters into force. *National Criminal Register Act of 24th May 2000*, 50 J. OF LAWS 580, art. 11, June 21, 2000 (Pol.). There is a possibility of delay. When sending notifications, the date when the judgment entered into force and the date of when a notification was sent must be indicated. From those dates, officials who work at the records register can determine whether courts have delayed sending in conviction information. Letter from Piotr Sobczak, Specialist, Ministry of Justice of the Republic of Poland, National Criminal Register, to author (Dec. 12, 2007) (on file with author).

security number, and by “hard identifiers,” such as fingerprints,<sup>67</sup> which are the most reliable.<sup>68</sup> Fingerprint searching makes it possible for police to determine quickly whether an arrestee has previously been arrested and convicted under a different name.<sup>69</sup> Police and prosecutors can find out immediately whether they are dealing with a first offender, a career criminal, or some other “type” of offender.

In contrast, EU countries generally use fingerprints much less frequently. Typically, police confirm the identity of EU citizens by means of a national identification card that must be carried at all times.<sup>70</sup> Non-citizen visitors are required to have a passport or other official government document in order to confirm their identity.<sup>71</sup> While police usually fingerprint arrested individuals,<sup>72</sup>

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67. “Fingerprint imaging is a process of photographic scanning of fingertips, entering the digitized record of the fingerprints in a computer database and then comparing the finger images of someone applying for a job, benefit or right with the database of authorized or excluded persons.” U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 25, n.14 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iiince.pdf> [hereinafter U.S. DEP’T OF JUSTICE, INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY].

68. *Id.* at 6 (“FBI fingerprint searches are highly preferable to III name checks as a means of criminal history screening. Individual fingerprint patterns are known to be unique. For this reason, fingerprint comparison is, and has for many decades been, the accepted standard for establishing positive identification of criminal history record subjects in the United States. Modern automated fingerprint identification systems are believed to produce identification error rates of less than one percent. Compared to FBI fingerprint searches, III name checks result in appreciable numbers of both false positives and false negatives.”). Duplicate records for the same person that may be held by state repositories due to the use of false names and identifiers or due to clerical mistakes are usually detected when the fingerprints for the new case are processed and the records consolidated. *Id.*

69. “[T]he analysis indicates that 11.7% of the applicants [for non-criminal justice and licensing purposes] in the sample who were found to have criminal records used names that were sufficiently different from the names on their criminal records to suggest that they intentionally used false names to avoid discovery of the records.” *Id.* at 26 app. B.

70. See Europa, Traveling in Europe – Documents You Will Need, [http://europa.eu/abc/travel/doc/index\\_en.htm](http://europa.eu/abc/travel/doc/index_en.htm) (last visited Nov. 14, 2008).

71. *Id.*

72. In Denmark police take an individual’s fingerprints when the person has been arrested for a crime that would give rise to a minimum prison term of one and a half years. Letter from Mikael Christensen, to author (Dec. 19, 2007) (on file with the author). In Germany, “§ 81b of the Code of Criminal Procedure states that the arrested/accused has to tolerate photography, fingerprinting and other measurements; if he resists, the identification can be enforced against his will (later on, he can turn to a court and have the measures examined with respect to their necessity; if the court rules in his favour, the data must be erased).” Interview with Henner Hess, Professor of Criminology, University of Frankfurt (Dec. 20, 2007) (on file with the author).



they rarely send fingerprints to the national criminal registers (which, for the most part, lack the capacity to store fingerprints). Therefore, the national criminal registers can usually only be searched via soft identifiers.<sup>73</sup> If fingerprints cannot be searched, a

73. The following chart identifies the central authority in each EU state (with the exception of Bulgaria and Romania). Under the Council Decision on the Exchange of Information Extracted from the Criminal Records – Manual of Procedure, *supra* note 62, Member States making a request to another EU country for criminal background information must provide the subject's name, gender, nationality, and date and place of birth on the request form. Council Decision on the Exchange of Information Extracted from the Criminal Record (EU) No. 2005/876/JHA of 21 Nov. 2005, 2005 O.J. (L 322) 33. Not all Member States, however, consider it useful to receive other identifiers such as father's name, mother's name, residence, fingerprints, national registration number, and social security number. As of January 2007, eight EU countries encouraged fingerprints.

Country	Authority	Fingerprints	Father's name	National Register Number
Austria	Police		Yes	
Belgium	Ministry of Justice			Yes
Cyprus	Police			Yes
Czech Republic	Ministry of Justice	Yes	Yes	Yes
Denmark	Police			Yes
Estonia	Ministry of Justice		Yes	Yes
Finland	Ministry of Justice			
France	Ministry of Justice			
Germany	Ministry of Justice			
Greece	Ministry of Justice		Yes	
Hungary	Ministry of Interior	No	No	If available
Ireland	Ministry of Justice	Yes	Yes	
Italy	Ministry of Justice	Yes	Yes	
Latvia	Ministry of Interior		Yes	Yes
Lithuania	Ministry of Interior	Yes	Yes	Yes
Luxemburg	Ministry of Justice			
Malta	Police	Yes	Yes	Yes
The Netherlands	Ministry of Justice			
Poland	Ministry of Justice		Yes	
Portugal	Ministry of Justice	Yes	Yes	Yes
Slovakia	Ministry of Justice	Yes	Yes	Yes
Slovenia	Ministry of Justice		Yes	Yes
Spain	Ministry of Justice		Yes	Yes
Sweden	Police			Yes
UK	Police	Yes	Yes	

query of Country R's criminal register, initiated by Country M, may result in a false negative error; that is, the query may fail to reveal a prior criminal record of "Mr. P," one of Country R's nationals, if Mr. P used a different name when offending in Country M. Potential for error is multiplied when searches are initiated by law enforcement agencies or courts in EU countries with different languages and even alphabets. Misspelling of names is also a problem.

National criminal registers that do not use fingerprints also present a heightened risk of false positive errors. For example, in response to a request from Country X, examination of Country Y's criminal register may reveal that Mr. Smith has a criminal record in Country Y. This record, however, may belong to a different Mr. Smith. Moreover, if officials of Country S's criminal register receive notice that "Mr. A," one of its nationals, has recently been convicted of robbery in Country W, Country S may not establish positive identification of the convicted person or recognize that Mr. A was convicted of a crime under an alias.<sup>74</sup>

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74. According to Joanna Piórek, Ministry of Justice of the Republic of Poland, National Criminal Register – IC Unit, "only a few countries collect fingerprints in their criminal records. Poland does not do it. That's why when we receive a request or notification from another country we have to know all personal data of that person, not only surname, name, date of birth and nationality, but also names of parents, maiden name, place of residence and PESEL (personal identification number). All that information can be found in the national ID card or in a passport. When a Polish judge sentences an offender, he or she has to know all that information. When that person does not have any documents then the police check his or her identity in fingerprints database (charged by the police)." Personal Communication with Joanna Piórek, Ministry of Justice, Nat'l Criminal Register (Oct. 10, 2007) (on file with author). A foreigner's identity is checked through Interpol. "In other words, before a person will be sentenced, his or her identity has to be checked (on the base of documents or fingerprints). It is a duty of the police to establish somebody's identity. We believe that other countries use the same procedure. When we have a problem with establishing an identity, we ask Interpol for help (fingerprints database). I think that in the nearest future we will have to adapt our criminal records to collect fingerprints and other biometric information. In fact, many countries did not start to exchange information on conviction and they do not know exactly the scope of the problem. For instance, in Poland we did not start to register notification on conviction of our citizens convicted in the EU yet." *Id.* "It is always a major problem when fingerprints are missing in a request among other things, because many (international) criminals use false identities, so fingerprints and photos are essential in every request." Personal Communication with Mikael Christensen, Interpol Copenhagen (Dec. 6, 2007) (on file with author). Furthermore, "the German register doesn't save fingerprints or utilize them. The use of fingerprints by the state is a politically very sensitive subject in Germany. The main attributes to identify persons in our register are name, first name, date of birth, and place of birth. There are a lot of other attributes that can be used, e.g., name of father or mother, domicile, alias name etc. If another EU state sends a notification of conviction to Germany, the German register doesn't check if a

Reluctance to use fingerprints is just one example of how the more confidentiality-minded EU countries more closely regulate the collection, storage, and transmission of "personal data," including criminal records.<sup>75</sup> In the United States, criminal records are effectively public, either by law or in practice. They can be obtained through three channels: (1) courts and court systems; (2) state criminal record repositories; and (3) private companies that sell information.<sup>76</sup> While the state-level repositories and the FBI's National Criminal Information Center (NCIC) restrict access to their criminal records,<sup>77</sup> court records are open to the public as a matter of historical practice and constitutional common law.<sup>78</sup> Private information companies mostly obtain criminal record information from courts and sell it to private customers.<sup>79</sup>

In contrast, while most EU countries make conviction records available to judicial authorities and in some cases to police and other public authorities,<sup>80</sup> they almost never provide private<sup>81</sup> individuals and entities (e.g., employers) with another individual's

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person with this data exists (that means that they don't have a cross check with a personal register). It would only check if a person with this data has an entry in the register. If this is the case, a new conviction will be added. If it is not the case, there will be a new entry for the person." Personal Communication with Sebastian von Levetzow, Division for Information Technology, Federal Ministry of Justice, Germany (Dec. 10, 2007).

75. See generally Council Directive On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, No. 95/46/EC, 1995 O.J. (L 281) 38 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>.

76. Jacobs & Crepet, *supra* note 9, at 179.

77. *Id.* at 208.

78. *Id.* at 183.

79. Many U.S. private employers purchase criminal background checks from private information vendors. See Chris J. Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C.J. INT'L L. & COM. REG. 595 (2003).

80. E.g., public administrations, government departments, prison and probation services, military authorities, customs offices, etc.

81. With regard to public employers' access to individual criminal records in Europe, see GERT VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY 69-75 (2002) [hereinafter VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE]. For example, under Greek law, a criminal background check is a prerequisite for the admission of a public servant, which is verified within the Government itself. Kodikas Poinikes Dikonomias [Kpoi.D.] [Code of Criminal Procedure] art. 577 (Greece). See also *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 3-7.

criminal history record.<sup>82</sup> This strict protection of criminal record information is loosened in some cases by national laws that permit certain employers to ask job seekers to show them an extract of their criminal record or an official certificate of good conduct.<sup>83</sup>

Citizens of EU countries have a right to see data recorded under their names.<sup>84</sup> Most countries allow individuals to request their criminal record extract, a certificate of good conduct, or an oral summary of what is in the record.<sup>85</sup> While some countries do not require the requesting individual to provide a reason for the request, other countries do (e.g., check the accuracy of information in the register, employment purposes, hunting permits etc.).<sup>86</sup> In

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82. See VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE, *supra* note 81; *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 3-7. Under Greek Law, there are two types of criminal record extracts. Type A is meant for judicial use and type B is meant for general use. Conviction information in the type B extract would not appear after three, eight, or twenty years from the execution of the sentence depending on the type of crime committed. Conviction information in the type A extract is only erased under very specific circumstances (i.e., the convicting decision is annulled, an amnesty is granted, or the convict person reaches the age of eighty, etc.). Greek judges may only access the criminal record of a defendant during the sentencing stage. During the pre-trial stage, prosecutors may access the criminal record information of a defendant only when making a decision on pre-trial detention or bail. During trial, they can also access it at the sentencing stage. The prosecution authority is also responsible for holding a database of convicted fugitives, separate from the criminal record database. The police stores information on individuals that have been arrested but it cannot access individual's criminal records. The police may access information with regards to convicted fugitives through the prosecution authority. *Kodikas Poinikes Dikonomias [Kpoi.D.]* [Code of Criminal Procedure] arts. 573-580 (Greece).

83. See VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE, *supra* note 81; *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 3-7.

84. See VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE, *supra* note 81; *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 3-7.

85. See VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE, *supra* note 81; *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 3-7.

86. See VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE, *supra* note 81; *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; *Commission Staff*

some cases, the extract that is provided varies according to the reason for the request.<sup>87</sup>

For our purposes, the important point is that the greater a jurisdiction's concern about protecting the confidentiality of criminal records, the greater the difficulty in establishing procedures and infrastructure for sharing those records with other jurisdictions.

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*Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union, supra* note 61, at 3-7.

87. For example, in Portugal, a subject's access to his own criminal record is limited to information legally relevant to the purpose for which the request is based. An employer is only entitled to see convictions, which by law are relevant to the job for which the subject is applying. Personal Communication with Jorge Pires, Portuguese Criminal Register (July 17, 2007) (on file with author); In Finland, when a person requests a criminal record extract, he or she must name the employer and job for which the extract is requested. The extract is valid for six months. The record holder may present the extract to another employer during that period. Letter from Marjatta Syväterä, *supra* note 64. Mandatory criminal background checks are common with regard to job positions that require proximity to children. For example, in Finland a private individual must request a criminal record extract when applying for a job that involves working with children. The extract is to be presented to the employer or relevant authority. *Id.* See also *Council Decision on the Exchange of Information Extracted from Criminal Records – Manual of Procedure, supra* note 62, at 92-96. In Sweden, "private employers have a right to obtain extracts from the criminal records regarding individuals that they have an intention to employ . . . [and who would] take decisions on employment of staff in psychiatric compulsory care, care of mentally retarded individuals or care of children and young people. The law also directs controls of personnel in registers with regulations regarding nursery school activities, schools and child care regarding individuals who are offered employment in nursery school activities or care of school children, arranged by the community or in nursery schools, nine-year compulsory schools, compulsory special schools for mentally handicapped children or special schools. Individuals who are offered employment in the above mentioned activities must submit an extract from the criminal records to the employer. From the 1st of July 2007[,] individuals who are offered employment in homes that care for children at the request of the social services, must also hand over an extract from the criminal records to the employer. Individuals who did not submit any extract from the criminal records cannot be employed." Personal Communication with Aimée Jillger, Legal Advisor, National Police Board (July 6, 2007) (on file with the author). If an individual in Sweden requests an extract of his criminal record for the purpose of employment at a school or with childcare, the extract will include only convictions relevant to that employment. See *Council Decision on the Exchange of Information Extracted from Criminal Records – Manual of Procedure, supra* note 62, at 97-99. In Denmark, public employers providing services to children can request that a job applicant's criminal record be sent directly to them, but only with the applicant's written consent. E-mail from Interpol Copenhagen, to Dimitra Blitsa (July 3, 2007) (on file with author).

## II. THE USEFULNESS OF CROSS-JURISDICTIONAL RECORDS SHARING

Under what circumstances do courts, immigration and border personnel, police, and non-governmental organizations need to see a person's criminal record from another country?

### A. Immigration and Border Security

#### 1. Relevance of Criminal Records for U.S. Immigration and Border Security

The officials with the greatest need for access to *foreign* criminal history records are immigration and border security personnel. Their job is to protect the homeland by preventing individuals who present a risk of criminality or terrorism from entering the country, either as visitors or immigrants. These officials believe that an individual's criminal record in his or her home country is relevant to whether the individual presents a threat to the country he or she seeks to enter. This is even true when the destination country has little respect for the home country's criminal justice system. The U.S. experience with the so-called "Mariel Boat People" or "Mariel Freedom Flotilla" is a case in point. In 1980, Fidel Castro allowed one hundred twenty thousand<sup>88</sup> individuals to flee Cuba for the United States, including hundreds of prison inmates. Despite U.S. contempt for Castro's regime, U.S. immigration authorities went to great lengths to determine which immigrants were convicted Cuban criminals and for what crimes. Some of those convictions kept individuals from being lawfully admitted to the United States.<sup>89</sup>

The United States will not admit into the country any person convicted of: 1) any two prior crimes that carry an aggregate prison term of five years or more; 2) any drug offenses, or; 3) a crime of moral turpitude, a broad category that even includes shoplifting.<sup>90</sup> This provision also prohibits U.S. entry to anyone *believed to be* a drug trafficker or money launderer.<sup>91</sup>

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88. MARK S. HAMM, *THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE* 45 (Northeastern University Press 1995).

89. *Id.* at 55.

90. Immigration and Nationality Act of 1952, 42 U.S.C. § 1182(a)(2) (1952).

91. Such immigration laws are not unique to the United States. Brazil, for example, bars entrance to anyone considered dangerous to the public order or national interest, anyone who has been previously deported from Brazil, and anyone condemned or tried in

How can immigration and border security personnel learn about prior foreign convictions? Except in a few exceptional cases,<sup>92</sup> border and immigration officials do not have routine (automatic) access to the national criminal record databases in prospective visitors' home countries. Nor do they require all visa-seekers to demonstrate a clean criminal record by providing proof of good character from the visitor's home country's criminal register or police agency.

Applicants for U.S. immigrant visas must proffer a certificate of good conduct (non-criminality), or their criminal record, issued by their local police agency.<sup>93</sup> Apparently, U.S. authorities consider it too burdensome to impose this same requirement on millions of non-immigrant visitors and tourists. Nonetheless, applicants for U.S. non-immigrant visas are asked to *disclose* whether they have ever been convicted of a criminal offense;<sup>94</sup> however, there is no routine method of verifying the applicant's answer. Travellers from countries covered by the Visa Waiver Program (VWP) are asked to disclose whether they have ever been arrested or convicted of an offense involving moral turpitude or unlawful possession or sale of a controlled substance or of any two or more offenses carrying an aggregate maximum sentence of at least five years.<sup>95</sup> In addition, they are required to reveal whether they are controlled substance traffickers or drug abusers or whether they are seeking U.S. entry to engage in criminal or immoral activities.<sup>96</sup>

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another country for willful infringement of a law that is subject to extradition by Brazil. Lei No. 6.815, de 19 de agosto de 1980, D.O.U de 22.08.1980. (Brazil).

92. For example, the FBI has access to Canadian criminal records and vice versa.

93. Applicants for a U.S. immigrant visa must provide the U.S. authorities with a police certificate that includes "all arrests, the reason for the arrest(s), and the disposition of each case of which there is a record." In addition, if they have been convicted of a crime they must produce "a certified copy of each court and any prison record, regardless of the fact that [they] have subsequently benefited from an amnesty, pardon or other act of clemency. Court records should include complete information regarding the circumstance surrounding the crime of which the applicant was convicted, and the disposition of the case, including sentence or other penalty of fine imposed." U.S. Dep't of State, Instructions for Immigrant Visa Applicants (Not Applying in Canada, Albania, Turkey, United Arab Emirates or Africa), [http://travel.state.gov/visa/immigrants/types/types\\_1308.html](http://travel.state.gov/visa/immigrants/types/types_1308.html) (last visited Nov. 14, 2008).

94. Applicants for a non-immigrant U.S. visa are not required to provide visa officials with a copy of their criminal record or proof of absence of a criminal record. *Id.*

95. 42 U.S.C. § 1182(a)(2).

96. I-94W Nonimmigrant Visa Waiver Arrival/Departure Form, <http://www.usvisalawyers.co.uk/article6add1form.htm> (last visited Nov. 14, 2008) (Travellers from VWP countries may not be eligible to enter the US without a visa if they have a prior criminal record.). Canadian and U.S. citizens are ineligible for the NEXUS

The 9/11 World Trade Center and Pentagon attacks generated a chorus of calls for greater cooperation between different countries' national intelligence services and police agencies. Proponents of greater cooperation pointed out that the 9/11 terrorist conspirators resided in, met in, and traveled through several countries.<sup>97</sup> Indeed, much of the recent momentum toward facilitating the exchange of criminal background information at immigration and border checks results from the *fear of cross-border terrorism*.<sup>98</sup>

After 9/11, the United States moved aggressively to tighten its border security, including enhancing access to visitors' criminal records. Since December 2003, the Terrorist Screening Center (TSC), operated jointly by the FBI and the Department of Homeland Security (DHS), maintains a database (TSDB) with names of persons suspected of ties to terrorist groups.<sup>99</sup> The TSDB consolidates various government watch lists, such as the

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travel program if they have been convicted in any country of a criminal offense for which they have not received a pardon (applicants who wish to enter the United States may be questioned about their full criminal history, including arrests and pardons, which may exclude them from NEXUS), have violated customs or immigration law, or are inadmissible to Canada or the United States under immigration rules. U.S. Custom and Border Protection, NEXUS Eligibility and Fees, [http://cbp.gov/xp/cgov/travel/trusted\\_traveler/nexus\\_prog/nexus\\_eligibility.xml](http://cbp.gov/xp/cgov/travel/trusted_traveler/nexus_prog/nexus_eligibility.xml) (last visited Nov. 14, 2008).

97. KRISTIN ARCHICK, U.S.-EU COOPERATION AGAINST TERRORISM 5 (Congressional Research Service, Library of Congress, Oct. 16, 2006), available at <http://www.fas.org/sgp/crs/terror/RS22030.pdf>.

98. Richard J. Aldrich, *Transatlantic Intelligence and Security Cooperation*, 80 INT'L AFF. 731, 743 (2004); Malcom Anderson & Joanna Apap, *Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation* (Centre for Eur. Pol'y Studies, Policy Brief No. 26, 2002); ARCHICK, U.S.-EU COOPERATION AGAINST TERRORISM, *supra* note 97, at 1; Oldrich Bures, *E.U. Counterterrorism Policy: A Paper Tiger?*, 18 TERRORISM & POL. VIOLENCE 57, 60 (2006); Mathieu Deflem, *Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective*, 23 JUST. Q. 336 (2006); Mathieu Deflem, *Global Rule of Law or Global Rule of Law Enforcement? International Police Cooperation and Counter-Terrorism*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 240, 240-41 (2006); Jan Griepink, *Criminal Records in the European Union, The Challenge of Large-Scale Information Exchange*, 14 EUR. J. CRIME CRIM. L. & CRIM. JUST. 1 (2006); Jörg Monar, *Cooperation in the Justice and Home Affairs Domain: Characteristics, Constraints and Progress*, 28 J. EUR. INTEGRATION 495 (2006); Glen M. Segell, *Intelligence Agency Relations Between the European Union and the U.S.*, 17 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 81 (2004); Walsh, *supra* note 7; Doron Zimmerman, *The European Union and Post-9/11 Counterterrorism: A Reappraisal*, 29 STUD. CONFLICT & TERRORISM 123 (2006).

99. See WILLIAM J. KROUSE, DOMESTIC SOCIAL POLICY DIVISION, TERRORIST IDENTIFICATION, SCREENING, AND TRACKING UNDER HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 6 (2004); Karen DeYoung, *Terror Database Has Quadrupled in Four Years*, WASH. POST, Mar. 25, 2007, at A1.



Transportation Security Administration's "no-fly" list,<sup>100</sup> the State Department's Consular Lookout and Support System, and the FBI's Violent Gang and Terrorist Organizations File. As of April 2007, the TSDB reportedly held seven hundred twenty thousand records and was growing by more than twenty thousand records per month.<sup>101</sup>

Post 9/11, Department of State (DOS) consular officers and DHS Customs and Border Protection (CBP) officers fingerprinted and photographed almost all non-U.S. citizens<sup>102</sup> between the ages of fourteen and seventy-nine when they applied for visas or arrived at U.S. ports of entry. The United States is now considering employing state of the art 10-fingerprint reading devices in its embassies and consulates as well as at ports of entry.<sup>103</sup> In November 2007, Washington Dulles International Airport became the first port of entry to collect additional fingerprints from visitors.<sup>104</sup> Nine other ports of entry were slated to begin 10-fingerprint collection in early 2008, and the 278 remaining ports were expected to participate by the end of 2008.<sup>105</sup>

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100. The U.S. "No-Fly list" contains the names of people whom the United States wants to prevent from flying to the United States or within the United States. Airlines are required, prior to departure, to check passengers' names against a No-Fly database provided by the Transportation Security Administration (TSA). European Commission, Article 29 Data Protection Working Party: Passenger Name Record (PNR) Subgroup, U.S. Watch Lists: Passenger No-Fly Lists/Selectee Lists (Mar. 21, 2007), [http://www.europarl.europa.eu/hearings/20070326/libe/nofly\\_factsheet\\_en.pdf](http://www.europarl.europa.eu/hearings/20070326/libe/nofly_factsheet_en.pdf). Canada has its own No-Fly list. *Critics Alarmed by Canada's No-Fly List*, CBC NEWS, June 18, 2007, <http://www.cbc.ca/canada/story/2007/06/18/no-fly-list.html>.

101. Ellen Nakashima, *Terrorism Watch List is Faulted for Errors, Justice Dept. Official Urges Improvement*, WASH. POST, Sept. 7, 2007, at A12. See also U.S. DEPT OF JUSTICE, OFFICE OF THE INSPECTOR GEN., FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER – AUDIT REPORT 07-41 (2007), available at <http://www.usdoj.gov/oig/reports/FBI/a0741/final.pdf>.

102. After 9/11 the United States implemented new security measures at ports of entry. Brazil responded by initiating fingerprinting and photographing of U.S. citizens arriving at its main international airports. *U.S. Fingerprints Foreign Visitors*, BBC NEWS, Jan. 5, 2004, <http://news.bbc.co.uk/1/hi/world/americas/3367893.stm>.

103. Press Release, Dep't of Homeland Sec., DHS Begins Collecting 10 Fingerprints From International Visitors At Washington Dulles International Airport (Dec. 7, 2007), available at [http://www.dhs.gov/xnews/releases/pr\\_1197300742984.shtm](http://www.dhs.gov/xnews/releases/pr_1197300742984.shtm).

104. *Id.*

105. *Id.* The US-VISIT program checks visitors' fingerprints against a joint FBI-DHS watch list of criminals, immigration violators, and known or suspected terrorists. *Id.* Watch list data come from several sources, including the Department of Defense (DOD), FBI, DHS, and other federal, state and local law enforcement agencies. See P.T. Wright, Acting Deputy Director, Dep't of Homeland Sec. US-VISIT Program, Address Before the Consular Section of the U.S. Embassy to Brussels (June 25, 2007), available at [http://useu.usmission.gov/Dossiers/Travel\\_Documents/Jun2507\\_Wright\\_US-VISIT.asp](http://useu.usmission.gov/Dossiers/Travel_Documents/Jun2507_Wright_US-VISIT.asp);

## 2. Relevance of Criminal Records For EU Immigration and Border Security

### a. Schengen Information System

The 1985 Schengen Agreement, signed by five European countries (Belgium, France, Germany, Luxemburg, and the Netherlands), called for the free movement of the signatories' citizens between the Schengen countries.<sup>106</sup> The 1990 Schengen Convention, effective in 1995, replaced the internal borders of the signatory states with a single external border, where officials conduct immigration checks for the whole Schengen area according to a single set of rules.<sup>107</sup> To prevent criminals from exploiting this freedom of movement, the Schengen countries implemented a common visa regime, improved coordination among the Member States' police, customs and judiciaries, and launched various anti-terrorism and anti-organized crime initiatives.<sup>108</sup>

To implement Schengen, Member States<sup>109</sup> created the Schengen Information System (SIS),<sup>110</sup> a shared database hosting a number of computer files, akin to the NCIC's "hot files." The SIS issues "alerts" that identify and describe property (lost or stolen identification documents, banknotes, vehicles and firearms) and

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Paul Harris et al., *Britons to be Scanned for FBI Database*, OBSERVER, Jan. 7, 2007, <http://observer.guardian.co.uk/world/story/0,,1984496,00.html>.

106. Convention Implementing the Schengen Agreement of 14 June 1985, F.R.G.-Fr., June 15, 1985, (2000) O.J. (L 239) 19, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML) [hereinafter *The Schengen Acquis*].

107. *Id.*

108. *Id.*; Europa, Summaries of Legislation, *The Schengen Area and Cooperation*, <http://europa.eu/scadplus/leg/en/lvb/l33020.htm> (last visited Nov. 14, 2008) [hereinafter *Europa, The Schengen Area and Cooperation*].

109. "A protocol attached to the Treaty of Amsterdam incorporates the developments brought about by the Schengen Agreement into the EU framework. The Schengen area, which is the first concrete example of enhanced cooperation between thirteen Member States, is now within the legal and institutional framework of the EU and thus comes under parliamentary and judicial scrutiny and attains the objective of free movement of persons enshrined in the Single European Act of 1986 while ensuring democratic parliamentary control and giving citizens accessible legal remedies when their rights are challenged." *Id.*

110. The SIS includes thirteen EU Member States plus Norway and Iceland. The UK and Ireland have exercised Schengen "opt-outs" and therefore partially participate in the SIS. Europa, *Your Europe – Citizens – Schengen (European Union)*, [http://ec.europa.eu/youreurope/nav/el/citizens/travelling/schengen-area/index\\_en.html](http://ec.europa.eu/youreurope/nav/el/citizens/travelling/schengen-area/index_en.html) (last visited Nov. 14, 2008).

persons that should be located, monitored, or apprehended.<sup>111</sup> For example, the SIS possesses information on individuals wanted for extradition, persons against whom a European arrest warrant has been issued, third-country nationals designated ineligible to enter the Schengen area, persons who pose a threat to the public order, missing persons, and individuals who should be monitored discretely.<sup>112</sup> SIS alerts also provide for an “action-to-be taken” notice with respect to suspicious or wanted persons or objects.<sup>113</sup> A state, however, may enter a reservation to this action if compliance would violate its laws.<sup>114</sup> In 2009, the upgraded SIS (SIS II) should be able to store fingerprints and facial images.<sup>115</sup>

Access to the SIS<sup>116</sup> is restricted to authorities who carry out border surveillance and other police and customs checks, make

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111. European Parliament, Schengen Information System [SIS], [http://www.europarl.europa.eu/comparl/libe/elsj/zoom\\_in/25\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/25_en.htm) (last visited Nov. 14, 2008) [hereinafter European Parliament, SIS]; Monar, *supra* note 98, at 501.

112. Monar, *supra* note 98.

113. *Id.*

114. *Id.*

115. SIS II, which can accommodate additional EU members and technological advances, will probably be operational by the end of 2009. Press Release, Carlos Coelho’s “Migration to SIS II” Adopted Today by the European Parliament (Sept. 24, 2008), available at <http://www.epp-ed.eu/Press/showpr.asp?PRControlDocTypeID=1&PRControlID=7808&PRContentID=13612&PRContentLG=en>; Press Release, EU Interior Ministers Confirm Framework SIS II Timetable and Agree on EUROPOL (Feb. 28, 2008), available at [http://www.eu2008.si/en/News\\_and\\_Documents/Press\\_Releases/February/0228JHA\\_MNZ.html](http://www.eu2008.si/en/News_and_Documents/Press_Releases/February/0228JHA_MNZ.html); Press Release, European Comm’n, SIS II: Commission Presents a Set of Proposals for Enlarging the Schengen Area to the New Member States (Jan. 6, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/651&format=HTML&aged=0&language=EN&guiLanguage=en> [hereinafter EC Press Release, Enlarging the Schengen Area]. The SIS system was designed to operate for a maximum of eighteen countries. European Parliament, Schengen Information System, [http://www.europarl.europa.eu/comparl/libe/elsj/zoom\\_in/25\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/25_en.htm) (last visited Nov. 14, 2008). Nine of the ten post-2004 EU Member States were scheduled to be incorporated into the Schengen regime in December 2007. Press Release, EU Presidency, Schengen and Visa Information System on Schedule (Apr. 20, 2007), available at [http://www.eu2007.de/en/News/Press\\_Releases/April/0420BMISchengenVisum.html](http://www.eu2007.de/en/News/Press_Releases/April/0420BMISchengenVisum.html); Press Release, Council of the EU, 2838th Council Meeting (Dec. 6-7, 2007), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/97498.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/97498.pdf); *Border-Free Zone Extended to 9 New EU States*, REUTERS UK, Nov. 8, 2007, available at <http://uk.reuters.com/article/worldNews/idUKL0887203320071108>.

116. The SIS has a “radial” structure. The C-SIS is responsible for the technical support of the SIS. Each Member State is responsible for maintaining its national section of the SIS (N-SIS). Each national section’s data can be electronically searched; however, the contracting parties may not search the data files of the other parties’ national sections. Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, tit. IV, June 19, 1990, 30 I.L.M. 123; MATTI JOUTSEN, *THE EUROPEAN UNION AND COOPERATION IN CRIMINAL MATTERS: THE*

asylum decisions, and issue residence permits. Europol<sup>117</sup> and Eurojust<sup>118</sup> can also use the system. To obtain additional information<sup>119</sup> a national authority with access to the SIS can contact its national SIRENE (Supplementary Information Request at the National Entry) office<sup>120</sup> which will subsequently contact the SIRENE office in the country responsible for entering the data in question into SIS.<sup>121</sup>

### b. Visa Information System

The EU Member States that apply the Schengen Acquis,<sup>122</sup> as well as Norway and Iceland, issue “short-stay” visas to non-EU nationals.<sup>123</sup> These visas are valid for traveling within the Schengen area.<sup>124</sup> Officials will deny a visa if the SIS contains an “alert-to-refuse-entry,” which would be issued in the case of a wanted or missing person, and for other excludable reasons. In addition, the

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SEARCH FOR BALANCE, PAPER NO. 25 13-14 (Eur. Inst. for Crime Prevention & Control [HEUNI] 2006), available at <http://www.heuni.fi/uploads/gg29d0zcr1rp1.pdf>; Europa, The Schengen Area and Cooperation, *supra* note 108. See generally Hielke Hijmans, *De derde pijler in de praktijk: leven met gebreken over de uitwisseling van informatie tussen de lidstaten* [The Third Pillar in Practice: Coping with Inadequacies: Information Sharing Between Member States], 54:10 SOCIAAL-ECONOMISCHE WETGEVING [S.E.W.] 375 (2006) (Neth.), translated in Meeting of the Netherlands Association for European Law (NVER), Nov. 24, 2006, *Discussion Paper*, available at [http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/Publications/Speeches/2007/07-02-07\\_preadvies\\_NVER\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/Publications/Speeches/2007/07-02-07_preadvies_NVER_EN.pdf) [hereinafter Hijmans, Third Pillar].

117. In regard to Europol’s access to SIS II, see House of Lords, Select Committee on the European Union Minutes of Evidence: Examination of Witnesses (Questions 445-459) (Nov. 28, 2006), <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldecom/49/6112808.htm>.

118. See Press Release, Eurojust, Eurojust Connected Today to the Schengen Information System (Dec. 14, 2007), available at [http://www.eurojust.europa.eu/press\\_releases/2007/14-12-2007.htm](http://www.eurojust.europa.eu/press_releases/2007/14-12-2007.htm).

119. The SIRENE allows for the transfer of additional information, such as extradition requests and fingerprints. European Parliament, SIS, *supra* note 111.

120. *Id.*

121. *Id.*

122. The Schengen Acquis includes measures that Member States took as part of cooperation under Schengen, “together with the decisions and declarations adopted by the Executive Committee set up by the 1990 Implementing Convention, the acts adopted in order to implement the Convention by the authorities on which the Executive Committee conferred decision-making powers, the agreement signed on 14 June 1985, the convention implementing that agreement, signed on 19 June 1990, and the protocols and accession agreements which followed . . .” Europa, The Schengen Area and Cooperation, *supra* note 108.

123. Europa, Same Visa Policy for All European Union Member States, [http://ec.europa.eu/justice\\_home/fsj/freetravel/visa/wai/fsj\\_freetravel\\_visa\\_en.htm](http://ec.europa.eu/justice_home/fsj/freetravel/visa/wai/fsj_freetravel_visa_en.htm) (last visited Nov. 14, 2008).

124. *Id.*

visa authorities may deny a visa if the applicant poses a threat to national security or public policy, or is likely to overstay the time period authorized by the visa.<sup>125</sup> “Special attention” should be paid to individuals who are known or suspected of being involved in criminal activities, or who, after entry, are likely to commit a crime or engage in prostitution.<sup>126</sup> In cases of doubt, the visa applicant may be asked to produce his or her criminal record extract.<sup>127</sup>

In 2007, the Justice and Home Affairs Council welcomed the agreement reached in the first reading with the European Parliament on a regulation concerning the Visa Information System (VIS)<sup>128</sup> and the exchange of data between Member States on short-stay visas.<sup>129</sup> The regulation allows competent authorities (in particular visa, border, and immigration agencies) to store and retrieve data on the biometrics of visa applicants and data on visas that have been issued, denied, or revoked. These data will be stored in and retrieved from a centralized European alphanumeric database.<sup>130</sup> The purpose of the database is to prevent visa

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125. See Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts, 2005 O.J. (C 326) 1, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XG1222\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XG1222(01):EN:HTML); Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, art. 5, June 14, 1985, 2000 O.J. (L 239) 43, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF>.

126. ISSUING OF VISA: RECOMMENDATIONS AND BEST PRACTICES, COUNCIL OF THE EUROPEAN UNION, EU SCHENGEN CATALOG (Vol. 3 2003), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/librairie/PDF/Cat.Sch.Vol.3EN.pdf](http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/Cat.Sch.Vol.3EN.pdf).

127. See Regulation of the European Parliament and of the Council Concerning the Visa Information System (VIS) and the Exchange of Data Between Member States on Short-Stay Visas, EUR. PARL. DOC. (PE-CONS 3630/07) (2007), available at <http://register.consilium.europa.eu/pdf/en/07/st03/st03630.en07.pdf>.

128. The Visa Information System (VIS) enables Member States to exchange visa information. Authorized national authorities may access participating states' visa data electronically. See generally Council Decision Establishing the Visa Information System (VIS) (EU) No. 2004/512/EC of 8 June 2004, 2004 O.J. (L 213) 5, available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l\\_213/l\\_21320040615en00050007.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_213/l_21320040615en00050007.pdf); Council Regulation 767/2008 of the European Parliament and the Council, Concerning the Visa Information System (VIS) and the Exchange of Data Between Member States on Short-Stay Visas (VIS Regulation), 2008 O.J. (L 218) 60 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0060:0081:EN:PDF> [hereinafter Council Regulation 767/2008].

129. Press Release, Council of the EU, 2807th Council Meeting (June 12-13, 2007) at 2, available at <http://www.statewatch.org/news/2007/jun/jha-12-13-june-07-prov-prel.pdf>.

130. Commission Proposal for a Regulation of the European Parliament and of the Council Concerning the Visa Information System (VIS) and the Exchange of Data Between Member States on Short Stay-Visas, at 14, COM (2004) 835 final (Dec. 28, 2004).

shopping and use of aliases in visa applications.<sup>131</sup> The VIS will store data, including an applicant's photograph and ten fingerprints, for up to seventy million people in the Schengen area (thus constituting the largest ten fingerprint system in the world).<sup>132</sup> Once fully operational, all visa-issuing consulates of the Schengen States and all officials at external border crossing points will be able to access this database.<sup>133</sup> The Justice and Home Affairs Council also agreed on a decision to authorize designated authorities of Member States and Europol access to VIS for the "purposes of the prevention, detection, and investigation" of terrorism and other serious offenses.<sup>134</sup>

### 3. Joint U.S. and EU Initiatives

The 9/11 terrorist attacks spurred a number of EU and Europol initiatives, some of which involved cooperation with the United States. The European Council's extraordinary meeting on September 21, 2001, concluded, "the Member States will share with Europol, systemically and without delay, all useful data regarding terrorism. A specialist anti-terrorist team will be set up within Europol as soon as possible and will cooperate closely with its U.S. counterparts."<sup>135</sup> In June 2003, the United States and the EU signed two agreements on extradition and mutual legal assistance. They have also concluded agreements on border controls and transport security.<sup>136</sup>

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131. Press Release, Council of the EU, 2807th Council Meeting, *supra* note 129, at 15.

132. Press Release, European Comm'n, Visa Information System (VIS): The JHA-Council Reaches a Political Agreement on the VIS Regulation and VIS Decision (June 12, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/802&format=HTML&aged=0&language=EN&guiLanguage=en>.

133. *See id.*

134. Press Release, Council of the EU, 2807th Council Meeting, *supra* note 129, at 15; Council Regulation 767/2008, *supra* note 128, at art. 3.

135. Conclusions and Plan of Action of the Extraordinary European Council Meeting, SN 140/01 (Sept. 21, 2001), available at [http://ec.europa.eu/justice\\_home/news/terrorism/documents/concl\\_council\\_21sep\\_en.pdf](http://ec.europa.eu/justice_home/news/terrorism/documents/concl_council_21sep_en.pdf). In November 2001, Europol established a Counter-Terrorism Task Force. Deflem, *Europol and the Policing of International Terrorism*, *supra* note 98, at 344. In December 2001, EU Member States reached a political agreement on the definition of terrorism and on the implementation of the EU-wide arrest warrant. In February 2002, the EU created Eurojust to coordinate the investigation and prosecution of serious cross border crime within the EU. ARCHICK, EUROPE AND COUNTERTERRORISM: STRENGTHENING POLICE AND JUDICIAL COOPERATION 3-4 (Congressional Research Service, Library of Congress 2002).

136. ARCHICK, U.S.-EU COOPERATION AGAINST TERRORISM, *supra* note 97, at 3-4.

In 2004, the United States and the EU signed an agreement requiring airlines operating flights to the United States to disclose passenger names (passenger name record data—PNR) in order to prevent and combat terrorism.<sup>137</sup> The agreement attracted much criticism in Europe on privacy grounds,<sup>138</sup> illustrating the vastly different concepts of privacy that reign on either side of the Atlantic. In 2006, when the European Court of Justice struck down the PNR agreement on technical grounds,<sup>139</sup> the United States threatened to stop non-complying EU airlines from operating in U.S. territory.<sup>140</sup> Ultimately, in July 2007, the United States and the EU completed negotiations on a new PNR agreement, which the EU General Affairs and External Relations Council (GAERC) approved.<sup>141</sup>

In November 2007, the European Commission (EC) put forward a PNR plan similar to the U.S.-EU PNR agreement<sup>142</sup> as part of a package of proposals aimed at fighting terrorism and organized crime.<sup>143</sup> The PNR plan requires air carriers to collect nineteen different points of personal data from air passengers

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137. *Id.* at 3-4.

138. *See id.*

139. *Id.* at 4.

140. *Massive Majority in European Parliament Against Deal with US on Access to Passenger Data*, STATEWATCH, Mar. 12, 2003, <http://www.statewatch.org/news/2003/mar/12epvote.htm>.

141. Agreement Between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security (DHS) [2007 PNR Agreement], U.S.-EU, Jul. 23, 2007, 2007 O.J. (L 204) 18, available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_204/l\\_20420070804en00180025.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_204/l_20420070804en00180025.pdf). *See also* Nicola Clark, *EU and U.S. Reach Tentative Deal on Passenger Data*, INT'L HERALD TRIB., June 27, 2007, available at <http://www.iht.com/articles/2007/06/27/europe/air.php>; Council Decision on the Signing, on Behalf of the European Union, of an Agreement Between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) (EU) No. 2007/551/CFSP/JHA, 2007 O.J. (L 204) 16, available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_204/l\\_20420070804en00160017.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_204/l_20420070804en00160017.pdf).

142. A few days after the attempted June 2007 car bomb attacks in London and Glasgow, Franco Prattini, the European Union Commissioner for Justice, Freedom and Security, announced plans for collecting more information on air travelers. *See* Declan McCullagh, *Global Police Database for Fingerprints, Airline Data?*, ZDNET AUSTL., July 13, 2007, <http://www.zdnet.com.au/news/security/soa/Global-police-database-for-fingerprints-airline-data-/0,130061744,339279955,00.htm>.

143. *EC Plans To Profile All Passengers In and Out EU*, EDRI-GRAM (Eur. Digital Rights [EDRI], Brussels, Belg.), Nov. 7, 2007, <http://www.edri.org/edriagram/number5.21/eu-pnr>.

flying to and from EU territory.<sup>144</sup> Analysis units will determine a traveler's risk assessment that could lead to passengers being questioned or refused entry.<sup>145</sup> Additionally, in response to a U.S. request, EU countries have amended their passports to include a face scan.<sup>146</sup> In the future, it is expected that new EU passports will also contain digitized fingerprint images.<sup>147</sup>

### *B. The Relevance of "Foreign" Criminal Records in Domestic Criminal Courts*

In most judicial systems throughout the world, judges sentence a defendant with a prior criminal record more severely; a more serious past criminal record warrants a more severe present sentence.<sup>148</sup> The various rationales for this include: (1) evidence of

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144. *Id.*

145. *EC Plans To Profile All Passengers In and Out EU*, *supra* note 143. See also *PNR (Passenger Name Record) Scheme Proposed to Place Under Surveillance All Travel In and Out of the EU*, STATEWATCH, Nov. 2007, <http://www.statewatch.org/news/2007/nov/01eu-pnr.htm>.

146. Press Release, New, Secure Biometric Passports in the EU, Strengthen Security and Data Protection and Facilitates Travelling [sic] (June 29, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/872&format=HTML&age=d=1&language=EN&guiLanguage=en> [hereinafter Press Release, Biometric Passports].

147. See *No Delay For EU Biometric Passports*, EDRI-GRAM (Eur. Digital Rights [EDRI], Brussels, Belg.), Apr. 6, 2005, <http://www.edri.org/edriagram/number3.7/biometrics>.

148. In Japan, there are two occasions at the sentencing stage when a defendant's criminal history may be taken into account. One is to extend the statutory maximum and the other is to suspend the sentence. Letter from Yuko Kato, Japanese criminal defense lawyer, to author (Nov. 15, 2007 and Nov. 16, 2007) (on file with author). If a defendant is convicted and sentenced to imprisonment within five years from the final day of the prior imprisonment, the statutory maximum of the sentence range will be automatically doubled. *Id.* With regard to sentence suspension, if a defendant, who (i) has no prior imprisonment or (ii) has a prior imprisonment, but not within the previous five years, is sentenced to imprisonment for three years or less or a fine of 300,000 yen (equal to about \$2,700) or less, the court may suspend the execution of the sentence for one to five years. *Id.* Generally, if a defendant has a criminal record, his sentence will be more severe than the sentence of a defendant who does not have a prior conviction. *Id.* If a defendant's criminal history is based on the same kind of crime as the charged crime or has a recent criminal history, his or her sentence will be more severe. *Id.* A Japanese Supreme Court decision held that, "the court shall determine an appropriate sentence within the scope of statutory punishment in light of the defendant's character and background as well as the motivation, objective, method and other circumstances concerning the offense charged. Therefore, the court shall not always be prohibited from taking another offense committed by the same defendant into consideration as one of the relevant circumstances for sentencing with respect to the offense charged." *Kojima v. Japan*, 20 KEISHU 609 (Sup. Ct., July 13, 1966), translation available at <http://www.courts.go.jp/english/judgments/text/1966.07.13-1965-A-No.878.html>. Therefore, in theory, courts can take into account a prior conviction in another country as a circumstance of sentencing if it is appropriately proved.



a prior criminal record combined with the current offense identifies the defendant as an active and perhaps incorrigible offender likely to commit future crimes; (2) a recidivist offender does not deserve the leniency shown to a first offender; (3) the defendant who commits another crime after having previously been charged, convicted and sentenced is more culpable because he or she is contemptuous of the legal order.<sup>149</sup>

### 1. Foreign Convictions and U.S. Courts

U.S. criminal law is decentralized; the federal government and each state has its own penal code. Both the federal government and the states, however, have laws punishing recidivist offenders more severely,<sup>150</sup> the "three strikes and you're out" statutes are the best known.<sup>151</sup> These recidivist statutes do not distinguish between prior convictions in the present jurisdiction and prior convictions in another U.S. jurisdiction. U.S. prosecutors and criminal courts therefore need access to defendants' prior convictions nationwide. This information is readily accessible through the III, which integrates the nation's diverse criminal record systems through a sophisticated electronic communications network.<sup>152</sup>

A prior conviction from another U.S. jurisdiction may have to be interpreted. Despite having fairly similar criminal codes, American states vary in defining and grading substantive

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In practice, however, courts do not take foreign prior convictions into account, and the prosecutor does not present to the court a prior conviction in another country. Letter from Yuko Kato, to author, *supra*. One reason for this is that a prior conviction in another country is difficult to prove. *Id.* Assuming there is a document titled "criminal record of Mr. X in Country A," signed by a Country A official, it could be difficult and burdensome to prove the authenticity of the document, if challenged by the defense counsel. Another reason is that, even if a prior conviction in other country is possible to prove, it is still difficult to take it into account from the viewpoint of due process. *Id.* Criminal offenses defined in criminal codes differ from country to country. In addition, there might be concerns about whether the defendant was convicted under sufficient due process. *Id.* The courts are reluctant to rely on another country's sentence on account of different due process standards. *Id.*

149. See generally ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985).

150. Parke v. Raley, 506 U.S. 20, 26-27 (1992).

151. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4 (2001).

152. NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION, *supra* note 10, at 21.

offenses.<sup>153</sup> Thus, even U.S. courts encounter difficulty in determining, for sentencing purposes, whether a particular conviction in another state is equivalent to a particular offense in the sentencing court's penal code. For example, in *Shepard v. U.S.*, a federal sentencing court had to decide whether a prior Massachusetts burglary conviction (by plea bargain) counted as a predicate felony for purposes of the federal Armed Career Criminal Act.<sup>154</sup> The Massachusetts criminal code defined "burglary" more broadly than federal burglary,<sup>155</sup> thereby raising the risk that the federal court might sentence the defendant as a federal predicate felon even though he or she would not have been previously convicted of burglary in federal court. The U.S. Supreme Court ruled that the federal sentencing court may interpret the prior conviction by plea bargain to determine whether the prior felony burglary from Massachusetts would have amounted to burglary as defined by federal law.<sup>156</sup>

Another U.S. example, this time from a state court, also illuminates the complexity of interpreting other jurisdictions' convictions. In *People v. Moore*, defendant-appellant contended that a prior New Jersey robbery-murder should not count as a violent felony for purposes of a California recidivist law.<sup>157</sup> The California appellate court held that the California sentencing court "can consider any evidence in the record of a prior foreign [i.e., from another state] conviction if it is not precluded by the rules of evidence or other statutory limitations."<sup>158</sup> "Under the current version of the 'least adjudicated elements' test, the trier of fact may consider the entire record of the proceedings leading to the prior conviction to determine whether the prior offense involved conduct that satisfies all of the elements of the comparable

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153. The majority of U.S. states follow the Model Penal Code [MPC]. James B. Jacobs, *Criminal Law, Criminal Procedure, and Criminal Justice*, in *Fundamentals of American Law* 296 (Alan B. Morrison ed., 1996). A minority of states, including California, have not adopted the MPC. *Id.* Even among MPC states, there are differences in the grading and definition of offenses. *Id.* For example, some jurisdictions classify first offense drunk driving as a violation, while others classify it as a misdemeanor. As a consequence, second offense drunk driving could be a misdemeanor or a felony, depending on the jurisdiction.

154. *Shepard v. U.S.*, 544 U.S. 13, 16 (2005). *See also* *Leocal v. Ashcroft* 543 U.S. 1 (2004); *Burgess v. U.S.*, 128 S. Ct. 1572 (2008).

155. *Shepard*, 544 U.S. at 17.

156. *Id.* at 26.

157. *People v. Moore*, No. F048164, 2006 WL 2053668, at 12 (Cal. Ct. App. 2006), *cert. denied* *Moore v. California*, No. 06-9195, 2007 WL 321382, at 1 (U.S.S.C. 2007).

158. *Id.* at 15 (citations omitted).

California serious felony offense. The prosecution can go behind the statutory elements of the crime to prove that the defendant's actual crime would have been a felony under California law."<sup>159</sup>

Interpreting prior convictions from *other countries* presents more problems than interpreting sister states' convictions. Although rare, the issue does arise in American courts, usually during sentencing. For example, the U.S. Federal Sentencing Guidelines (FSG) include a "criminal history score" that assigns points for every previous misdemeanor and felony conviction *in a U.S. court*.<sup>160</sup> It also, however, gives federal judges discretion to take account of prior foreign convictions in determining whether the criminal history score "adequately reflects the seriousness of the defendant's past criminal conduct or the likelihood of the defendant's recidivism."<sup>161</sup> If not, the federal judge can enhance the sentence.<sup>162</sup> For example, in *U.S. v. Concha*, a federal judge enhanced the sentence of a defendant with six prior UK convictions.<sup>163</sup>

The laws of U.S. states vary considerably on whether, and to what extent, convictions handed down in other countries can be taken into account.<sup>164</sup> Frequently, state sentencing laws can be

159. *Id.* at 17 (citations omitted). See also *State v. Thiefault*, 128 Wash. App. 1056 (2005) (providing a good example of how a sentencing court in one U.S. state (Washington) has to engage in "comparability analysis" to determine whether a criminal conviction in another state (Montana) would have qualified for three-strikes sentencing in the first state); *In re Pers. Restraint of Lavery*, 111 P.3d 837 (Wash. 2005) (Washington court applying comparability analysis to a prior federal conviction).

160. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2001).

161. *Id.* §§ 4A1.2(h), 4A1.3.

162. *Id.* § 4A1.3 (providing a non-exclusive list, including foreign convictions, of circumstances where an upward departure may be warranted because the criminal history score does not adequately reflect the seriousness of the defendant's past criminal conduct).

163. *U.S. v. Concha*, 294 F.3d 1248, 1253 (10th Cir. 2002). See also *U.S. v. Kum*, 309 F. Supp. 2d 1084, 1085, 1089 (E.D. Wis. 2004). In *U.S. v. Kum*, defendant Kum, a Singaporean national residing in Thailand, was convicted in the United States on one count of conspiracy to smuggle wildlife into the United States and one count of money laundering. The court imposed an upward departure based on evidence that Kum had smuggled women from Thailand to Singapore for purposes of prostitution, although there was no Singaporean conviction. *Kum*, 309 F. Supp. 2d at 1085, 1089. See also *U.S. v. Delmarle*, 99 F.3d 80, 85-86 (2nd Cir. 1996) (affirming upward departure based on foreign criminal conduct, even though foreign conviction was infirm; investigative records were deemed sufficiently reliable).

164. See, e.g., N.Y. PENAL LAW § 70.06(b)(i) (McKinney 2004) (providing that for purposes of sentencing someone as a second (or persistent) felony offender, the predicate felony conviction "must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a

interpreted to permit consideration of foreign convictions. For example, New Jersey law provides that “[a] conviction in *another jurisdiction* shall constitute a prior conviction of a crime if a sentence of imprisonment in excess of 6 months was authorized under the law of the other jurisdiction.”<sup>165</sup> In *State v. Williams*, a New Jersey court took a Canadian conviction into account when imposing an extended sentence.<sup>166</sup> Likewise, in *People v. Le Grand*, a New York appellate court stated that a prior Canadian conviction could qualify as a predicate felony offense for purposes of New York’s recidivist statute.<sup>167</sup>

Some U.S. courts have interpreted federal and state laws to prohibit consideration of foreign convictions. In *Small v. U.S.*, a federal court was faced with sentencing a defendant who had previously been convicted of smuggling firearms into Japan; the Japanese court sentenced him to five years in prison.<sup>168</sup> Subsequently, back in the United States, Small was arrested for possessing a firearm and charged under the federal felon-in-possession law which prohibits “any person . . . convicted in any court of, [sic] a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm.”<sup>169</sup> Small argued that “any court” referred only to U.S. courts, not to foreign courts.<sup>170</sup> The U.S. Supreme Court agreed, pointing out the slew of problems and complexities that would arise if “convicted in any court” was interpreted to include convictions in foreign courts.<sup>171</sup> Writing for the majority, Justice Breyer argued that a foreign

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sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed”).

165. N.J. STAT. ANN. § 2C:44-4C (West 2005) (emphasis added).

166. N.J. v. Williams, 706 A.2d 795, 798 (N.J. Super. Ct. App. Div. 1998).

167. *People v. Le Grand*, 439 N.Y.S.2d 695, 697 (N.Y. App. Div. 1981). In *Le Grand*, the defendant contended that he was improperly sentenced as a second felony offender on the basis of Canadian convictions for assault and fraud. The Court agreed with him. *Id.* at 696, 697. Since assault and fraud, as defined in the relevant Canadian statutes, are not offenses punishable in New York state by a term of imprisonment in excess of one year, neither could constitute a predicate felony for purposes of New York state’s sentencing law. *Id.* According to New York state law, an out-of-state (including federal) conviction could count as a predicate offense for sentencing only if the conduct would also be a felony if prosecuted in New York. *Id.* at 697. If an out of state conviction does qualify, it is given equal weight to a New York conviction. *Id.*

168. *Small v. U.S.*, 544 U.S. 385, 387 (2005).

169. *Id.* (quoting 18 U.S.C. § 922(g)(1) (emphasis added by court)).

170. *Id.*

171. *Id.* at 391-392 (Cindrich, J., providing several specific examples showing that the inclusion of foreign convictions would create anomalies).

conviction might have punished conduct not prohibited in the United States, citing economic and political conduct that is legal in the U.S. but prohibited in countries like Russia and Cuba.<sup>172</sup> He went on to emphasize how burdensome it would be for American courts to interpret foreign convictions and determine the fairness of foreign criminal procedures.<sup>173</sup> The *Small* decision does *not* mean that federal courts cannot take foreign convictions into account.<sup>174</sup> It does, however, raise a presumption against doing so unless Congress has clearly indicated a contrary intention.<sup>175</sup>

## 2. Foreign Criminal Convictions in EU National Courts

EU Member States' national laws differ on whether prior foreign convictions (whether from EU or non-EU countries' courts) may be considered in criminal proceedings.<sup>176</sup> Historically

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172. *Id.* at 389.

173. *Id.* at 390 (“[t]o somehow weed out inappropriate foreign convictions that meet the statutory definition is not consistent with the statute’s language; it is not easy for those not versed in foreign laws to accomplish; and it would leave those previously convicted in a foreign court (say, of economic crimes) uncertain about their legal obligations”).

174. *See id.* *See also* U.S. v. Gayle, 342 F.3d 89 (2d Cir. 2003); Dionna K. Taylor, Note, *The Tempest in a Teapot: Foreign Convictions as Predicate Offenses Under the Federal Felon in Possession of a Firearm Statute*, 43 WASHBURN L.J. 763 (2004).

175. *Small*, 544 U.S. at 390-391 (“These considerations, suggesting significant differences between foreign and domestic convictions, do not dictate our ultimate conclusion. Nor do they create a “clear statement” rule, imposing upon Congress a special burden of specificity. They simply convince us that we should apply an ordinary assumption about the reach of domestically oriented statutes here—an assumption that helps us determine Congress’ intent where Congress likely did not consider the matter and where other indicia of intent are in approximate balance. We consequently assume a congressional intent that the phrase “convicted in any court” applies domestically, not extraterritorially. But, at the same time, we stand ready to revise this assumption should statutory language, context, history, or purpose show the contrary.”) (citations omitted).

176. *See Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 9 (“The [1959 European Convention on Mutual Assistance in Criminal Matters] makes no mention of the legal consequences that should be attached to foreign convictions. The European Convention on the International Validity of Criminal Judgments of 28 May 1970 makes provision for measures in that area but has been ratified by only a few Member States. At [the] EU level, just one provision on the protection of the euro deals with reoffending. At present, the scope for attaching consequences to foreign convictions is a matter covered by national law. It is often limited. Within a national legal framework, previous convictions may have a variety of consequences. They may affect: the rules governing prosecution (e.g., type of procedure applicable, rules on pre-trial detention); the trial procedure (e.g., choice of court), definition of the offense and choice of sentence (e.g., it might be impossible to give a suspended sentence to persons with previous convictions); sentence enforcement (arrangements for early release or adjusting the conditions of imprisonment may be different for persons with previous convictions), and the possibility of sentences running concurrently.”). *See also Commission Staff Working Paper: Annex to the White*

and presently, even when national law gives effect to prior foreign convictions, sentencing courts usually lack prior foreign conviction information and therefore do not take such convictions into account.<sup>177</sup> EU officials are well aware that recognition of Member States' judicial judgments is a crucial step toward mature political integration.<sup>178</sup> According to the EU Commissioner for Justice, Freedom and Security, Franco Frattini:

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*Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union, supra* note 61, at 25-27. In the UK, Section 143(5) of the Criminal Justice Act 2003, Criminal Justice Act, 2003, c. 44, § 143 (Eng.), permits English and Welsh courts to treat a previous foreign conviction as an aggravating sentencing factor. Similarly, section 57 of the 2003 Scottish Criminal Justice Act allows a court to afford a conviction in another EU state the same effect as a conviction in a Scottish court. Criminal Justice Act (Scotland), asp. 7, § 57 (2003); SELECT COMMITTEE ON EUROPEAN SCRUTINY, SECOND REPORT, 2005-6, H.C. 34-ii, at ¶ 6.14, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-ii/3408.htm>. Danish courts may afford prior *foreign* criminal convictions the same effect as prior *domestic* criminal convictions. See Danish Penal Code § 84.

177. Although the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters promoted the exchange of criminal conviction information between European countries, there were serious implementation problems. See *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union, supra* note 61; *Commission Proposal for a Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings*, at 2, COM (2005) 91 final (Mar. 17, 2005), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0091en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0091en01.pdf); Press Release, Ministry of Justice (Finland), Courts to Take Account of Convictions in Other EU Member States in New Criminal Proceedings (Dec. 4, 2006), available at <http://www.vn.fi/ajankohtaista/tiedotteet/tiedote/fi.jsp?oid=176670> ("This [F]ramework [D]ecision adds significant value to the process, because courts in Member States do not usually take account of decisions handed down abroad.").

178. See Remarks of Mr. Demetriou, Eur. Parl. Deb. (A6-0268/2006) (Sep. 26, 2006), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20060926+ITEM-016+DOC+XML+V0//EN> ("The proposal is another step in the direction of the enlargement of judicial cooperation and the development of confidence between the Member States in the field of justice. It is another measure to promote the principle of the mutual recognition of civil and criminal judgments, which is considered to be the cornerstone of judicial cooperation in the Union. . . . We are of the opinion that, as the proposal to be put to the vote has been formulated, it adequately serves both the principle of mutual recognition of court judgments and the policy of gradual assimilation of the law."). Cf. Remarks of Mr. Allister, EUR. PARL. DEB. (Sept. 26, 2006), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20060926+ITEM-016+DOC+XML+V0//EN> ("[A]s in the case of many EU harmonising proposals there is a certain simplistic and plausible appeal to mutual recognition of criminal convictions throughout the community. But make no mistake: it is part of a grand design for an integrated and EU-controlled criminal justice system requiring, of necessity, the subservience of national systems. For me, criminal justice matters are intrinsically national issues and must remain so. Hence I welcome the resistance at last Friday's Council of Ministers meeting to a further surrender of the national veto. I hope it will be sustained.

Currently, little, if any, account is taken of convictions handed down in other Member States. That is not acceptable in an area of freedom, security and justice. That is why the objective of the EU is twofold: first, information on criminal convictions should circulate efficiently between the Member States, and second, it should be possible to use that information outside the territory of the sentencing Member State.<sup>179</sup>

In recent years, the EU has been striving to achieve mutual recognition of its Member States' criminal convictions and other judicial judgments.<sup>180</sup> In 2005, the Commission of the European Communities<sup>181</sup> submitted a Proposal for a Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings (Framework Decision on Taking Account of Convictions).<sup>182</sup> This Framework Decision on Taking Account of

Not only because of my opposition to the grand design of which it is part but because it diminishes the protection of my constituents against unfairness, I oppose this proposal.”)

179. Remarks of Vice-President Franco Frattini, EUR. PARL. DEB. (Sept. 26, 2006) (debate on taking into account previous convictions in another Member State), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20060926+ITEM-016+DOC+XML+V0//EN>.

180. EU initiatives promoting judicial cooperation in criminal matters have focused on: a) the exchange of criminal records; b) the *ne bis in idem* (literally, “not twice for the same”) principle; c) mutual recognition of convictions in other Member States for purposes of criminal proceedings; d) enforcement of criminal penalties; e) mutual recognition of disqualifications, e.g., disqualifications from working with children, driving, etc. See *Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust Between Member States*, at 4, COM (2005) 195 final (May 19, 2005) (EC).

181. The Council of the European Union and the European Parliament are the EU's two legislative institutions. The Member States' ministers negotiate Council Framework Decisions relevant to their areas of authority. Europa, Glossary: Council of the European Union, [http://europa.eu/scadplus/glossary/eu\\_council\\_en.htm](http://europa.eu/scadplus/glossary/eu_council_en.htm) (last visited Nov. 14, 2008); Europa, Glossary: European Parliament, [http://europa.eu/scadplus/glossary/european\\_parliament\\_en.htm](http://europa.eu/scadplus/glossary/european_parliament_en.htm) (last visited Nov. 14, 2008). “Framework [D]ecisions are used to approximate (align) the laws and regulations of the Member States. Proposals are made on the initiative of the Commission or a Member State and they have to be adopted unanimously. They are binding on the Member States as to the result to be achieved, but leave the choice of form and methods to the national authorities. Decisions are used for any purpose other than approximating the laws and regulations of the Member States. They are binding and any measures required to implement them at Union level are adopted by the Council, acting by a qualified majority.” Europa, Glossary: Decision and Framework Decision (Title VI of the EU Treaty), [http://europa.eu/scadplus/glossary/framework\\_decisions\\_en.htm](http://europa.eu/scadplus/glossary/framework_decisions_en.htm) (last visited Nov. 14, 2008) (paraphrasing 2002 O.J. (C 325) 45, tit. IV, art. 34(2)).

182. See Council Framework Decision 2008/675/JHA, 2008 O.J. (L 220) 32 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:220:0032:0034:EN:PDF> [hereinafter Council Framework Decision 2008/675/JHA]. See different

Convictions, which was adopted in July 2008,<sup>183</sup> will further the “mutual recognition principle”<sup>184</sup> by requiring Member States to give equivalent effects to prior convictions from other Member States<sup>185</sup> as they give to prior domestic convictions.<sup>186</sup> The Framework Decision on Taking Account of Convictions would

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versions of the Framework Decision. *Commission Proposal for a Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings*, supra note 177; *Council Draft Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings*, COM (2005) 91 final (Nov. 24, 2006), available at <http://europapoort.eerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2f=/vhgqehsexfx8.doc> [hereinafter *2006 Draft Framework Decision on Taking Account of Convictions*]; Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings (EU) No. 2007/.../JHA of 2 July 2007, art. 3, 2005/0018 (CNS), available at <http://register.consilium.europa.eu/pdf/en/07/st09/st09675.en07.pdf> [hereinafter *2007 Draft Council Framework Decision on Taking Account of Convictions*]. For a discussion of the Draft Framework Decision in the UK, see Response of the Law Reform Committee of the Bar Council regarding the European Commission Proposal for a Framework Decision on Taking Account of Convictions in the Course of New Criminal Proceedings (Nov. 14, 2005), available at <http://www.barcouncil.org.uk/assets/documents/EuropeanCommissionFrameworkDecision.doc>; SELECT COMMITTEE ON EUROPEAN SCRUTINY, THIRTY-FIFTH REPORT, 2005-6, H.C. 34-xxxv, at 23, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxxv/3408.htm>; SELECT COMMITTEE ON EUROPEAN SCRUTINY, FORTIETH REPORT, 2005-6, H.C. 34-xl, at 40, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xl/3413.htm>.

183. Council Framework Decision 2008/675/JHA, supra note 182. “Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 15 August 2010.” *Id.* art. 5(1).

184. The mutual recognition principle, presented as the “cornerstone” of judicial cooperation at the Tampere European Council, “is the basis of a programme of measures adopted by the Council in December 2000. Measure 2 of the programme provides for the “adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other Member States for the purposes of assessing the offender’s criminal record and establishing whether he has re-offended, and in order to determine the type of sentence applicable and the arrangements for enforcing it.” The purpose of this proposal for a Framework Decision is to attain the objectives set by measure 2 of the programme. . . .” *Commission Proposal for a Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings*, supra note 177, at 2.

185. Council Framework Decision 2008/675/JHA, supra note 182, at art. 3. “However, this Framework Decision does not seek to harmonise the consequences attached by the different national legislations to the existence of previous convictions, and the obligation to take into account previous convictions handed down in other Member States exists only to the extent that previous national convictions are taken into account under national law.” *Id.* ¶ 5.

186. See James B. Jacobs & Dimitra Blitsa, *Major ‘Minor’ Progress Under the Third Pillar: EU Institution Building in the Sharing of Criminal Record Information* 8 CHI.-KENT J. INT’L & COMP. L. 111 (2008).



apply to the pre-trial stage, the trial stage, and at the time of execution of the conviction (e.g., applicable rules of procedure and provisional detention, definition of offenses, type and level of sentence, rules on the execution of the decision).<sup>187</sup> Each Member State, however, is free to adopt its own policy with regard to how much weight should be given to convictions in non-EU countries.<sup>188</sup>

The Framework Decision on Taking Account of Convictions, in effect, directs Member States' courts to regard court decisions from other EU countries the same way that American courts treat decisions from other federal and state courts. It also prohibits EU Member States from interfering with, revoking, or reviewing convictions from other EU countries.<sup>189</sup> In order to give appropriate effect to a prior foreign EU conviction, however, each country's courts will have to determine the meaning of a foreign EU country's conviction (and sentence), i.e., what the foreign conviction/sentence would correspond to under its own penal code.<sup>190</sup>

Consider, for example, the following situation. A Greek court has convicted a UK citizen of attempted theft. The UK defendant has a prior UK conviction for burglary. In rendering a sentence, the Greek court must determine what significance should be afforded to the prior UK conviction. The UK defines burglary as an unlawful entry with intent to commit a felony,<sup>191</sup> yet there is no equivalent crime in the Greek penal code. Should (or must) the Greek court engage in the same kind of analysis that the U.S.

187. Council Framework Decision 2008/675/JHA, *supra* note 182, at art. 3(2).

188. *Id.* ¶ 5-6.

189. *Id.* art. 3.

190. *Commission Proposal for a Council Framework Decision on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings*, *supra* note 177, at 5 ("Member States will have to specify the conditions in which equivalent effects are attached to the existence of a conviction handed down in another Member State. National legal rules applying to repeat offending are often very directly connected with the national structure of offences and penalties, for example in all the cases where there are special systems applicable to repeat offending. . . ."); Council Framework Decision 2008/675/JHA, *supra* note 182, at ¶ 6, 11 ("... this Framework Decision contains no obligation to take into account such previous convictions, for example, in cases where the information obtained under applicable instruments is not sufficient, where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed or where the previously imposed sanction is unknown to the national legal system. . . . This Framework Decision . . . aims to approximate the laws and regulations of the Member States, which cannot be done adequately by the Member States acting unilaterally and requires concerted action in the European Union. . . .").

191. Theft Act, c. 60, § 9 (1968).

Supreme Court undertook in *Shepherd*<sup>192</sup> and that the California appellate court undertook in *Moore*?<sup>193</sup>

The complexity of the comparability analysis that has developed in the United States should raise a serious caution for EU courts; they will need to compare criminal codes that differ significantly more than the various U.S. state codes, and codes that must also be translated from one language to another. The Framework Decision requires Member States to take into account previous EU convictions obtained a) under applicable instruments on mutual legal assistance, or b) via the exchange of information extracted from criminal records.<sup>194</sup> In other words, a court could seek information, such as the judicial file, under Article 4 of the Additional Protocol to the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters. There is, however, an exception to this requirement.<sup>195</sup> Courts are not required to take into account a conviction from another Member State if the conviction information “obtained under applicable instruments is not sufficient.”<sup>196</sup>

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192. *Shepard*, 544 U.S. at 13; Council Framework Decision 2008/675/JHA, *supra* note 182, at ¶ 8 (“Where, in the course of criminal proceedings in a Member State, information is available on a previous conviction in another Member State, it should as far as possible be avoided that the person concerned is treated less favourably than if the previous conviction had been a national conviction.”).

193. See *Moore*, 2006 WL 2053668.

194. Council Framework Decision 2008/675/JHA, *supra* note 182, at art. 3.

195. Article 4 of the Additional Protocol of the 1959 Convention provides: “Article 22 of the Convention shall be supplemented by the following text, the original Article 22 of the Convention becoming paragraph 1 and the below mentioned provisions becoming paragraph 2: Furthermore, any Contracting Party which has supplied the above mentioned information shall communicate to the Party concerned, on the latter’s request in individual cases, a copy of the convictions and measures in questions as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measures at the national level. This communication shall take place between Ministries of Justice concerned.” Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters art. 4, Mar. 17, 1978 Europ. T.S. No. 99, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/099.doc>. See also Denisa Fikarová, Seminar Presentation at the Academy of European Law (ERA) Conference in Trier, Germany on Exchanging Criminal Records in the EU, *Workshop: Taking into Account of Previous Convictions* (Sept. 14, 2007) [hereinafter Fikarová, *Taking into Account of Previous Convictions*].

196. Council Framework Decision 2008/675/JHA, *supra* note 182, at ¶ 6. “This Framework Decision respects the variety of domestic solutions and procedures required for taking into account a previous conviction handed down in another Member State. The exclusion of a possibility to review a previous conviction should not prevent a Member State from issuing a decision, if necessary, in order to attach the equivalent legal effects to such previous conviction. However, the procedures involved in issuing such a decision should not, in view of the time and procedures or formalities required, render it impossible

This exception raises many questions. How should “sufficient” be interpreted? Will its interpretation create a loophole that could, in the hands of skeptical judges, be used to avoid considering foreign convictions? Could, or should, the sentencing court communicate *ex parte* with the foreign judges who heard the previous case? Could a court independently review the witness depositions, police reports or trial testimony that led to the prior conviction? If so, how would those documents be translated? What opportunity would the defendant have to challenge the translation and any inferences drawn from written or oral communication about the previous case?

### 3. Creating an EU-Wide Criminal Record in the Home Country’s Criminal Records Registry

To successfully implement the Framework Decision on Taking Into Account Criminal Convictions in the Member States of the European Union in the Course of New Criminal Proceedings, EU Member States’ courts need a reliable way to obtain and interpret a defendant’s EU-wide criminal record.<sup>197</sup> The

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to attach equivalent effects to a previous conviction handed down in another Member State.” *Id.* ¶ 13.

197. Several different models for improving the exchange of criminal records have been proposed. *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at ¶ 18. The proposal for a central European records office, a network of national criminal records registers, as well as a hybrid model, like the FBI’s Interstate Identification Index, seem to have been rejected. *Id.* The hybrid model called for a “European Index System” based upon a centralized offender identity database that could be searched by name plus other soft identifiers. *Id.* An inquiring party would be directed to the EU country where the person of interest has a criminal record. The proposal’s second stage called for a standard EU format for the electronic exchange of criminal records information. *Id.* See *Communication From the Commission to the Council and the European Parliament: Mutual Recognition of Final Decisions in Criminal Matters*, COM (2000) 495 final (July 26, 2000). See also VERMEULEN, ET AL., EUROPOL, 2000/STOP/16: FINAL PROJECT FINDINGS & PROPOSALS (Ghent Univ. 2001), available at [www.ircp.org/uploaded/2001-06-12%20-%20Round%20Table%2012%20Juni%202001.ppt%20%5BAlleen-lezen%5D.pdf](http://www.ircp.org/uploaded/2001-06-12%20-%20Round%20Table%2012%20Juni%202001.ppt%20%5BAlleen-lezen%5D.pdf) [hereinafter VERMEULEN ET AL., 2000/STOP/16 FINDINGS & PROPOSALS] (final project report on a feasibility study regarding implementation of recommendations resulting from a prior research project on the systematic gathering and administration of data concerning missing minors, minor victims of human trafficking or sexual exploitation of children, and perpetrators of sexual offenses against minors); GERT VERMEULEN ET AL., BLUEPRINT FOR AN EU CRIMINAL RECORDS DATABASE: LEGAL, POLITICO-INSTITUTIONAL & PRACTICAL FEASIBILITY (Maklu 2002) [hereinafter GERT VERMEULEN ET AL., BLUEPRINT]; *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61; Press Release, European Comm’n, Exchange of Information on Criminal

EU seems to have settled on a model that originated with the 1959 Council of Europe<sup>198</sup> Convention on Mutual Assistance in Criminal Matters.<sup>199</sup> The Convention committed the signatories' Ministries of Justice to notify one another at least annually of any convictions of each other's citizens.<sup>200</sup> Furthermore, it required that upon a request for criminal history information on a particular individual from another signatory country's judicial authorities, the requested party's appropriate authority (usually the national criminal register or the Ministry of Justice) respond to the requesting judicial authority as it would to its own national judicial authority.<sup>201</sup> European-wide compliance would mean that over time, every European<sup>202</sup> citizen's complete criminal record would be concentrated in his or her home country's criminal register, thus allowing any European court or prosecutor to obtain a defendant's European-wide criminal record by sending a request to that defendant's home country.

In practice the Convention worked imperfectly because:<sup>203</sup> 1) Member States did not consistently send conviction notifications

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Convictions: Commission Proposes a Far-reaching Action Programme (Jan. 27, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/26&format=HTML&aged=1&language=EN&guiLanguage=en>; *Ministers Disagree on European Criminal Record*, EURACTIV, Jan. 31, 2005, <http://www.euractiv.com/en/justice/ministers-disagree-european-criminal-record/article-134831>.

198. The Council of Europe seeks to develop common and democratic principles throughout Europe based on the European Convention on Human Rights and other reference texts on the protection of individuals. See Council of Europe, About the Council of Europe, [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/) (last visited Nov. 14, 2008). The Council of Europe has forty-seven member countries, one applicant country and five observer countries. *Id.*

199. European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, Europ. T.S. No. 30, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm> [hereinafter 1959 European Convention on Mutual Assistance in Criminal Matters].

200. See *id.* art. 22. See also Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, *supra* note 195, at art. 4.

201. See 1959 European Convention on Mutual Assistance in Criminal Matters, *supra* note 199, at art. 13; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters art. 4, Nov. 8, 2001, Europ. T.S. No. 99, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/182.htm>.

202. The 1959 Convention includes several non-EU countries such as Albania, Armenia, Russia, Turkey and Israel, etc. See Council of Europe, European Convention on Mutual Assistance in Criminal Matters, CETS No. 030, Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=030&CM=8&DF=2/9/2008&CL=ENG> (last visited Nov. 14, 2008).

203. For an analysis of the 1959 Convention's limitations, see generally *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such*

to the defendant's home state;<sup>204</sup> 2) frequently, the convicted person could not be identified because the convicting authority did not record the defendant's nationality or the convicting authority was not aware that the defendant, a citizen, was also a citizen of another Member State;<sup>205</sup> 3) the transmission of conviction information through bureaucratic channels was too slow;<sup>206</sup> 4) transmitted information was often unusable due to language barriers, the absence of complete and updated conviction information, different legal concepts between the sending and the receiving state,<sup>207</sup> the absence of a uniform format for sending information on convictions, and/or the absence of resources and incentives to process the received information;<sup>208</sup> and/or 5) the absence of a requirement that signatories store the information that they receive from convicting countries.<sup>209</sup>

Council Decision 2005/876/JHA of 21 November 2005 on the Exchange of Information Extracted from the Criminal Record sought to build upon the 1959 Convention.<sup>210</sup> It required each

*Convictions in the European Union*, supra note 61; GERT VERMEULEN ET AL., BLUEPRINT, supra note 197.

204. *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, supra note 61, at ¶12.

205. In practice, the notification procedure was inadequate. *Id.* ¶ 12. Additionally, many Member States had specific reservations with respect to the obligation provided by Article 22 of the 1959 Convention, qualifying their responsibility to send notifications to the extent possible considering the condition of their records. Under the 1959 Convention, the convicting Member State must notify both home states of a person with dual nationality unless the person is a national in the territory where he was convicted. This requirement also generated notification failures. 1959 European Convention on Mutual Assistance in Criminal Matters, supra note 199, at art. 22.

206. See *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, supra note 61, at ¶ 13.

207. The information sent may not meet the requirements of the requesting country. *Id.* ¶¶ 12, 14.

208. See Elsa García-Maltrás, Seminar Presentation at the ERA Conference in Trier, Germany on Exchanging Criminal Records in the EU, *Too Many Shortcomings in the Previous System?: Exchanging Criminal Records under the European Convention on Mutual Assistance in Criminal Matters* (Sept. 14, 2007) (on file with author).

209. See *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, supra note 61, at ¶ 12.

210. The 2000 Convention on Mutual Assistance in Criminal Matters Between the Member States of the European Union (MLA) authorized direct communication between different countries' judicial authorities with respect to requesting and replying to requests for information on individuals' criminal convictions. Council Act Establishing in Accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters Between the Member States of the European Union, 2000 O.J. (C 197) 6 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF> [hereinafter Council Act Establishing the Convention

Member State to designate a central authority to be responsible for sending notifications of convictions and making/replying to requests for criminal record information.<sup>211</sup> The central authority in the convicting Member State must, *without delay*, send notice of the conviction to its counterpart in the defendant's home country.<sup>212</sup> When a Member State requires conviction information, its central authority may request this information from another Member State's central authority.<sup>213</sup> The purpose of the requested criminal record information should be identified as 1) for use in a criminal proceeding, 2) for use by a judicial or administrative authority for a non-criminal proceeding, or 3) a request initiated by the record subject.<sup>214</sup> The requested central authority *must* reply immediately within ten working days (twenty days for requests originating from the record subject),<sup>215</sup> and central authorities should use prescribed paper forms for sending and replying to requests.<sup>216</sup>

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on Mutual Assistance in Criminal Matters]. The MLA also required Member States to designate "central authorities" to transmit notification of convictions of their nationals to their EU counterparts at least once a year. 1959 European Convention on Mutual Assistance in Criminal Matters, *supra* note 199, at art. 22. In other words, each Member State could assign this responsibility to its Justice Ministry or any other government agency. See generally Eileen Denza, *The 2000 Convention on Mutual Assistance in Criminal Matter*, 40 COMMON MKT. L. REV. 1047 (2004). The Council Decision on the Exchange of Information Extracted from the Criminal Record supplements and facilitates Articles 13 and 22 of the 1959 Convention as well as the MLA 2000 Convention. See Council Decision on the Exchange of Information Extracted from the Criminal Record, *supra* note 73. Therefore, Member States can still rely on Articles 13 and 22 to exchange criminal record information, but the system introduced by the Council Decision is speedier.

211. Council Decision on the Exchange of Information Extracted from the Criminal Record, *supra* note 73, at art. 1, ¶ 1.

212. *Id.* art. 2. According to Article 2, if the person is also a national of the convicting Member State, notification is not required.

213. *Id.* art. 3

214. Council Decision on the Exchange of Information Extracted from the Criminal Record, *supra* note 73, at Annex. Information transmitted for use in criminal proceedings may only be used for that purpose. If the request is *for purposes other than criminal proceedings* (e.g., *employment purposes*), the requested Member State may place additional restrictions on use of the information. *Id.* art. 4.

215. *Id.* art. 3, ¶ 2. Specifically, "When a person requests information on his or her criminal record, the central authority of the Member State where this request is made, may in accordance with national law send a request for extracts from, and information relating to, criminal records to the central authority of another Member State if the person concerned is or has been a resident or a national of the requesting or the requested Member State." *Id.* art. 3, ¶ 1.

216. See *id.* Annex. In order to assist Member States to better understand each other's criminal records information, the Council Decision provided common forms for

In 2007, just two years after the Council Decision, the EU Justice and Interior Ministers agreed on a general approach to a Proposal for a Council Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States (Framework Decision).<sup>217</sup> This proposal imposes several requirements.

First, the Framework Decision requires the central authority in the convicting state, when recording a conviction, to determine the convicted person's nationality.<sup>218</sup> If the defendant is a national of another EU Member State, the convicting state must notify the home country's central authority of the conviction as soon as

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requesting conviction information and for replying to such requests. The use of standardized forms contributes to achieving the goals set out in the Programme on Mutual Recognition in Criminal Matters of November 2000. *Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust Between Member States*, *supra* note 180. See also *Council Decision on the Exchange of Information Extracted from Criminal Records – Manual of Procedure*, *supra* note 62.

217. See Press Release, Presidency of the Council of the European Union – Germany 2007, EU-Wide Networking of Criminal Records (June 13, 2007), available at [http://www.eu2007.de/en/News/Press\\_Releases/June/0613BMJSTrafregister.html](http://www.eu2007.de/en/News/Press_Releases/June/0613BMJSTrafregister.html) [hereinafter Press Release, Germany 2007] (it should be noted that the Framework Decision discussed herein has to be formally adopted by the EU Member States before it enters into force); *Outcome of Proceedings: Proposal for a Council Framework Decision on the Organisation and Content of the Exchange of Information Extracted from Criminal Records Between Member States-General Approach, Annex I*, COM (2005) 690 final/2 (June 18, 2007), available at <http://register.consilium.europa.eu/pdf/en/07/st10/st10800.en07.pdf> [hereinafter *Draft 2007 Framework Decision*]. The Framework Decision aims at a thorough reform of the current system of criminal records information exchange. See *Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the Organisation and Content of the Exchange of Information Extracted from Criminal Records Between Member States*, COM (2005) 690 final (Dec. 20, 2006), available at [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2006/06-05-29\\_criminal\\_records\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2006/06-05-29_criminal_records_EN.pdf). On May 27, 2008, the Commission of the European Communities actually came out with a proposal for a Council decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA which discusses the need to improve the quality of information exchange on convictions. See *Commission Proposal for a Council Decision on the Establishment of the European Criminal Records Information System (ECRIS) in Application of Article 11 of Framework Decision 2008/XX/JHA*, COM (2008) 332 final (May 27, 2008), available at <http://www.statewatch.org/news/2008/jun/eu-com-criminal-records-proposal.pdf> [hereinafter *Commission Proposal, ECRIS*]. See also *Council Decision on the Establishment of the European Criminal Records Information System (ECRIS) in Application of Article 11 of Framework Decision 2008/.../JHA*, available at <http://register.consilium.europa.eu/pdf/en/08/st14/st14571.en08.pdf> [hereinafter *Council Decision, ECRIS*].

218. See Press Release, Germany 2007, *supra* note 217.

possible,<sup>219</sup> and the home country must enter this foreign conviction into its national criminal register.<sup>220</sup> If the convicting Member State subsequently alters or deletes any information pertaining to the conviction, its central authority must inform the home state's central authority so that it can amend its records accordingly.<sup>221</sup>

Second, the Framework Decision specifies what information should be included with a notification of conviction: 1) obligatory information should always be transmitted (e.g., full name, nationality, date of offense, contents of the conviction);<sup>222</sup> 2) optional information must be transmitted if entered into the criminal record (e.g., parents' names, disqualifications arising from the criminal conviction);<sup>223</sup> 3) additional information must be transmitted if available (e.g., identity number, fingerprints, pseudonyms and/or aliases);<sup>224</sup> and 4) any other information the central authority wishes to transmit may be provided as well.<sup>225</sup> The home country's central authority is only required to store obligatory and optional information.<sup>226</sup>

Third, the Framework Decision includes rules for replying to requests.<sup>227</sup> For example, in replying to a request from a Member State for information to be used in a criminal proceeding, the home state must provide recorded information on national convictions, convictions handed down in other Member States transmitted before the Framework Decision's implementation,

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219. *Id.* In contrast to the 2005 Council Decision, the 2007 Framework Decision requires, in the case of a dual nationality defendant who holds nationality in the convicting state, that the convicting state notify the other country of nationality. Compare Council Decision on the Exchange of Information Extracted from the Criminal Record, *supra* note 73, at art. 4, with *Draft 2007 Framework Decision*, *supra* note 217 (outlining the 2007 Framework Decision).

220. See *Draft 2007 Framework Decision*, *supra* note 217, at art. 5.

221. *Id.* art. 5(2). For the purposes of retransmission of information, the Member State of nationality must store the conviction information according to the time frame of the convicting country. *Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the Organisation and Content of the Exchange of Information Extracted from Criminal Records Between Member States*, *supra* note 217, at ¶ 30.

222. *Draft 2007 Framework Decision*, *supra* note 217, at art. 11(1)(a).

223. *Id.* art. 11(1)(b).

224. *Id.* art. 11(1)(c).

225. *Id.* art. 11(1a); Council Decision on the Exchange of Information Extracted from the Criminal Record, *supra* note 73, at Annex.

226. *Draft 2007 Framework Decision*, *supra* note 217, at art. 11(1b).

227. See *id.* art. 7 (both requests and replies to requests are to be made using an annexed form).



convictions from other Member States transmitted after the Framework Decision's implementation, and convictions from non-EU countries.<sup>228</sup> If information is requested for use in non-criminal proceedings, the home country's central authority shall respond to the request in accordance with its national law.<sup>229</sup>

Fourth, the Framework Decision incorporates elements from the 2004 Belgian Initiative with a View to the Adoption by the Council of a Framework Decision on the Recognition and Enforcement in the European Union of Prohibitions Arising from Convictions for Sexual Offences Committed Against Children.<sup>230</sup> The convicting Member State must transmit to the defendant's home state information on employment disqualifications arising from a criminal conviction, *but only if its criminal register holds that disqualification information.*<sup>231</sup> When the home country receives disqualification information it must both store and provide this information to any Member State that requests criminal background information on the record subject.<sup>232</sup> The Framework Decision does not cover enforcement of employment prohibitions handed down in an EU state other than the state where the disqualified person resides; this is left to national law.

Fifth, within three years of its adoption, the Framework Decision commits Member States to establish a standardized format for sending notifications, sending and replying to requests,

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228. *Id.* Personal data transmitted to the requesting Member State for the purposes of criminal proceedings may be used in accordance with the requesting state's national law and only for the purposes for which the information was requested. If personal data is transmitted for purposes other than criminal proceedings, the requesting state must additionally comply with any restrictions specified by the requested state. *Id.* art. 9(2).

229. *Id.* art. 7(2); *Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the Organisation and Content of the Exchange of Information Extracted from Criminal Records Between Member States*, *supra* note 217, at ¶ 37.

230. *See* Press Release, Germany 2007, *supra* note 217; Initiative of the Kingdom of Belgium with a View to the Adoption by the Council of a Framework Decision on the Recognition and Enforcement in the European Union of Prohibitions Arising from Convictions for Sexual Offences Committed Against Children, Eur. Parl. Doc. C6-0244 (2004) [hereinafter Initiative of Belgium].

231. Press Release, Germany 2007, *supra* note 217; *Draft 2007 Framework Decision*, *supra* note 217, at art. 11(1)(b)(iv). The Belgian Proposal required the Member State whose criminal register is queried for a person's criminal record to send a request to that person's home country in order to find out about convictions and disqualifications. Initiative of Belgium, *supra* note 230, at art. 5. *Contra Draft 2007 Framework Decision*, *supra* note 217, at art. 6(2). *But see Draft 2007 Framework Decision*, *supra* note 217, at art. 6(2a).

232. *Draft 2007 Framework Decision*, *supra* note 217, at art. 11(1)(b)(iv).

and “any other ways” of organizing and facilitating exchanges of conviction information.<sup>233</sup> “Other such ways” include all means of improving, understanding and automatically translating transmitted information, defining how to transmit information *electronically*, and possible alterations to the forms attached to the Framework Decision.<sup>234</sup> After adopting the standardized format and means to electronically exchange conviction information, Member States will have an additional three years to solve technical problems.<sup>235</sup>

The Framework Decision substantially improves the exchange of information on criminal convictions handed down against nationals of EU Member States. It is an important step toward third-pillar EU integration, at least for courts.<sup>236</sup> Nonetheless, future steps will be needed to answer a number of questions that the Framework Decision leaves ambiguous or purposefully unresolved.<sup>237</sup>

For example, how, if at all, will the criminal records of non-EU nationals be stored? Currently, EU Member States do not have a reliable method of discovering prior convictions within the EU of non-EU nationals. One possible solution is a centralized database of the names of non-EU nationals convicted in EU Member States; the database would point an inquiring party to those EU countries that hold a criminal record pertaining to the foreign national record subject.<sup>238</sup>

Another question is how, if at all, will the storing of and access to pre-implementation convictions be guaranteed?<sup>239</sup> The

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233. *Id.* arts. 11(2), 11(3), 11(6).

234. *Id.* arts. 11(3)(a-c).

235. *Id.* art. 11(6).

236. See Press Release, Germany 2007, *supra* note 217. The Framework Decision will establish basic rules for the transmission of conviction information to the defendant's home country as well as rules for recording such information in the home country's criminal register.

237. See Jacobs & Blitsa, *supra* note 186.

238. See *Proposal for a Council Framework Decision on a Computerized System of Exchange of Information on Criminal Convictions*, 2004 J.L.S. 116, available at <http://www.berr.gov.uk/files/file25605.pdf> (for a central index of third country nationals convicted in the European Union). See also *Commission Working Document on the Feasibility of an Index of Third-Country Nationals Convicted in the European Union*, COM (2006) 359 final (July 4, 2006).

239. Neither the 1959 Convention nor the 2005 Council Decision made it mandatory for the home state to store conviction information sent by other Member States. Thus, even if everything works smoothly going forward, each Member State will only have a comprehensive record of post-2011 convictions.

Framework Decision requires the defendant's home state to record only notifications of convictions received after the Framework Decision is implemented.<sup>240</sup>

Yet another unresolved question is whether, EU police authorities will be permitted to utilize the Framework Decision in order to obtain criminal record information held by other Member States' criminal registers.<sup>241</sup> Moreover, since disclosure under the Framework Decision of criminal record information for non-criminal purposes (e.g., employment purposes) depends on the national legislation of the requesting and requested states, will the EU make criminal records more readily available for non-criminal justice purposes, at least with respect to some types of public and private employment (e.g., educational professions/working with children)?<sup>242</sup>

Lastly, it remains to be seen whether the Member States will succeed in both establishing a common standardized format and developing efficient translating software,<sup>243</sup> an equally important

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240. *Draft 2007 Framework Decision, supra* note 217, at art. 5(1).

241. In contrast to the United States, EU judicial and law enforcement authorities use different channels for obtaining criminal background information. Many EU countries make a distinction between judicial (e.g., magistrates, prosecutors) and law enforcement authorities (e.g., police). Neither the Council Decision nor the Framework Decision defines "criminal proceedings." Some Member States' central authorities will forward police authorities' requests for information needed for criminal investigative purposes. For example, the UK central authority sends requests from fifty-two separate police forces in England, Wales, Scotland, Northern Ireland, the UK Crown Prosecution Service's lawyers (DA's), and the HM Revenue and Customs when a UK court needs to determine an offender's suitability for "community service." Letter from Tony Grace, Manager, UK Central Authority, to author (Oct. 3, 2007) (on file with author). By contrast, some Member States take the position that the exchange of criminal records applies only to judicial cooperation, and therefore will not honor police requests. For example, France, applying the 2005 Council Decision, does not forward requests on behalf of police authorities. Personal Communication with Eric Serfass, National Criminal Records Office, France (on file with author).

242. *See* VERMEULEN ET AL., BLUEPRINT FOR AN EU CRIMINAL DATABASE, *supra* note 81, at 37. Because some EU countries do not provide for issuance of certificates of good conduct or extracts of criminal record for employment purposes, a 2002 IRCP [Institute for International Research on Criminal Policy] study on the feasibility of an EU criminal records database did not propose making an EU-wide criminal extract available to employers. *Id.* It did, however, recommend making a certificate of non-conviction available to job applicants for positions in "vulnerable professions." *Id.*

243. UNISYS's study for the Directorate General Justice, Freedom and Security of the European Commission, with a view to develop a standardized format, identified the following challenges: differences in types of information contained in EU criminal registers; Member States' limited knowledge of each others' criminal records information requirements; language and translation issues; different methods for storing criminal records information; varying rules for information expiry and deletion; different rules for

issue considering there is no mechanism for enforcing compliance.<sup>244</sup>

#### 4. Network of EU Judicial Registers

At the JHA<sup>245</sup> Council of April 2005, France, Germany, Spain, and Belgium, expressed a preference to network their national criminal records. In March 2006, they implemented a pilot project, the Network of Judicial Registers (NJR) on the electronic exchange of conviction information. The Czech Republic and Luxembourg joined the NJR in 2006. Slovakia, UK, Poland, Italy, Slovenia, and Portugal joined in 2007 while the Netherlands and Bulgaria in 2008. Austria and Sweden are currently observing the project. Romania has also shown an interest to join.<sup>246</sup>

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accessing criminal record information; and a few Member States' decentralized and non-computerized systems. The study calls for a format that will introduce a standard set of fields for four categories of information (i.e., identity of the record subject, offense, sanction, decision) based on the standardization of data achieved by the Network of Judicial Registers (NJR) project. The offense and sanction fields, following the NJR, should be divided into main families and sub-families. The study, however, favors a criminal offense family structure different from the pilot project's recommended structure. *See Review of National Criminal Records Systems in the European Union, Bulgaria and Romania with the View to the Development of a Common Format for the Exchange of Information on Criminal Records* (report on file with author) (noting that, at this point, it is not yet clear what the standardized format would look like. An EU committee will be created to discuss and agree on the standardized format and functional specifications of the exchange of criminal records network.). *See also Commission Proposal, ECRIS, supra* note 217, at 4-6 (The Decision creates a standardized electronic European format for transmission of information on convictions, thereby allowing information to be exchanged easily through a computer. It establishes an obligation for Member States to refer to the codes of categories of offenses and sanctions provided for in two reference tables called "Offences categories" and "Sanctions categories" when notifying other Member States about convictions or when replying to their requests for information on convictions. When transmitting this information, Member States will have to indicate an appropriate subcategory code from the reference table of offenses or sanctions for each offense and each sanction.); *Council Decision, ECRIS, supra* note 217.

244. There is no authority responsible for implementing the Framework Decisions under the third pillar. Each Member State is responsible for its own compliance. *See generally Draft 2007 Framework Decision, supra* note 217. Ultimately, some kind of financial incentives or disincentives may be necessary for the EU to achieve the kind of well-functioning EU-wide exchange of criminal records that has been the goal for about fifty years.

245. *See* European Parliament: Criminal Law Cooperation, Dec. 15, 2005, [http://www.europarl.europa.eu/comparl/libe/elsj/zoom\\_in/12\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm).

246. Wilfried Bernhardt, Seminar Presentation at the Academy of European Law (ERA) Conference in Trier, Germany on the Network of Judicial Registers (Sept. 13, 2007) (presentation slides from this presentation are available at [http://www.mj.gov.pt/sections/o-ministerio/instituto-das/anexos/sebastian-von-levetzon/downloadFile/file/NJR\\_Presentation\\_Lisbon.pdf](http://www.mj.gov.pt/sections/o-ministerio/instituto-das/anexos/sebastian-von-levetzon/downloadFile/file/NJR_Presentation_Lisbon.pdf)). *See also* National Society for the

This joint project also builds on the 1959 Convention as a strategy for information exchange, but it is more technologically advanced than the 2005 Council Decision.<sup>247</sup> It allows Member States' criminal registers to request and receive information from each other over TESTA, the European Community's secure private IP electronic network.<sup>248</sup> Information exchange is divided into four categories: 1) notifications on convictions, 2) requests for conviction information, 3) information, and 4) error messages.<sup>249</sup>

A request for information must be for criminal justice purposes. Most requesters will be national judicial authorities (e.g., courts, magistrates, prosecutors).<sup>250</sup> For example, if a German prosecutor wants to find out whether X, a French national, has a criminal record in France, his or her request for information would have to go through the German Criminal Register, TESTA, and the French criminal register (if necessary, it would ultimately be sent to a French judicial authority).<sup>251</sup> Similarly, a reply would have to work its way in reverse over the same path.<sup>252</sup> The convicting Member State is required to immediately send electronic notification of any convictions to the defendant's home state. The

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Prevention of Cruelty to Children [NSPCC], Cross-border Cooperation in the European Union to Prevent Sex Offenders from Working with Children (2007), available at [http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Europe/Briefings/EUSexOffendersSummary\\_wdf48504.pdf](http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Europe/Briefings/EUSexOffendersSummary_wdf48504.pdf) [hereinafter NSPCC Briefing on Preventing Sex Offenders from Working with Children]; Personal Communication with Sebastian von Levetzow, Division for Information Technology, Federal Ministry of Justice, Germany (Apr. 30, 2008); Personal Communication with Christian Engelking, Division for Information Technology, Federal Ministry of Justice, Germany (Jan. 6, 2009).

247. Bernhardt, *supra* note 246.

248. *Id.*

249. *Id.*

250. *See id.*

251. *See* Press Release, Germany 2007, *supra* note 217. For example, a request should include (1) information about the requesting authority (e.g., Anfrage an, Anfragende Behörde, BKZ, Adresse, Telefon, Fax, Verwendungszweck, Strafvorwurf, Aktenzeichen der anfragenden Stelle, Interne Anmerkungen) and (2) information related to the person who is the subject of the request (e.g., Geschlecht, Geburtsname, Familienname, Frühere Namen, Vorname, Geburtsdatum, Geburtsort, Geburtsland, Nationalität). Bernhardt, *supra* note 246.

252. Bernhardt, *supra* note 246. For example, a reply should include (1) Allgemeine Angaben (e.g., BZR-Interne ID, ID der Auskunft, ID der Anfrage, Erstellungszeit, Erstellt von, Anfragende Stelle, Anzahl der Entscheidungen); (2) Angaben zur Person (e.g., Geschlecht, Geburtsname, Vorname, Geburtsdatum, Geburtsort, Geburtsland); and (3) Entscheidung (e.g., Entscheidungsdatum, Erkennende Stelle, Tat-Details [Tatdatum, Tatbezeichnung, Angewendete Rechtsvorschriften, Sraftatenkategorie], Weitere Einzelheiten zur Entscheidung). *See also* Draft 2007 Framework Decision, *supra* note 217.

same principle applies to replies to information requests.<sup>253</sup> The home state is required to store information transmitted by the convicting Member State.<sup>254</sup>

The NJR partners have agreed on a common data format for exchanging information. They have committed themselves to developing an automatic translating system that uses tables and codes, families and subfamilies of offenses, to make the conviction information more comprehensible.<sup>255</sup> National representatives approved this strategy at the June 2007 plenary session in Bratislava.<sup>256</sup> Since September 1, 2007, Germany, Spain, France and Belgium have been sharing translated criminal record information.<sup>257</sup> Additionally, the Czech Republic and Luxemburg are completely integrated in the electronic exchange of data. Beginning in January 2009, Poland and Bulgaria will take part in

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253. *Id.*

254. *Id.* Between January 1, 2007 and July 31, 2007 Germany sent 327 requests and received "positive" information in eighty-four cases. Germany received 1,028 requests from other registers with 201 cases of "positive" information, and sent 2,884 notifications to other registers. The German Register received a total of 1,320 notifications. The minimum time for replying to a request is a few minutes; average time is approximately three hours. Bernhardt, *supra* note 246.

255. *Id.* The NJR codes criminal offenses into forty-four families and one hundred seventy-six subfamilies which are translated into the language of the requesting state. *Id.* If, for example, a person is convicted of a crime in Germany and the crime belongs to the "Diebstahl" family of offenses, the German register will add the code "180100" to the message when transmitting the conviction information to the Czech Republic. The Czech register will translate this code to "Krádež", and forward the information to the Czech court or agency that made the request. Thus, the "180100" code would be translated into the languages of the participating countries as follows: German: Diebstahl; Spanish: Hurto; French: Vol; Czech: Krádež; English: Theft; Slovak: Krádež; Italian: Furto. Letter from Sebastian von Leveto-zow, German Ministry of Justice, to author (Nov. 12, 2007) (on file with author). The translation system does not apply to (1) "Allgemeine Angaben" and (2) "Angaben zur Person" fields (including, for example, ID-number, name of a court, name, date and place of birth, etc.), as translation of them is not necessary. *Id.* As of January 2009, the common table of sanctions has been finalized, but is not yet in use. Personal Communication with Christian Engelking, Division for Information Technology, Federal Ministry of Justice, Germany (Jan. 6, 2009). See also *Commission Proposal, ECRIS*, *supra* note 217, at 3, 7 ("The main inspiration for this proposal comes from the pilot project [NJR] launched by Member States. . . . The content of the tables derives from the analysis of the needs of all 27 Member States by considering mainly the Pilot Project categorisation and the results of the clustering exercise of various national offences and sanctions.").

256. Fikarová, *Taking into Account of Previous Convictions*, *supra* note 195.

257. See Denisa Fikarová, *A Network of National Criminal Registers: The Joint Project of France, Germany, Spain, Belgium and Luxemburg, ERA, Trier, Sept. 15, 2007* (unpublished) (on file with author).

the NJR electronic exchange. Other countries are scheduled to participate by the end of 2009.<sup>258</sup>

### C. Police Use of Foreign Criminal Records

Police officials have been more active than judges in pressing for cooperation in international criminal justice. They argue that improved information sharing will enable national police forces to carry out investigations more effectively and to better prepare cases for prosecution.<sup>259</sup> For example, suppose the police were to arrest an individual for possession of child pornography. It would be extremely useful to know whether the arrestee is a “hardcore” pornographer, as evidenced by prior criminal convictions (or perhaps prior arrests) in one or more other countries or whether he or she is “merely” a neophyte consumer. Likewise, the police in Country A would like to know whether an individual arrested for car theft has been convicted of the same or similar offenses in other countries. If so, he or she may be a professional criminal, perhaps linked to an organized crime group.<sup>260</sup> Police investigators

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258. Letter from Sebastian von Levetzow, Division for Information Technology, Federal Ministry of Justice, Germany, to author (Apr. 30, 2008) (on file with author); Personal Communication with Christian Engelking, Division for Information Technology, Federal Ministry of Justice, Germany (Jan. 6, 2009).

259. PETER ANDREAS & ETHAN NADLEMANN, *POLICING THE GLOBE: CRIMINALIZING CRIME CONTROL IN INTERNATIONAL RELATIONS* 231 (2006). In the opinion of one experienced European (Finnish) justice ministry official: “Internationally, the pattern has been that law enforcement officials are the first criminal justice officials to engage in international cooperation. Prosecutorial, adjudicatory and penal authorities do not get around to state-to-state cooperation until a historically later stage. For example, Interpol was created already during the 1920s, long before there were any global structures for cooperation among other officials. In the EU, Europol was established before Eurojust. Part of this pattern is due to the fact that the law enforcement officials were and are ready, willing and able to cooperate even informally because the essence of their cooperation—the exchange of criminal intelligence—lends itself to informal international cooperation. Prosecutors, judges and prison administrators must deal through more formal processes, and they must often also present requests that can only be answered in a formal way—for example, requests for extradition or mutual legal assistance—where the response has to be usable in criminal proceedings.” Letter from Matti Joutsen, to author (Dec. 5, 2007) (on file with author).

260. See generally, Helen Xanthaki & Constantin Stefanou, *A European Criminal Record as A Means of Combating Organized Crime*, Falcone Project JHA/199/FAL/197, Sir William Dale Centre for Legislative Studies, London; Helen Xanthaki, *The Use of Criminal Records as A Means of Preventing Organized Crime in the Areas of Money Laundering and Public Procurement: The Need for Europe-Wide Collaboration*, Falcone Project JHA/199/FAL/197, Sir William Dale Centre for Legislative Studies, London (discussing variations on what constitutes “organized crime” across different countries).

always prefer more information.<sup>261</sup> Furthermore, Country A's police investigators would also want to know about the suspect's previous arrests in foreign jurisdictions, including those that did not lead to a conviction.<sup>262</sup> (Maybe a key witness was murdered? Maybe there was an acquittal under circumstances suggesting intimidation or corruption?)<sup>263</sup> Consider another example: the police arrest John Doe for identity fraud. Has he previously committed this crime in other countries leaving a string of victims in his wake? If so, the police may choose to devote substantial resources to the investigation and prosecution of this individual.

Arguably, the police have more need than courts for foreign criminal records, but ironically they have had less success in obtaining such information. This may be due to more distrust and fear of police than of courts. In addition, the police may deal with more sensitive non-public information (e.g., criminal intelligence). Finally, police departments are often competitive while courts are not.

### 1. Criminal Information Sharing Among U.S. Police Departments

Police departments in the United States, indeed individual police officers, can routinely and automatically obtain any person's nationwide criminal record, including arrests that did not result in

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261. Letter from Matti Joutsen, to author (Nov. 21, 2007) (on file with author).

262. *Id.* ("Law enforcement authorities world-wide would be among the first to agree that a more proactive, intelligence-led approach is needed to detect and interrupt organized criminal activities, apprehend the offenders, demolish the criminal networks, and seize and confiscate the proceeds of crime. Information is needed on the profile, motives and modus operandi of the offenders, the scope of and trends in organized crime, the impact of organized crime on society, and the effectiveness of the response to organized crime. This information includes operational data (data related to suspected individuals and to detected cases) and empirical data (qualitative and quantitative criminological data). On the global level the arrangements for the exchange of operational and empirical data continue to be ad hoc, between individual law enforcement agencies or even individuals. Such ad hoc arrangements also raise concerns over whether or not domestic legislation on data protection is being followed. Implementation of the United Nations Convention against Transnational Organized Crime (in particular articles 27 and 28) should provide a firmer foundation for this exchange of data, but national practice will undoubtedly be slow in aligning itself with the 'soft' requirements of the Convention, which allows for considerable national discretion in implementation.").

263. *Lambert v. California*, 355 U.S. 225, 229-30 (1957). The famous U.S. Supreme Court decision, dealt with a Los Angeles ordinance, no doubt passed at the behest of the police, that required anyone ever convicted of a felony anywhere in the United States to register with the L.A. police when they came to the city. The U.S. Supreme Court struck down the law as unconstitutional because it failed to provide adequate notice as required by the U.S. Constitution's due process clause.



convictions.<sup>264</sup> But U.S. police departments do not have a routine way of obtaining criminal intelligence information from police departments in other states or even from police departments in other cities within the same state.<sup>265</sup> American policing is highly decentralized, reflecting Americans' deep distrust of centralized authority, especially powerful police agencies. Every city and town in the United States has its own police department; no laws or treaties mandate or pledge cooperation.<sup>266</sup> To the contrary, the relationship between police departments is often marked by competition, conflict, and distrust. Cooperation must be achieved through ad hoc requests and informal relationships.<sup>267</sup> The lack of cooperative mechanisms remains a major handicap for U.S. law enforcement, despite the emergence in recent years of local and regional multi-agency task forces devoted to particular crime problems.

## 2. U.S. Criminal Record Sharing with Law Enforcement Agencies in Other Countries

The United States has Mutual Legal Assistance Treaties (MLAT) with scores of countries.<sup>268</sup> While these treaties do not provide for reciprocal electronic access to the other countries' criminal record databases, they do provide a formal mechanism for requesting investigational and prosecutorial assistance on a case-by-case basis.<sup>269</sup> They could also provide a foundation for more routine record sharing in the future. MLATs authorize the signatories to assist each other with criminal investigations by summoning witnesses, providing for the production of documents

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264. *See id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. For a complete list of U.S. MLATs, see U.S. Dep't of State, Mutual Legal Assistance (MLAT) and Other Agreements, [http://travel.state.gov/law/info/judicial/judicial\\_690.html](http://travel.state.gov/law/info/judicial/judicial_690.html) (last visited Nov. 14, 2008) [hereinafter U.S. Dep't of State, MLAT Information]. For a list of the UK's MLAT's, see U.K. Foreign & Commonwealth Office, Bilateral Agreements on Mutual Legal Assistance in Criminal Matters, <http://www.fco.gov.uk/resources/en/pdf/3706546/10773698/FCOTrMLAs>. For Australia's MLAT's, see Australasian Legal Info. Inst. [AustLII], List of Australian MLATs Regarding Criminal Matters, [http://www.austlii.edu.au/au/other/dfat/subjects/Mutual\\_Assistance\\_In\\_Criminal\\_Matters.html](http://www.austlii.edu.au/au/other/dfat/subjects/Mutual_Assistance_In_Criminal_Matters.html) (last visited Nov. 14, 2008).

269. U.S. Dep't of State, MLAT Information, *supra* note 268. After 9/11, the United States signed MLATs with Belize, Cyprus, Egypt, Finland, France, Greece, India, Japan, Liechtenstein, Romania, and Sweden. *Id.*

and other evidence, and obtaining search warrants.<sup>270</sup> The U.S. MLAT operatives are generally prosecutors, while other countries' MLAT operatives are usually police officials. This discrepancy can probably be explained by the fact that the United States, unlike most other countries, does not have a national police force.<sup>271</sup>

In June 2003, the United States and the EU signed two agreements on extradition and mutual legal assistance.<sup>272</sup> The MLAT seeks to reduce delay in criminal investigations and gives each signatory access to bank accounts in the other's territory in investigating terrorism, organized crime, and serious financial crimes.<sup>273</sup> It also provides for the creation of joint investigative teams "for the purpose of facilitating criminal investigations or prosecutions involving the United States and one or more Member States . . . ."<sup>274</sup>

In addition, Canada and the United States have been exchanging fingerprint and criminal record information for more than fifty years.<sup>275</sup> The U.S.-Canada Smart Border Declaration/30 Point Action Plan of December 2001 and the subsequent Memorandum of Understanding of December 2002 committed the

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270. *Id.*

271. The FBI is a federal law enforcement agency, not a national police force. It has fewer than fifteen thousand agents in the entire country. FBI, About Us—Quick Facts, <http://www.fbi.gov/quickfacts.htm> (last visited Nov. 14, 2008). By contrast, the NYC Police Department alone has approximately forty thousand uniformed officers. NYPD, Frequently Asked Questions, [http://www.nyc.gov/html/nypd/html/faq/faq\\_police.shtml#1](http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml#1) (last visited Nov. 14, 2008).

272. See Agreement on Mutual Legal Assistance Between the European Union and the United States, June 3, 2003, 2003 O.J. (L 181) 34, available at <http://register.consilium.eu.int/pdf/en/03/st09/st09153en03.pdf>.

273. *Id.*; US – E.U. Summit, June 25, 2003, *Factsheet: Extradition and Mutual Legal Assistance* (June 25, 2003), available at [http://ec.europa.eu/external\\_relations/us/sum06\\_03/extra.pdf](http://ec.europa.eu/external_relations/us/sum06_03/extra.pdf). See also ARCHICK, EUROPE AND COUNTERTERRORISM, *supra* note 135, at 3.

274. SELECT COMMITTEE ON THE EUROPEAN UNION, REPORT, 2002-3, H.L. 153, at ¶18, available at <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/153/153.pdf>.

275. "Under certain conditions, information from NCIC 'hot files' and from Ident is made available to foreign countries. Canada is the only foreign country permitted to access the NCIC database directly. The Royal Canadian Mounted Police (RCMP) have a terminal in their central headquarters under a reciprocal assistance agreement. NCIC, in turn, has access to the Canadian Police Information Center (CPIC) in Ottawa. Thus, the RCMP can access all NCIC 'hot files,' but the total volume of RCMP message traffic is quite small. . . . The RCMP cannot access CCH data. Foreign countries other than Canada wishing to access NCIC must do so through the Drug Enforcement Administration (DEA), which is the official U.S. liaison with Interpol." KENNETH C. LAUDON, DOSSIER SOCIETY: VALUE CHOICES IN THE DESIGN OF NATIONAL INFORMATION SYSTEMS 85 (Columbia University Press 1986).

two countries to exchange electronically criminal records and fingerprints using a standard communication interface.<sup>276</sup> The FBI agreed to provide the Royal Canadian Mounted Police (RCMP) with electronic access to its Integrated Automated Fingerprint Identification System (IAFIS).<sup>277</sup> This initiative enhances real time delivery of fingerprint images. Fingerprints are electronically recorded, transmitted, and verified instantly against databases in both countries.<sup>278</sup>

The MS-13 National Gang Task Force, established by the FBI in 2004 as a clearinghouse for local, state, and federal law enforcement to share gang data, implemented an extraordinary Central American Fingerprint Exploitation (CAFE) initiative, merging Central American fingerprint files into the IAFIS.<sup>279</sup> By January 2007, the FBI had input one hundred thousand fingerprint cards from Central American sources into the IAFIS.<sup>280</sup> This gives law enforcement agencies the ability to determine whether a fingerprinted suspect or arrestee has a criminal record in one of

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276. FOREIGN AFFAIRS AND INT'L TRADE CANADA, 5TH SMART BORDER ACTION PLAN STATUS REPORT (Dec. 17, 2004), <http://geo.international.gc.ca/world/site/includes/print.asp?lang=en&print=1&url=%2Fcan-am%2Fmain%2Fborder%2Fstatus-en.asp>.

277. John Ashcroft, U.S. Att'y Gen., Prepared Remarks at the U.S.-Can. Border Security Agreement Signing Ceremony (Dec. 3, 2001), available at <http://www.usdoj.gov/archive/ag/speeches/2001/1203aguscanadabordersecurityagreementsigningceremony.htm>; A. ANNE MCLELLAN, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, RCMP DEPARTMENTAL PERFORMANCE REPORT, SECTION II - ANALYSIS OF PERFORMANCE BY STRATEGIC OUTCOME (for the period ending March 31, 2005) (Oct. 31, 2005), available at [http://www.tbs-sct.gc.ca/rma/dpr1/04-05/RCMP-GRC/RCMP-GRCd4504\\_e.asp](http://www.tbs-sct.gc.ca/rma/dpr1/04-05/RCMP-GRC/RCMP-GRCd4504_e.asp) (specifically analyzing performance by strategic outcome).

278. Press Release, Embassy of the United States, Ottawa, U.S.-Canada Smart Border/30 Point Action Plan Update Governor Tom Ridge and Deputy Prime Minister John Manley Sign the Smart Border Declaration (Dec. 6, 2002), available at [http://canada.usembassy.gov/content/textonly.asp?section=can\\_usa&subsection1=border\\_issues&document=borderissues\\_30points\\_120602](http://canada.usembassy.gov/content/textonly.asp?section=can_usa&subsection1=border_issues&document=borderissues_30points_120602); Allan Thompson, *Canada, U.S. Set to Ink Deal on Fingerprints*, TORONTO STAR, Dec. 16, 2002, at A10.

279. FBI, Violent Crime: Officials Discuss Fight Against Gangs (Jan. 16, 2007), <http://www.fbi.gov/page2/jan07/gangs011607.htm> [hereinafter FBI, Officials Discuss Fight Against Gangs] (last visited Nov. 14, 2008); Press Release, U.S. Dep't of Justice, Attorney General Announces Aggressive New Joint Initiatives with El Salvador To Combat Transnational Gangs (Feb. 5, 2007), available at [http://www.usdoj.gov/opa/pr/2007/February/07\\_ag\\_071.html](http://www.usdoj.gov/opa/pr/2007/February/07_ag_071.html). See also Eric Green, U.S. - Central American Cooperation Focuses on Fighting Gangs, AMERICA.GOV, July 24, 2007, <http://www.america.gov/st/washfile-english/2007/July/200707241205091xeneerg0.4201471.html> (discussing cooperation between Central America, Mexico and the United States in developing new anti-gang strategies, including the use of CAFE).

280. FBI, Officials Discuss Fight Against Gangs, *supra* note 279.

the participating Central American countries.<sup>281</sup> The Task Force believes that CAFE will assist the United States in preventing violent Central American gang members, who often use aliases, from entering the United States.<sup>282</sup>

### 3. Criminal Information Sharing Among EU Member States' National Police Agencies

EU nations usually have a single national police department that has authority over local units throughout the country.<sup>283</sup> Thus, sharing criminal information among different police units ought to be easier in EU countries than in the United States, where policing is so decentralized. Moreover, EU national police agencies typically maintain a computerized database of arrestees with accompanying identification data, often including fingerprints.

Yet unlike the EU commitment and support for judicial cooperation, there is no EU instrument that provides unified mechanisms and procedures for police cooperation. Thus, police are left to bilateral or multilateral agreements that authorize, rather than oblige, cooperation. Police cooperation through the Schengen Convention is highly centralized; requests and replies are processed via central authorities and are exchanged directly only in exceptional situations.<sup>284</sup> Police cooperation through national Interpol units is bureaucratic and hierarchical.<sup>285</sup> For

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281. *Id.*; *Statement Before the H. Judiciary Comm.*, 110th Cong. (2007) (statement of Robert S. Mueller, III, Director, FBI), available at <http://www.fbi.gov/congress/congress07/mueller072607.htm> (statement of Robert S. Mueller, III, Director, FBI) [hereinafter *Mueller Statement Before the H. Judiciary Comm.*].

282. *Mueller Statement Before the H. Judiciary Comm.*, *supra* note 281.

283. The situation, however, varies from country to country. For example, Italy has five different police forces (Arma dei Carabinieri, Guardia di Finanza, Polizia di Stato, Polizia Penitenziaria, and Corpo Forestale dello Stato). *3-5 April 2007 Visit to Italy [Sub-Committee on Transatlantic Relations]*, NATO PARLIAMENTARY ASSEMBLY, <http://www.nato-pa.int/default.Asp?SHORTCUT=1356>.

284. *See Proposal for a Council Framework Decision on the Exchange of Information Under the Principle of Availability*, COM (2005) 490 final (Dec. 10, 2005), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0490:FIN:EN:HTML>. (Article 39 of the Schengen Convention provides for police information exchange on request, but does not oblige Member States to reply. As a consequence, the procedure works erratically. Furthermore, requests and replies must usually be channeled through central authorities; this is a time consuming procedure.) *See also* The Schengen Acquis, *supra* note 106. Europol might also be helpful in providing arrest and conviction information, but Europol's jurisdiction is limited to a small number of crimes.

285. *See generally Proposal for a Council Framework Decision on the Exchange of Information Under the Principle of Availability*, *supra* note 284. "Each Interpol member country maintains a National Central Bureau staffed by national law enforcement officers.

example, a Finnish police officer's request for information about an Italian suspect would first be sent to the Finnish Interpol representative, who would then contact her Italian counterpart, who would then make an inquiry with the Italian police. Differences in administrative practices and customs and in judicial cooperation prevent efficient exchange of information.<sup>286</sup> National privacy laws that restrict police dissemination of personal data further hinder effective police cooperation.<sup>287</sup>

In 2004, the European Council's Hague Programme called for greater information sharing among Member States' police agencies based upon "the principle of availability" which states that a law enforcement officer can obtain information necessary to perform his or her job from police officials in the Member State where the information is held.<sup>288</sup> Legal instruments implementing the

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The NCB is the designated contact point for the General Secretariat, regional offices and other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives." Interpol, About Interpol, <http://www.interpol.int/public/icpo/default.asp> (last visited Nov. 14, 2008).

286. Council of Europe, Explanatory Report: 1959 European Convention on Mutual Assistance in Criminal Matters, <http://www.conventions.coe.int/Treaty/EN/Reports/Html/030.htm> (last visited Nov. 14, 2008) ("... [T]he committee debated whether a provision should be drawn up to enable single items of information concerning a criminal matter to be exchanged directly between 'police authorities acting in an auxiliary capacity to the judicial authorities.' The majority of the experts were in favor of making no such provision. They thought it best not to force the existing practice of the police into a rigid mould, besides which, the Statute of the International Criminal Police Organisation (Interpol) already regulated mutual assistance between police authorities. It was stipulated, however, in paragraph 5 of Article 15 relating to channels of communication that, in all cases where direct transmission is permitted, it may take place through Interpol.") (emphasis in original). See also Council Act Establishing the Convention on Mutual Assistance in Criminal Matters, *supra* note 210, at art. 6(8); Council Decision on the Exchange of Information Extracted from the Criminal Record, *supra* note 73.

287. *Proposal for a Council Framework Decision on the Exchange of Information Under the Principle of Availability*, *supra* note 284.

288. See Valsamis Mitsilegas, *Police Co-operation: What Are the Main Obstacles to Police Co-operation in the EU?*, CHALLENGE: LIBERTY & SECURITY, Mar. 8, 2007, <http://www.libertysecurity.org/article1379.html>. The Hague Program called for the following: "The methods of exchange of information should make full use of new technology and must be adapted to each type of information, where appropriate, through reciprocal access to or interoperability of national databases, or direct (on-line) access, including for Europol, to existing central EU databases, such as the SIS." Tony Bunyan, *The "Principle of Availability"*, STATEWATCH, Dec. 2006, at 1, available at <http://www.statewatch.org/news/2006/dec/p-of-a-art.pdf>. See EU: *The "Principle of Availability" Takes Over from the "Notion of Privacy": What Price Data Protection?*, STATEWATCH, Feb. 2005, <http://www.statewatch.org/news/2005/feb/07eu-data-prot.htm>. See also Bigo Didier et al., *The Principle of Information Availability*, CHALLENGE: LIBERTY & SECURITY, Mar. 1, 2007, <http://www.libertysecurity.org/article1376.html> (citing a note circulated by the Netherlands EU Council Presidency on September 2004,

availability principle are currently being drafted.<sup>289</sup> At the same time, the Council of Europe is trying to develop a general approach to the privacy issues implicated by police handling of personal information obtained from other EU countries.<sup>290</sup>

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which read: “[W]ith effect from 1 January 2008, the exchange of information should be governed by the principle of availability, which means that, ‘throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.’”).

289. The Proposal for a Council Framework Decision on the Exchange of Information under the Principle of Availability requires Member States’ law enforcement authorities to grant to each other, as well as Europol officers, direct online access to national databases to which national competent authorities have online access. *Proposal for a Council Framework Decision on the Exchange of Information Under the Principle of Availability*, *supra* note 284, at 2. With regard to information not available online, Member States shall supply each other with index data for online consultation. *Id.* Types of information that may be obtained under the Decision to prevent, detect, or investigate crimes are DNA profiles, fingerprints, ballistics, vehicle registration data, telephone numbers, and other data for the identification of persons contained in civil registers. *Id.* Annex II; Julio Perez Gil, Univ. of Burgos, Presentation on the Principle of Availability, *Investigation of Crime Data vs. Data Protection*, at 12 (Jan. 20, 2007) (presentation available at [http://www.lefis.org/meetings/workshops/2007/rovaniemi\\_2007/contenido/Rovaniemi\\_JulioPerez.ppt#12](http://www.lefis.org/meetings/workshops/2007/rovaniemi_2007/contenido/Rovaniemi_JulioPerez.ppt#12)). See Council Decision 2008/615/JHA, On the Stepping Up of Cross-Border Cooperation, Particularly in Combating Terrorism and Cross-Border Crime, 2008 O.J. (L 210) 1 (EU), available at <http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0001:0011:EN:PDF> [hereinafter Council Decision 2008/615/JHA] (referring to the principle of availability). See also Council Framework Decision 2002/584/JHA, On the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) (EC) (The Decision notes statements made by certain Member States upon the adoption of the Framework Decision that any pieces of evidence, including documentation, that is available to the police of one country should be transmitted to the police of another country as needed. In this context, “evidence” and “documentation” refer to items and materials that are evidence of the offense being investigated. For example, company accounts may be evidence of fraud or embezzlement. The term “documentation” does not refer to documents such as arrest records that the authorities have in their possession.).

290. See Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, *supra* note 75, at pmbl. art. 2(a). The Council Directive establishes common rules for data protection among Member States of the EU and seeks to promote harmonization of diverse privacy laws. It defines personal data as “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.” *Id.* art. 2(a). The Directive also notes that personal data under the EU Directive cannot be transmitted from a Member State to a non-EU state unless the non-EU state can guarantee a sufficient level of data protection. “The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the

### a. Prüm Convention

In 2005, seven EU Member States (Germany, Spain, France, Luxembourg, the Netherlands, Austria, and Belgium) signed the Schengen III Agreement, also known as the Prüm Convention.<sup>291</sup>

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proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country." *Id.* art. 25(2). See also European Comm'n, Justice and Home Affairs, Data Protection, [http://ec.europa.eu/justice\\_home/fsj/privacy/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm) (last visited Nov. 14, 2008). The Directive does *not* apply to the processing of personal data in the course of activities provided within the framework of police and judicial cooperation in criminal matters. See Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, *supra* note 75. In November 2007, the EU JHA Council reached an agreement on a Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters. Press Release, Europa Rapid, Proposal for a Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters (Oct. 4, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/349&format=HTML&aged=0&language=EN&guiLanguage=en>. See also Questions to the Commission, Written Answer to Question No. 64 by Athanasios Pafilis, EUR. PARL. DEB. (Nov. 15, 2007), <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20071115&secondRef=ANN-01&language=EN&detail=H-2007-0847&query=question> (last visited Nov. 14, 2008); *Proposal for a Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters* (Oct. 23, 2007), available at <http://www.statewatch.org/news/2007/nov/eu-dp-14119-07.pdf>; TONY BUNYUM, EU DATA PROTECTION IN POLICE AND JUDICIAL COOPERATION MATTERS: RIGHTS OF SUSPECTS AND DEFENDANTS UNDER ATTACK BY LAW ENFORCEMENT DEMANDS (2006); Press Release, Presidency of the Council of the European Union – Portugal 2007, Data Protection, Directive on Mediation and Europol: The Results of the Portuguese Presidency at the Council of Ministers for Justice (Nov. 9, 2007), available at [http://www.eu2007.pt/UE/vEN/Noticias\\_Documentos/20071109JAIResultados.htm](http://www.eu2007.pt/UE/vEN/Noticias_Documentos/20071109JAIResultados.htm) [hereinafter EU Presidency]. See also Press Release, Council of the EU, 2827th Council Meeting (Nov. 8-9, 2007), available at <http://register.consilium.europa.eu/pdf/en/07/st14/st14617.en07.pdf>; Press Release, Council of the EU, 2818th Council Meeting (Sept. 18, 2007), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/95982.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/95982.pdf).

291. Convention on the Stepping Up of Cross-Border Cooperation, Particularly in Combating Terrorism, Cross-Border Crime and Illegal Migration, May 27, 2005, EU Couns. 10900/05, available at <http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf> [hereinafter Prüm Convention]. The Schengen III Agreement provides for the transmission of DNA profiles, fingerprints, vehicle registrations, and other data. Prüm Convention, *supra*, at ch. 2. As of spring 2007, Bulgaria, Italy, Portugal, Romania, Sweden, Slovenia, Greece, Finland, and Estonia formally declared their intention to accede to the treaty. Public Hearing on the Prüm Decision: Striking the Balance Between Data Protection and Effective Police Cooperation, EUR. PARL. DOC. PE 388.491, at 2 n.2 (2007); Press Release, Council of the EU, 2807th Council Meeting, *supra* note 129. As of spring 2008, Austria, Germany, Luxemburg, Spain, and Slovenia exchange DNA profiles and Austria and Germany exchange fingerprints. Personal Communication with Luc Reding, Conseiller de direction adjoint Ministère de la Justice, Direction de la Sécurité publique, Luxemburg (May 30, 2008) (on file with author). For a discussion of the Prüm

This Convention requires signatories to designate ‘contact points’ who will be granted access to participating countries’ DNA and fingerprint databases in order to prosecute criminal offenses and prevent crimes.<sup>292</sup> This agreement allows Country A to compare a suspect’s fingerprints with Country B’s fingerprint index. If Country B’s database indicates a match, Country A can request from Country B the identity of the person to whom the fingerprints belong. Country B, however, may follow its own law and policing objectives in deciding whether to honor the request.

In June 2007, the EU Justice and Home Affairs Council reached an agreement on a Council Decision on the Stepping Up of Cross-Border Cooperation, Particularly to Combat Terrorism and Cross-Border Crime.<sup>293</sup> This Decision called for automated electronic access (based on the online access and follow-up request system of the Prüm Convention) to national fingerprint databases, DNA profiles, and vehicle registrations by the “designated contact points” of all twenty-seven Member States’ law enforcement agencies.<sup>294</sup> The basic elements of the Prüm Treaty were transposed into the legal framework of the European Union in June 2008 when Decision 2008/615/JHA on the Stepping up of Cross-Border Cooperation, Particularly in Combating Terrorism and Cross-Border Cooperation was adopted.<sup>295</sup> On the same day,

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Treaty, see generally Hijmans, *Third Pillar*, *supra* note 116; Thierry Balzacq et al., *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats* (Ctr. for Eur. Pol’y Stud., Working Doc. No. 234, 2006), available at [http://www.libertysecurity.org/IMG/pdf/WD234\\_e-version.pdf](http://www.libertysecurity.org/IMG/pdf/WD234_e-version.pdf).

292. Prüm Convention, *supra* note 291, at ch. 2.

293. *EU Adopts DNA Data-Sharing System in Crime Crackdown*, EURACTIV, June 13, 2007, <http://www.euractiv.com/en/justice/eu-adopts-dna-data-sharing-system-crime-crackdown/article-164547?Ref=RSS>; *Initiative from the German Delegation 6002/07: Draft Council Decision 2007/.../JHA of ... on the Stepping up of Cross-border Cooperation, Particularly in Combating Terrorism and Cross-border Crime* (Feb. 6, 2007), available at [http://www.libertysecurity.org/IMG/pdf\\_eu-prum-plan-decision.pdf](http://www.libertysecurity.org/IMG/pdf_eu-prum-plan-decision.pdf) [hereinafter *German Delegation – Draft Council Decision*].

294. *EU Adopts DNA Data-Sharing System in Crime Crackdown*, *supra* note 293; *German Delegation – Draft Council Decision*, *supra* note 293. For more information on the Draft Council Decision on the Stepping Up of Cross-Border Cooperation, Particularly in Combating Terrorism and Cross-Border Crime, see generally *Sharing Police Records: Conference Discusses German Presidency Proposal*, *supra* note 291; Press Release, European Parliament, Prüm Treaty Will Allow EU27 to Exchange DNA Data to Fight Crime (June 7, 2007), available at <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20070606IPR07542>; Press Release, Council of the EU, 2807th Council Meeting, *supra* note 129.

295. See Council Decision 2008/615/JHA, *supra* note 289, at ¶ 4; *EU Adopts DNA Data-Sharing System in Crime Crackdown*, *supra* note 293. The Prüm Treaty itself does not mention the principle of availability (PoA), but it is clear to the Prüm States that the



Council Decision 2008/616/JHA on the Implementation of Decision 2008/615/JHA on the Stepping up of Cross-Border Cooperation, Particular in Combating Terrorism and Cross-Border Crime, was also adopted.<sup>296</sup>

#### b. Europol

Europol, the European Police Office, is responsible for facilitating the exchange of criminal information among the twenty-seven EU Member States in order to prevent and combat serious international organized crime and terrorism affecting two or more Member States.<sup>297</sup> Europol's jurisdiction includes terrorism, drug trafficking, human trafficking, trafficking in nuclear and radioactive substances, motor vehicle crime, counterfeiting, forgery, and money laundering.<sup>298</sup>

Each Member State is required to designate a Europol National Unit (ENU) which assigns one or more Europol liaison officers (ELOs) to Europol headquarters in The Hague; each ENU is responsible for providing criminal intelligence to Europol, responding to Europol's requests for criminal intelligence, and disseminating Europol information to domestic law enforcement authorities.<sup>299</sup>

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Prüm Treaty constitutes the first real application of the PoA. This is evidenced by the fact that the Council Decision integrating Prüm into the EU specifically refers to the PoA.

296. See Council Decision 2008/616/JHA, 2008 O.J. (L 210) 12 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0012:0072:EN:PDF>.

297. *Europol: European Police Office*, in ACTIVITIES OF THE EUROPEAN UNION – SUMMARIES OF LEGISLATION (Eur. Union 2007), <http://europa.eu/scadplus/leg/en/lvb/l14005b.htm> (summarizing the Convention based on Article K.3d of the Treaty on European Union on the Establishment of a European Police Office (Europol Convention), 1995 O.J. (C 316) 2 (EC) [hereinafter Europol Convention]). See also Europol, Frequently Asked Questions, <http://www.europol.europa.eu/index.asp?page=faq> (last visited Nov. 14, 2008) [hereinafter Europol FAQ]. For additional information on Europol, see Deflem, *Europol and the Policing of International Terrorism*, *supra* note 98; Joutsen, *supra* note 116, at 12-13; Lauri Lugna, *Institutional Framework of the European Union Counter-Terrorism Policy Setting*, BALTIC SEC. & DEF. REV., 2006, at 101, 113-114; Monar, *supra* note 98, at 501-502; Segell, *supra* note 98.

298. Europol FAQ, *supra* note 297. Europol supports its members' efforts to fight cross border organized crime and terrorism by providing them with operational analysis in support of operations and by generating strategic reports and crime analysis. Upon request, Europol provides training to national law enforcement agencies.

299. *Europol: European Police Office*, *supra* note 297; Europol FAQ, *supra* note 297.

Europol's IT database has three main components: the Information System (IS),<sup>300</sup> the Analysis Work Files (AWF) and the index system.<sup>301</sup> The IS holds data on individuals who have been convicted of, are suspected of having committed, or are believed to pose a high risk of committing an offense within Europol's jurisdiction.<sup>302</sup> Such data include identification information as well as details on criminal offenses, suspected membership in a criminal organization, and information on convictions within Europol's jurisdiction.<sup>303</sup> ENUs are responsible for entering data directly into the IS,<sup>304</sup> while Europol itself may enter into the IS information supplied by non-EU member countries and organizations.<sup>305</sup> The IS can be accessed by the ENUs, liaison officers, and designated Europol officials.<sup>306</sup> National law enforcement authorities have limited access to the IS,<sup>307</sup> but can still obtain additional information via their ENU.<sup>308</sup>

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300. Europol's Information System (IS) facilitates the communication in English between the Member States, and between the Member States and Europol. *Europol: European Police Office*, *supra* note 297; Europol FAQ, *supra* note 297. Europol also communicates between the Member States and "third party" liaisons (e.g., FBI, USSS, DEA, USPIS, ICE [U.S.], RCMP [Canada], AFP [Australia]). See Press Release, Europol, US Postal Inspection Service Signs Liaison Agreement with Europol (Sept. 21, 2007), available at <http://www.europol.europa.eu/index.asp?page=news&news=pr070921.htm>; Press Release, Europol, US Secret Service and Europol Partners in Fighting Organized Crime (Nov. 7, 2005), available at <http://www.europol.europa.eu/index.asp?page=news&news=pr051107.htm>; Press Release, Europol, Royal Canadian Mounted Police as Point of Contact for Europol (Nov. 24, 2005), available at <http://www.europol.europa.eu/index.asp?page=news&news=pr051124.htm>; Press Release, Austl. Fed. Police (AFP), AFP and Europol Joint Forces to Fight Crime (Feb. 26, 2007), available at [http://www.afp.gov.au/media\\_releases/national/2007/afp\\_and\\_europol\\_join\\_forces\\_to\\_fight\\_crime](http://www.afp.gov.au/media_releases/national/2007/afp_and_europol_join_forces_to_fight_crime). Europol's IS also supports the EU's twenty-three official languages and three alphabets. Europol Convention, *supra* note 297, at art. 33; European Union, Languages and Europe, <http://europa.eu/languages/en/home> (last visited Nov. 14, 2008).

301. *Europol: European Police Office*, *supra* note 297.

302. *Id.* See also Walsh, *supra* note 7, at 632.

303. *Europol: European Police Office*, *supra* note 297 ("Personal data may include only the following details: surname, given names and any alias or assumed name; date and place of birth; nationality; sex; other characteristics likely to assist in identification, such as any specific objective physical characteristics not subject to change."). See also Walsh, *supra* note 7, at 632.

304. *Europol: European Police Office*, *supra* note 297.

305. Press Release, Europol, Information System Made Available for All EU Member States (Oct. 10, 2005), <http://www.europol.europa.eu/index.asp?page=news&news=pr051010.htm>.

306. *Europol: European Police Office*, *supra* note 297.

307. *Id.* Until 2003, the ENUs were the single contact point between the Member States and Europol. The November 2003 Protocol, which amended the Europol Convention, enabled other Member States' officials to contact Europol directly. *Id.*

Europol's work files, created by Europol staff in cooperation with Member States, store information on offenders, witnesses, informers, and victims.<sup>309</sup>

In December 2001, Europol and the United States signed the Strategic Cooperation Agreement which provides for exchange of strategic and technical information.<sup>310</sup> As a result, Europol opened a liaison office in Washington, D.C.<sup>311</sup> In December 2002, Europol and the United States signed an agreement regarding the exchange of personal data.<sup>312</sup>

The 2005 Council Decision on the Exchange of Information and Cooperation Concerning Terrorist Offences requires that each Member State send all relevant information concerning and resulting from criminal investigations of terrorist activity to Europol.<sup>313</sup> The transmitted information should include "data which identify the person, group or entity," "the offence concerned," and "links with other relevant cases."<sup>314</sup>

Each Member State is also required to designate a "Eurojust national correspondent for terrorism matters or an appropriate judicial or other competent authority which . . . shall have access to and can collect all relevant information concerning prosecutions and convictions for terrorist offences and send it to

308. *Id.* "The Council is expected to reach agreement on Chapter II ('Information progressing systems') and III ('Common provisions on information processing') of a draft Decision establishing the European Police Office. The Council already reached an agreement on Chapter I ('Establishment and tasks') at its meeting on 12-13 June 2007. This Council Decision will replace the Europol Convention and will constitute a real improvement of the operational and administrative functioning of Europol." 2827th Council Meeting, Nov. 8-9, 2007, *Background Note from the General Secretariat of the Council of the European Union, Justice and Home Affairs Council* (Nov. 6, 2007), 2, available at <http://www.statewatch.org/news/2007/nov/jha-background-note-8-9-nov-07.pdf>. For more information on this Council Decision, see generally *Commission Proposal for a Council Decision Establishing the European Police Office (EUROPOL)*, COM (2006) 817 final (Jan. 5, 2007), available at <http://www.parliament.uk/documents/upload/L%20Grenfell%20to%20Tony%20McNulty%20MP%20Europol%20%2022%2002%2007.pdf>.

309. *Europol: European Police Office*, *supra* note 297. For more information on Europol's work files, see Walsh, *supra* note 7, at 635.

310. Segell, *supra* note 98; Press Release, Europol, USA and Europol Join Forces in Fighting Terrorism! (Dec. 11, 2001), available at <http://www.europol.europa.eu/index.asp?page=news&news=pr011211.htm>.

311. Segell, *supra* note 98, at 82, 90.

312. *Id.* See also Aldrich, *supra* note 98, at 743.

313. Council Decision 2005/671/JHA, 2005 O.J. (L253) 22 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:253:0022:0024:EN:PDF>.

314. *Id.* art. 2(4).

Eurojust . . . .”<sup>315</sup> The information to be transmitted to Eurojust shall include “data which identify the person, group or entity that is the object of a criminal investigation or prosecution; the offense concerned and its specific circumstances; information about final convictions for terrorist offences and the specific circumstances surrounding those offenses; links with other relevant cases; [and] requests for judicial assistance.”<sup>316</sup>

#### *D. Non-Criminal Justice Users of Criminal Records*

Law enforcement, intelligence, and immigration/border protection agencies are not the only entities that desire individuals’ criminal background information; some regulatory and licensing agencies, schools, banks, other employers, and voluntary organizations want to know whether job applicants, employees, volunteers, and associates have criminal records. Screening out ex-offenders is meant to reduce the risk of thefts from the company, possible violence against fellow employees or clients, and to ensure a reliable workforce. In balancing the interests of employers on the one hand and ex-offenders on the other hand, there is a big difference between U.S. and EU law and policy.

#### 1. Non-Criminal Justice Use of Criminal Records in the United States

The United States makes its citizens’ national criminal records widely available to employers.<sup>317</sup> According to a Society for

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315. *Id.* art. 2(2).

316. *Id.* art. 2(5). “Each Member State shall take the necessary measures to ensure that any relevant information included in documents, files, items of information, objects or other means of evidence, seized or confiscated in the course of criminal investigations or criminal proceedings in connection with terrorist offences can be made accessible as soon as possible, taking account of the need not to jeopardise current investigations, to the authorities of other interested Member States in accordance with national law and relevant international legal instruments where investigations are being carried out or might be initiated or where prosecutions are in progress in connection with terrorist offences.” *Id.* art. 2(6). “In appropriate cases Member States shall take the necessary measures to set up joint investigation teams to conduct criminal investigations into terrorist offences.” *Id.* art. 3.

317. See also Michael Adams, *Benchmarking the Background Check Industry Criminal and Civil Records*, COMMERCIAL BUS. INTELLIGENCE, INC., Aug. 2005, at 1, <http://www.cbintel.com/courtrecords.pdf> (describing the various criminal and civil records checks available in the United States and noting their inconsistencies). See generally REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA, *supra* note 27, at 1 (noting that “[t]he criminal background check has become a ubiquitous part of American culture.”).

Human Resource Management survey, published in 2004, more than eighty percent of U.S. private employers conducted criminal background checks of at least some prospective employees.<sup>318</sup> Federal laws permit employers in certain industries and businesses (nuclear power, securities, banking, nursing homes, and critical infrastructure) to obtain a job applicant's criminal history record from the FBI.<sup>319</sup> Federal law also authorizes states to designate in-state private employers eligible to obtain nationwide criminal background checks by means of a state-repository-initiated FBI records search.<sup>320</sup> Annually, the number of NCIC criminal record

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318. REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA, *supra* note 27, at 1. In addition, "some law enforcement criminal records repositories now conduct almost as many criminal record checks for civil or non-criminal justice purposes as for criminal purposes. The FBI, for example, processed 9,777,762 fingerprint submissions for civil checks in fiscal year 2005 compared to 10,323,126 fingerprint submissions for criminal checks during that same period. It would be difficult to accurately tally the tens of millions of non-criminal justice criminal record checks, both name and fingerprint-based, conducted throughout the country each year by government-administered repositories and by private commercial background check service providers." *Id.* (citing information provided January 10, 2006, by Barbara S. Wiles, Management Analyst, Criminal Justice Information Services Division, FBI.).

319. U.S. ATT'Y GEN., *supra* note 52, at 4-5. After 9/11 federal legislation authorized criminal background checks for millions of workers in transportation and "critical infrastructure." *Id.* at 5-6. "Just weeks after the attacks, Federal Aviation Administration administrator Jane Garvey ordered [background] checks of up to 1 million workers with access to secure areas in the nation's airports. The Patriot Act, enacted by Congress [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Public Law 107-56] in October 2001, directed the criminal backgrounding of hazardous materials transporters. The process was expected to result in approximately 3.5 million checks each year. Similar checks were contemplated for those working in U.S. ports and in the country's chemical industry." REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA, *supra* note 27, at 1. The 2004 Private Security Officers Employment Authorization Act authorized private security firms to obtain individual criminal history records from the federal criminal records database. Pub. L. No. 108-458, 118 Stat. 3755, *amended* by 28 U.S.C. §534 (2004). Proponents argued that criminal record background checks on private security guards might prevent a terrorist event because: (1) terrorists might seek to obtain jobs as security guards in companies that are part of the nation's critical infrastructure, and (2) terrorists might seek to recruit or obtain the assistance of private security guards. See Ira A. Lipman, *Intel Reform Bill Covers Officer Standards*, 42 SECURITY MAGAZINE 34 (2005), available at [http://www.securitymagazine.com/Articles/Feature\\_Article/a1bd7c5da74d8010VgnVCM10000f932a8c0](http://www.securitymagazine.com/Articles/Feature_Article/a1bd7c5da74d8010VgnVCM10000f932a8c0).

320. Pub. L. No. 92-544, enacted in 1972, authorizes states to pass legislation that designates specific licensing or employment purposes for which state and local government agencies may request FBI background checks on behalf of private employers. Department of Justice Appropriation Act of 1973, Pub. L. No. 92-544, 86 Stat. 1115 (1972). According to the Report of the National Task Force on the Criminal Backgrounding of America, "[s]tates have enacted more than 1,100 statutes under the

checks conducted for non-criminal justice purposes exceeds the number conducted for criminal justice purposes.<sup>321</sup> U.S. employers routinely obtain criminal background information about job applicants, employees, volunteers, business partners, clients, and others from private information vendors.<sup>322</sup> Some states make some criminal record information available online,<sup>323</sup> in some cases, for

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Public Law 92-544 umbrella.” REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA, *supra* note 27, at 7. “Private sector job applicants and employees are given some rights under the federal Fair Credit Reporting Act, 15 USC §1681 et seq. (FCRA).” Letter from Beth Givens, Dir., Privacy Rights Clearinghouse, to Richard A. Hertling, Deputy Ass’t Att’y Gen., Office of Legal Policy (Aug. 5, 2005), available at <http://72.14.205.104/search?q=cache:tmegN8S5ppUJ:www.usdoj.gov/olp/pdf/dojbackgrdchkfinalprc.pdf+Attorney+general%27s+Report+Criminal+records&hl=en&ct=clnk&cd=1&gl=us>. The FCRA imposes obligations on consumer reporting agencies and limited obligations on “users” of employment consumer reports. *Id.*

321. NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION, *supra* note 10, at 55. “As of September 30, 1999, . . . 15,913 agencies and organizations” filed over one million requests for criminal background checks during fiscal year 1998-1999. *Id.* at 21.

322. See Nat’l Ass’n of Prof’l Background Screeners [NAPBS], Welcome to NAPBS, <http://www.napbs.com> (last visited Nov. 14, 2008); ChoicePoint, <http://www.choicepoint.com/index.html> (last visited Nov. 14, 2008). See also Karen Gottlieb, Presentation at the International Workshop on WHOLES - A Multiple View of Individual Privacy in a Networked World, Sigtuna, Swed., *Using Court Information for Marketing in the United States: It’s Public Information, What’s the Problem?*, at 2 (Jan. 30, 2004), available at <http://www.privacyrights.org/ar/courtmarketing.htm>; SEARCH: THE NATIONAL CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION (2005), available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.

323. “Courts and government agencies at all levels of government-local, state, and federal-are increasingly making public records available on web sites. Some jurisdictions are just beginning, while others have done so since the mid-1990s. There are two ways public records are accessible electronically. Some jurisdictions post them on their government web sites, thereby providing free or low-cost access to records. Government agencies and courts also sell their public files to commercial data compilers and information brokers. They in turn make them available on a fee basis, either via web sites or by special network hookups.” Beth Givens, *Public Records on the Internet: The Privacy Dilemma*, PRIVACY RTS. CLEARINGHOUSE, Apr. 19, 2002, <http://www.privacyrights.org/ar/onlinepubrecs.htm>. See also, e.g., Minneapolis Police Dep’t, Prostitution Solicitation Conviction Photos, <http://www.ci.minneapolis.mn.us/police/prostitution-convictions/convictions.asp#TopOfPage> (last visited Nov. 14, 2008); St. Paul Police Dep’t, Public Notification: Saint Paul Arrests for Engaging in Prostitution, <http://www.stpaul.gov/index.asp?NID=2167> (last visited Nov. 14, 2008); Ill. State Police, Bureau of Identification, Enrollment Instructions for Submitting Conviction Inquiries, available at <http://www.isp.state.il.us/services/enrollmentinstructions.pdf> (mandating public access to all state conviction records); Fla. Dep’t of Law Enforcement, <http://www.fdle.state.fl.us/> (last visited Nov. 14, 2008).

free.<sup>324</sup> Any criminal record information posted to the internet can be accessed by foreign law enforcement personnel and private employers; they can also obtain criminal record information about U.S. nationals from private U.S. information vendors.

Public and private organizations that provide services to children, such as schools, boy scouts, girl scouts, and child care facilities, want to know whether a potential employee has a previous record of sex offenses. A movement to publicize the identities and whereabouts of dangerous sex offenders was sparked by several horrific sex offenses committed by offenders with previous sex offense arrests or convictions.<sup>325</sup> As a result, all states have established sex offender registries (with names, addresses, and photos) that can be accessed via the internet.<sup>326</sup> In addition, the U.S. federal government has authorized the creation of a national on-line sex offender register.<sup>327</sup>

### 1. Non-Criminal Justice Use of Criminal Records in the EU

For EU Member States, the dissemination of individual criminal history information to employers is a matter of national policy.<sup>328</sup> For example, in Germany, employers may not request job

324. "Fees for fingerprint-based criminal history record checks vary from state to state and at the federal level. State fees range from \$0 to \$75. FBI fees range from \$18 to \$24. Fees are sometimes reduced or waived for certain classes of consumers, such as volunteers. Fees for name-based criminal history record checks and criminal record checks are usually less than fingerprint-based checks. . . ." REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA, *supra* note 27, at 13. The cost of checking for foreign convictions (and arrests) would be much greater and often not feasible given restrictive privacy laws. *Id.*

325. The Federal Protect Act gives voluntary organizations providing programs and services to children the right to request an FBI criminal background check on employees and volunteers. Press Release, Dep't of Justice, PROTECT Act Fact Sheet (Apr. 30, 2003), available at [http://www.usdoj.gov/opa/pr/2003/April/03\\_ag\\_266.htm](http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm) (last visited Nov. 14, 2008).

326. There is a proliferation of state-level "Megan's Laws" that require law enforcement officials to make public the identity and residence of serious sex offenders. See, e.g., N. J. STAT. ANN. 2C:7-1-17 (West 2005). See also Maureen S. Hopbell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331 (2004); Leora Sedaghati, *Megan's Law: Does it Serve to Protect the Community or Punish and Brand Sex Offenders?*, 3 J. LEGAL ADVOC. AND PRAC. 27 (2001); KAREN J. TERRY & JOHN S. FURLONG, *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK* (2d ed. 2004).

327. See Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, *supra* note 9, at 398.

328. Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 730-731 (2001) ("[T]he United States has, in recent years, left the protection of

applicants' or employees' criminal records from the national criminal register, but applicants and employees have the right to request, for employment purposes, a criminal record extract or certificate of good conduct.<sup>329</sup> An employer may only inquire into previous convictions if, according to employment law, the job justifies such inquiry<sup>330</sup> and the prospective employee is not required to answer "inadmissible" questions.<sup>331</sup>

Recently in Europe, fear of "sexual predators" has generated a push to create an exception to the confidentiality of criminal records.<sup>332</sup> Some shocking recidivist sex crimes have provoked proposals to make sex offenders' records more available.<sup>333</sup> One of the most notorious cases involved Marc Dutroux, who was convicted by a Belgian jury in 2004 for the child abduction, rape, and murder of young girls during the mid-1990s.<sup>334</sup> Dutroux had

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privacy to markets rather than law. In contrast, Europe treats privacy as a political imperative anchored in fundamental human rights. European democracies approach information privacy from the perspective of social protection. . . . This vision of governance generally regards the state as the necessary player to frame the social community in which individuals develop and in which information practices must serve individual identity.").

329. VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE, *supra* note 81, at 73. See also *Commission Staff Working Paper: Annex to the White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 4.

330. Letter from Manfred Weiss, Univ. of Frankfurt, to author (Dec. 1, 2007) (on file with author) (noting that employment discrimination on the basis of a criminal record is regulated by Member States' national law. "As far as Germany is concerned, there are severe restrictions due to the applicant's right of privacy. . . . The employer may only ask about previous convictions whether and in so far as the intended work requires this. Thus, for example, an accountant or cashier may be questioned about previous convictions for property offences, or a truck driver may be asked for previous convictions for traffic offences. The applicant, however, need not declare previous convictions or disclose the underlying facts of the conviction if the previous convictions are no longer registered in the Federal Central Register for Convictions or if they need no longer be listed in the policy certificate of good conduct, i.e., not in cases of insignificant offences committed more than five years ago. The applicant is not obliged to answer inadmissible questions. To prevent the employer from concluding from the applicant's mere refusal to answer that something is worth hiding, the applicant is allowed to answer inadmissible questions with a lie. According to the consistent practice of the Federal Labor Court only a false answer to a lawfully asked question can be a reason for terminating the employment relationship because of fraudulent misrepresentation.").

331. *Id.*

332. See VERMEULEN ET AL., 2000/STOP/16 FINDINGS & PROPOSALS, *supra* note 197.

333. *Id.*

334. See *Dutroux Guilty of Child Murder*, CNN, June 17, 2004, <http://74.125.95.132/search?q=cache:yozt-LMaBwoJ:www.cnn.com/2004/WORLD/europe/06/17/belgium.dutroux/+site:cnn.com+Dutroux+Guilty+of+Child+Murder>. See also Jonny



previously been convicted of theft, violent muggings, drug-dealing, trading in stolen cars, as well as sexual offenses against children.<sup>335</sup> His case triggered a proposal for a European database of persons convicted or suspected of sexual offenses. Public and private agencies and organizations that work with or provide services to children<sup>336</sup> would be able to check their employees and volunteers against this database.<sup>337</sup> One possibility would be that an individual seeking a job with a children's services organization would be required to obtain an official certificate stating the non-existence of any prior record of sexual offenses anywhere within the EU.<sup>338</sup>

Another horrific Belgian case involved Michel Fourniret, who obtained employment in Belgium as a school supervisor despite having been convicted of rape and indecent assault of minors in France.<sup>339</sup> In 2003, Belgian police arrested him for abduction of minors and sexual misconduct; he later confessed to several murders of young girls.<sup>340</sup>

In 2004, in the wake of the Fourniret case, Belgium urged the adoption of the Framework Decision on the Recognition and Enforcement in the European Union of Prohibitions Arising from Convictions for Sexual Offences Committed Against Children.<sup>341</sup> This would obligate a Member State that had imposed on an individual an employment prohibition resulting from a conviction for a sexual offense against children to make the prohibition

Dymond, *Widening the EU's Criminal Justice Net*, BBC NEWS, Oct. 5, 2006, <http://news.bbc.co.uk/2/hi/europe/5410518.stm>.

335. *Dutroux Guilty of Child Murder*, *supra* note 334.

336. See GERT VERMEULEN ET AL., EUROPEAN DATA COLLECTION ON SEXUAL OFFENCES AGAINST MINORS 197 (2001) [hereinafter VERMEULEN, EUROPEAN DATA COLLECTION].

337. VERMEULEN ET AL., 2000/STOP/16 FINDINGS & PROPOSALS, *supra* note 197.

338. *Id.*

339. *How Fourniret Slipped Through the Net*, BBC NEWS, July 8, 2004, <http://news.bbc.co.uk/2/low/europe/3875987.stm>. See also Ruth Reichstein, *EU Rules Out Central Criminal Register*, DEUTSCHE WELLE, July 19, 2004, <http://www.dw-world.de/dw/article/0,1433,1262357,00.html>; Dymond, *supra* note 334; VERMEULEN, EUROPEAN DATA COLLECTION, *supra* note 336.

340. See *How Fourniret Slipped Through the Net*, *supra* note 339.

341. See Initiative of Belgium, *supra* note 230. See also Addendum to Initiative 14207/04, of the Kingdom of Belgium with a View to the Adoption by the Council of a Framework Decision on the Recognition and Enforcement in the European Union of Prohibitions Arising from Convictions for Sexual Offences Committed Against Children, available at <http://register.consilium.europa.eu/pdf/en/04/st14/st14207-ad01.en04.pdf>; Remarks on Prohibitions on Certain Sex Offenders, Eur. Parl. Deb. (A6-0068/2006) (May 31, 2006), <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20060531&secondRef=ITEM-022&language=EN>.

known in any criminal record excerpt transmitted to another Member State.<sup>342</sup> The Member State that imposed the prohibition would have to record this information in its criminal register; the same responsibility would apply to any other EU country that had been notified of the employment prohibition.<sup>343</sup> The proposed Framework Decision would require the Member State in which an adjudicated sex offender resides to recognize and enforce any collateral employment prohibition imposed by another Member State's judicial authority.<sup>344</sup> Additionally, when a Member State receives an inquiry about an individual who is a national of another EU country, the queried state must send a criminal record information request to the individual's home country criminal register.<sup>345</sup> Nonetheless, only some parts of the 2004 Belgian proposal are included in the pending Council Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States.<sup>346</sup>

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342. See *Commission White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, *supra* note 61, at 5 (noting that Member States vary with respect to licensing and employment disqualifications for a conviction. In some countries certain convictions automatically trigger disqualifications, while in other countries, disqualification is a matter of judicial discretion. EU countries also differ with respect to whether disqualifications may be ordered in civil, administrative, or disciplinary proceedings following a conviction, and for what offenses. Such disqualifications are not always included in EU countries' criminal registers.). See also Council Framework Decision 2004/68/JHA, On Combating the Sexual Exploitation of Children and Child Pornography, 2004 O.J. (L 13) art. 5(3) (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:013:0044:0048:EN:PDF> ("Each Member State shall take the necessary measures to ensure that a natural person, who has been convicted of one of the offences referred to in Articles 2, 3 or 4, may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children."); Initiative of Belgium, *supra* note 230, at 3 (defining "prohibition" "referred to in Article 5(3) of Council Framework Decision 2004/68/JHA of 22 December 2003 ... arising from a conviction for an offence under Article 1(1)."); NSPCC Briefing on Preventing Sex Offenders from Working with Children, *supra* note 246.

343. Initiative of Belgium, *supra* note 230, at art. 3.

344. *Id.* art. 6.

345. *Id.* art. 5.

346. See Press Release, NSPCC, NSPCC: European Sex Offenders (Oct. 2, 2007) available at [http://www.politics.co.uk/press-releases/opinion-former-index/equality/nsppc-european-sex-offenders-\\$479231.htm](http://www.politics.co.uk/press-releases/opinion-former-index/equality/nsppc-european-sex-offenders-$479231.htm). See also *Home Affairs Committee Inquiry into Justice and Home Affairs Issues at European Level: NSPCC Submission*, BRIEFING (NSPCC, London, U.K.), Nov. 2006, available at [http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Consultations/2006/consultation2006\\_JHA\\_enquiry\\_wdf48616.pdf](http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Consultations/2006/consultation2006_JHA_enquiry_wdf48616.pdf) (on the problems of monitoring sex offenders in the EU).

As of December 2007, many EU countries still do not have a separate database of convicted sex offenders.<sup>347</sup> The May 2007 disappearance of four-year-old Madeleine McCann in Portugal, however, may increase the likelihood that the EU will make sex offender records more available, even though there is currently no evidence linking her presumed kidnapping to a recidivist sex offender. In August 2007, a poll commissioned by a campaign to find the missing child found that 97% of the members of the European Parliament favor the creation of an EU-wide sex offender register.<sup>348</sup>

### III. INTERPOL'S INITIATIVES

As the preceding discussion indicates, it is no small task to coordinate, much less integrate, the criminal record systems of two or more different countries, even those that have already achieved a significant degree of political and economic cooperation. Thus, the prospect of some kind of worldwide IT criminal records network is decades away, if not longer; perhaps no such IT system will ever be created. Any such system would, of course, have to surmount huge political obstacles as well as immense logistical, technical, and legal hurdles. Nevertheless, Interpol, the International Criminal Police Organization, has already launched several impressive initiatives in international criminal information sharing.

Practically every country in the world is a member of Interpol.<sup>349</sup> Interpol invites police agencies in its member countries to contribute information to a number of Interpol databases that can be accessed by all member countries' police.<sup>350</sup> These databases

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347. For an example of an attempt to create a national sex offender registry, see U.K. HOME OFFICE, CRIMINAL JUSTICE SYSTEM, PROTECTING THE PUBLIC FROM SEXUAL CRIME: AN EXPLANATION OF THE SEXUAL OFFENSES ACT 2003, 6 (2004), available at [http://www.popan.org.uk/policy/Policy\\_content/sexual%20offences/sexual\\_offences\\_act\\_leaflet.pdf](http://www.popan.org.uk/policy/Policy_content/sexual%20offences/sexual_offences_act_leaflet.pdf) ("... [T]he Sex Offenders Act of 1997... introduced a requirement on sex offenders to notify the police of their personal details and any subsequent changes to them. This notification requirement is commonly known as the sex offenders register."). See also Press Release, U.K. Home Office, Better Tracking of Sex Offenders Between the UK and Republic of Ireland (Nov. 27, 2006), available at <http://press.homeoffice.gov.uk/press-releases/tracking-of-sex-offenders?version=1>.

348. *MEPs 'Want EU Sex Offender List'*, BBC NEWS, Aug. 22, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/6958807.stm](http://news.bbc.co.uk/2/hi/uk_news/6958807.stm).

349. Interpol, Interpol Member Countries, <http://www.interpol.int/Public/ICPO/Members/default.asp> (last visited Nov. 14, 2008).

350. *Id.*

contain identification data (names, fingerprints, and DNA profiles, etc.) on certain convicted, wanted, and suspected criminals, as well as data on stolen passports, vehicles, and works of art.<sup>351</sup> The efficacy of these databases depends upon member countries sending information to Interpol and on national police and border officials checking arrestees, suspects, travelers, and recovered property against the Interpol databases.

One of Interpol's best known databases, Nominal Data on Criminals (fugitives and other wanted and suspected persons), supports the organization's historical role of helping police forces share criminal information globally in order to prevent and investigate terrorist attacks and other crimes and to apprehend criminal suspects and escaped convicts.<sup>352</sup> Police agencies from 186 Interpol member states can add names or other identifying information (including photographs of the wanted or suspected persons) to the Nominal Database.<sup>353</sup>

Until recently, a check of Interpol's Nominal Database could only be initiated by a country's central police authorities. After making a stop or arrest, a police officer that wanted an Interpol check would have to send a request up the chain of her agency's command. Processing the request could take weeks or months; even then there was no guarantee that higher-level officials would agree to forward the request to Interpol. New IT technology now allows decentralized access to the Nominal Database and other Interpol databases.<sup>354</sup> As a result, the use of the Nominal Database is growing impressively.<sup>355</sup> When police stop or arrest a citizen or foreign national for any offense, they can check the Interpol Nominal Database to see if that person is wanted in other countries.<sup>356</sup> Between 2000 and 2006, the annual number of

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351. Interpol, Databases, available at <http://www.interpol.int/Public/ICPO/FactSheets/GI04.pdf> (last visited Nov. 14, 2008).

352. *See id.*

353. *Id.*

354. *See* Ronald K. Noble, Op-Ed, *Share-and Snare*, WALL ST. J., Sept. 8, 2006, available at <http://www.interpol.int/Public/News/2006/RonaldNoble20060908.asp>.

355. "Between 9/11 and today, the number of wanted persons annually sought for arrest through Interpol has more than doubled (to over 16,000 in 2005). The number of annual arrests of criminals wanted internationally has more than tripled (to over 3,000 in 2005)." *Id.* Of course, each country still has to decide, according to its own laws and bilateral and multilateral agreements whether, if requested, to extradite the wanted person.

356. *Id.*

searches of Interpol's Nominal Database increased from 81,034 to 703,000.<sup>357</sup>

Interpol member countries can also circulate electronic "diffusion" notices through Interpol's global police communication system (called "I-24/7"), which notifies police worldwide that a person is wanted. These diffusions contain identification details and judicial information about wanted criminals.<sup>358</sup>

At the request of a member state, Interpol can also issue a "red notice."<sup>359</sup> This is an international wanted person notice based on an arrest warrant issued for a person wanted for prosecution or to serve a sentence after having been convicted.<sup>360</sup>

Interpol requests that member countries send the fingerprints of non-citizens suspected or convicted of serious crimes to Interpol's Fingerprints Database.<sup>361</sup> Currently, that database contains forty-seven thousand fingerprint forms and is increasing by eight thousand forms per year.<sup>362</sup> Interpol also accepts DNA profiles for its DNA Profiles Database, which can be searched by investigators who have a DNA sample they want to match to a named individual.<sup>363</sup> In July 2007, Interpol Secretary General,

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357. Ronald K. Noble, Sec'y Gen., Interpol, Address at 36th Interpol European Regional Conference (May 30, 2007), available at <http://www.interpol.int/Public/ICPO/speeches/SGVarna20070530.asp>.

358. See Interpol, Interpol Notices, <http://www.interpol.int/Public/Notices/default.asp> (last visited Nov. 14, 2008); Interpol, Fugitive Investigative Services, <http://www.interpol.int/Public/Wanted/fugitiveInvestServ.asp> (last visited Nov. 14, 2008) ("The Interpol Red Notice has been recognised in a number of countries as having the legal value to serve as a basis for provisional arrest. The persons concerned are wanted by national jurisdictions or International Criminal Tribunals, where appropriate, and the Red Notice is intended to help police identify or locate these individuals with a view to their arrest and extradition. Interpol created the Fugitive Investigative Service to offer more proactive and systematic assistance to member countries.").

359. Interpol, Wanted, <http://www.interpol.int/Public/Wanted/Default.asp> (last visited Nov. 14, 2008).

360. *Id.*

361. See Press Release, Interpol, *Fingerprint Database Helps US Officials Find Panamanian Fugitive*, Mar. 29, 2006, available at <http://www.interpol.int/public/News/2006/FingerprintsPanama20060329.asp>.

362. See Interpol, Guidelines for Fingerprint Transmission, available at <http://www.interpol.int/Public/Forensic/fingerprints/RefDoc/default.asp> (last visited Nov. 14, 2008).

363. See Interpol, DNA Profiling, <http://www.interpol.int/Public/Forensic/DNA/Default.asp> (last visited Nov. 14, 2008) ("Following the acceptance of Resolution No. 8 of the 67th General Assembly (Cairo, 1998) to advance international co-operation on the use of DNA in criminal investigations, the Interpol DNA Unit has been established. The objective of this unit is to: provide strategic and technical support to enhance member

Ronald Noble, urged member countries to share more identification data with Interpol, including the fingerprints of non-nationals arrested by national police.<sup>364</sup>

Interpol's database on Suspected Terrorists, established in 2002, permits authorized police agencies to access information on suspected terrorists.<sup>365</sup> It includes information on persons subject to arrest as well as location and information notices. This database includes names and photographs of individuals whom member countries consider to be terrorist suspects.<sup>366</sup>

Interpol also maintains databases for Stolen Motor Vehicles and Stolen Works of Art.<sup>367</sup> Posting such information improves the chance of recovering the stolen property if it appears in another country. The main challenge lies in motivating police to check the Interpol databases when they have recovered property that they have no reason to suspect comes from another country.<sup>368</sup>

After 9/11, Interpol established a database on Stolen and Lost Travel Documents (SLTD).<sup>369</sup> Despite the strong interest in

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states' DNA profiling capacity . . ."). The international database records DNA profiles provided by member states are available to investigators all over the world. Thirty-three members are making at least some use of the DNA Database. The DNA unit also promotes the best practices for creating DNA profiles. *See UK Leads the Way in Development of a Global DNA Database*, PRIVACY INT'L, Jan. 31, 2006, <http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-508149>.

364. In the United States, that would include tourists, H-1B visa holders and even permanent residents who are arrested. When asked whether U.S. citizens who are arrested should be included as well, Noble replied, "[t]he data would overwhelm Interpol, and from a political perspective, the likelihood that a country would accept sending the criminal information of a US citizen to Interpol, I'm not sure if that's politically viable or even advisable." McCullagh, *supra* note 142.

365. *See* Press Release, Interpol, Interpol Launches New Tool in the Fight Against Terrorism (Apr. 11, 2002), available at <http://www.interpol.int/public/icpo/pressreleases/pr2002/pr200210.asp>.

366. *See id.*

367. INTERPOL GENERAL SECRETARIAT, ACTIVITY REPORT 10-11 (2002), available at <http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN72/Reports/agn72r01.pdf>.

368. *Compare* Interpol, Recent Thefts, <http://www.interpol.int/Public/WorkOfArt/Search/RecentThefts.asp> (last visited Nov. 14, 2008) (showing reports for 314 items recently stolen), *with* Interpol, Unclaimed Items, <http://www.interpol.int/Public/WorkOfArt/Search/Owner.asp> (last visited Nov. 14, 2008) (showing reports for only 181 unclaimed items).

369. Interpol established the SLTD database in 2002 to address the threat of terrorists traveling with false or stolen passports. "The [SLTD] database began with approximately 3,000 passports reported stolen from 10 countries. It has since grown astronomically to 14.4 million stolen and lost travel documents from 123 countries. This includes 6.7 million passports and 7.7 million other types of travel documents . . ." *Interrupting Terrorist Travel: Strengthening the Security of International Travel Documents: Statement before the S. Judiciary Comm. Subcomm. on Terrorism, Technology, and Homeland Security* (May 2,

preventing terrorists and sophisticated criminals from using these documents, many countries have not provided border control officers at their airports and other points of entry with direct access to the database.<sup>370</sup> Some countries do not regularly update their submissions.<sup>371</sup> This demonstrates that creating international criminal justice information sharing mechanisms does not guarantee that such mechanisms will be used.<sup>372</sup>

Interpol has developed an IT system called “MIND/FIND” to provide border control personnel at airports and other national points of entry access to the SLTD database by electronically scanning passports and visas.<sup>373</sup> The FIND system (Fixed Interpol Network Database) allows a country’s national system to search Interpol’s SLTD database through a secure private internet network (Interpol’s I-24/7 global police communications system).<sup>374</sup> A border official scanning a passport checks the passport’s validity against Interpol’s SLTD database and his or her national databases. Interpol sends police agencies that opt for the MIND (Mobile Interpol Network Database) technology an encrypted copy of the SLTD database on a storage device (called a MIND Box).<sup>375</sup> When the passport is scanned, the system automatically checks the SLTD database stored in the MIND Box in parallel to the national database. Interpol automatically updates the copy of the SLTD database.<sup>376</sup>

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2007) (statement of Ronald K. Noble, Sec’y Gen, Interpol), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=2733&wit\\_id=6436](http://judiciary.senate.gov/hearings/testimony.cfm?id=2733&wit_id=6436) [hereinafter *Statement before the S. Judiciary Comm. Subcomm. on Terrorism, Technology, and Homeland Security*].

370. Press Release, Interpol, *Interpol Warns of Terrorists Using Stolen Travel Documents to Evade Detections* (May 2, 2007), <http://www.interpol.int/Public/ICPO/PressReleases/PR2007/PR200715.asp> [hereinafter Press Release, Interpol, *Interpol Warns of Terrorists Using Stolen Travel Documents*]; contra McCullagh, *supra* note 142 (“In May [2007], the Department of Homeland Security announced it would begin using Interpol’s database of 7 million lost or stolen passports to screen foreign travelers. The US began reporting its own lost or stolen passports to Interpol in 2004.”).

371. See, e.g., *Interpol Concern over UK Borders*, BBC NEWS, Dec. 1, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4058427.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4058427.stm). The UK did not require passport numbers be recorded unless the traveler fell into certain categories, such as a student from outside the EU or an applicant for a work permit.

372. See *id.*

373. Interpol, MIND/FIND, <http://www.interpol.int/Public/FindAndMind/default.asp> (last visited Nov. 14, 2008).

374. *Id.*

375. *Id.*; *Statement before the S. Judiciary Comm. Subcomm. On Terrorism, Technology, and Homeland Security*, *supra* note 369.

376. *Id.*

The I-24/7 system connects the Interpol General Secretariat in France with the Interpol National Central Bureaus (NCBs) in member countries.<sup>377</sup> Through the I-24/7 system, NCBs have direct access to Interpol's databases on suspected terrorists, wanted persons, fingerprints, DNA profiles, lost and stolen travel documents, stolen motor vehicles, and stolen works of art.<sup>378</sup> Using the I-24/7 system, member states may also access one another's national databases through the business-to-business (B2B) connection.<sup>379</sup> Interpol encourages national police agencies to extend access to the system to border police, customs and immigration personnel, and other law enforcement agents.<sup>380</sup>

Due to MIND/FIND technology, law enforcement officers now perform far more SLTD searches every day than were carried out in all of 2003, and they obtain more hits every month than in all of 2003.<sup>381</sup> Yet, as of summer 2007, only seventeen countries utilized the MIND/FIND systems.<sup>382</sup> Again this demonstrates the lag between deployment and use of new law enforcement technologies, even those that might prevent terrorists from crossing national borders.

In July 2007, Interpol Secretary General Ronald Noble called for airlines to provide Interpol with passenger data on international flights.<sup>383</sup> Airlines were asked to identify the country that issued the passport and the passport's number. This information could be run against Interpol's SLTD database to identify passengers using lost or stolen passports.<sup>384</sup> The Secretary General's ambition is to expand this initiative to international travel via trains, ocean liners, and cruise ships.<sup>385</sup>

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377. Interpol, Interpol's Global Police Communications System: I-24/7, <http://www.interpol.int/Public/NCB/i247/default.asp> (last visited Nov. 14, 2008) [hereinafter I-24/7].

378. *Id.*

379. *Id.*

380. *Id.*

381. *Statement before the S. Judiciary Comm. Subcomm. On Terrorism, Technology, and Homeland Security*, *supra* note 369.

382. Noble, *supra* note 357.

383. McCullagh, *supra* note 142.

384. *Id.*

385. *Id.*



#### IV. IMPEDIMENTS TO INTERNATIONAL EXCHANGE OF CRIMINAL RECORDS

If domestic decision makers lack confidence in the reliability of another country's criminal records, i.e., if they regard that country's criminal justice system as extremely corrupt or highly politicized, they may not be interested in obtaining individual criminal history records from that country. But such a negative assessment of another country's criminal justice system is relatively rare and decision makers, especially police and border security personnel, almost always prefer more information. They are confident that they will be able to discount records of doubtful reliability (as in the case of the Mariel boat people).

While most political leaders and law enforcement officials are in favor of more cooperation and better information-sharing in principle,<sup>386</sup> a senior EU diplomat observes, "... everybody says they are in favour of co-ordination, but nobody is in favour of being co-ordinated.... The reflex of interior ministers is to jealously protect their powers on the national level even though the fight against terrorism is a global one."<sup>387</sup>

National privacy laws<sup>388</sup> and general privacy concerns are important obstacles to cross border criminal records sharing.<sup>389</sup>

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386. Letter from Max-Peter Ratzel, Director of Europol, to author (June 20, 2007) (on file with author) ("The 'need to know' principle must evolve into a 'need to share' principle. This is the task for the generation of 'new' police officers around the world with different skills, experiences and expectations than the 'old' ones.").

387. Judy Dempsey, *International News-After the Bombs: International Reaction: Europe at Loggerheads Over How to Coordinate on Terrorism*, FIN. TIMES, Mar. 18, 2004, <http://search.ft.com/nonFtArticle?id=040318000892>.

388. The European Convention on Human Rights and Fundamental Freedoms [ECHR] defines the "right to respect for private and family life" as: "1. Everyone has the right to respect for his private and family life, his home and correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others." Art. 8, Nov. 4, 1950, 213 U.N.T.S. 222, 230, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>. The Organization for Economic Co-operation and Development [OECD] promulgated eight principles for the protection of personal information. Organization for Economic Co-operation and Development [OECD], *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, at 3-4 (Sept. 23, 1980), available at [http://www.it.ojp.gov/documents/OECD\\_FIPs.pdf](http://www.it.ojp.gov/documents/OECD_FIPs.pdf). The Guidelines apply to personal data in both the public and private sectors. While nonbinding, the Guidelines have had a significant impact on national law in North America, Europe and East Asia. See also ELEC. PRIVACY INFO. CTR. & PRIVACY INT'L,

PRIVACY AND HUMAN RIGHTS 2003: AN INT'L SURVEY OF PRIVACY LAWS AND DEVELOPMENTS (2003), available at <http://www.privacyinternational.org/survey/phr2003/threats.htm>.

389. With regards to the different data protection laws in the United States and the EU, see generally ARCHICK, EUROPE AND COUNTERTERRORISM, *supra* note 135; ARCHICK, U.S.-EU COOPERATION AGAINST TERRORISM, *supra* note 97; DOROTHEE HEISENBERG, NEGOTIATING PRIVACY: THE EUROPEAN UNION, THE UNITED STATES AND PERSONAL DATA PROTECTION 53-55 (2005); *U.S. Discusses Data Protection, Retention Policies with EU Member States*, THE UNITED STATES MISSION TO THE EUROPEAN UNION, Apr. 14, 2005, [http://useu.usmission.gov/Dossiers/Data\\_Privacy/Apr1405\\_Data\\_Retention.asp](http://useu.usmission.gov/Dossiers/Data_Privacy/Apr1405_Data_Retention.asp) (with a statement delivered by Mark M. Richard, Counselor for Justice Affairs, U.S. mission to the EU at a meeting of the EU's Art. 29 Working Party in Brussels); Solveig Singleton, *Privacy and Human Rights: Comparing the United States to Europe* (Cato White Papers & Misc. Reports, 1999), available at <http://www.cato.org/pubs/wtpapers/991201paper.html>. See Agreement to Enhance Cooperation in Preventing, Detecting, Suppressing, and Investigating Serious Forms of International Crime, with Annex, U.S.-Eur. Police Office, Dec. 6, 2001, State Dep't No. 02-10, 2001 WL 1758139, available at <http://www.europol.europa.eu/legal/agreements/Agreements/16268-2.pdf>; Supplemental Agreement Between the Europol Police Office and the United States of America on the Exchange of Personal Data and Related Information, U.S.-E.U., Dec. 20, 2002, available at <http://www.europol.europa.eu/legal/agreements/Agreements/16268-1.pdf>. Some Europeans criticized the December 2002 agreement between Europol and the United States on the Exchange of Personal Data and Related Information. The Agreement allows for the transmission of personal data and related information to numerous U.S. local, state and federal law enforcement authorities. There are only weak restrictions imposed on U.S. personnel transferring this information to third parties. In addition, "sensitive" information on race, religious/political opinions, and health are included. Aldrich, *supra* note 312, at 743. See also *Proposed Exchange of Personal Data Between Europol and USA Evades EU Data Protection Rights and Protections*, STATEWATCH, Nov. 27, 2002, <http://www.statewatch.org/news/2002/nov/12eurousa.htm>; SELECT COMMITTEE ON THE EUROPEAN UNION, REPORT ON EUROPOL'S ROLE IN FIGHTING CRIME, 2002-3, H.L. 43, at 47, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/lducom/43/4305.htm>. Another example of the difference between European and American conceptions of privacy is the flurry of criticism over the May 2004 U.S.-EU Agreement that enabled the United States to obtain passenger name record data (PNR) from airlines operating flights from and to the United States. EUROPEAN UNION COMMITTEE, THE EU/US PASSENGER NAME RECORD (PNR) AGREEMENT, 2006-7, H.L. 108, available at <http://www.publications.parliament.uk/pa/ld200607/ldselect/lducom/108/108.pdf>. The United States is concerned that the EU Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters, which is currently being negotiated, will: (1) make it more difficult for EU states to send personal data to non-EU countries, and (2) extend data protection restrictions to law enforcement cooperation. Paul Rozenweig, Deputy Assistant Secretary for Policy at the U.S. Dept. of Homeland Security, expressed his disapproval of the EU data-sharing provisions that require "adequate" privacy protection to third party recipients of EU personal data. See *Observatory on Data Protection in the EU*, STATEWATCH, Mar. 8, 2008, <http://www.statewatch.org/eu-dp.htm> (last visited Nov. 14, 2008) (Paul Rosenweig's critical comments on EU demands data sharing restrictions). See *Proposal for a Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial cooperation in Criminal Matters*, at 12, COM (2005) 475 final, available at [http://ec.europa.eu/justice\\_home/news/intro/doc/com\\_2005\\_475\\_en.pdf](http://ec.europa.eu/justice_home/news/intro/doc/com_2005_475_en.pdf).

Some countries have laws against connecting their electronic databases to other country's computers.<sup>390</sup> For example, according to a 2002 EU survey, the national laws of Belgium, Germany, and Italy, among others, did not permit connection to an EU database of criminal records.<sup>391</sup> Many privacy objections surfaced after the Fourniret case triggered proposals for an EU sex offender registry.<sup>392</sup> Some German officials argued that the creation of such a database would infringe on national sovereignty.<sup>393</sup>

Efforts to increase criminal records sharing across national boundaries constantly confront and must overcome security objections. Law enforcement agencies are notoriously reluctant to divulge information. Officers fear that providing direct or indirect access to their criminal intelligence, even to record databases, might compromise confidential information about witnesses, victims, and offenders. Though this is truer of police agencies and criminal intelligence information than of prosecutorial and judicial agencies dealing with conviction information, even conviction databases can be corrupted or sabotaged.

This article has pointed out many practical difficulties that arise in sharing criminal records. In some countries, responsibility for criminal records is divided among several different agencies. Some criminal registers still use paper records.<sup>394</sup> Creating an IT system that would permit records to be exchanged among several countries would, in many instances, mean overcoming inadequate criminal record databases, incompatible computer software, and different languages and alphabets. Moreover, a successful system for sharing criminal records information must allow its end users to obtain the information they need quickly and efficiently without fear of overwhelming the database.<sup>395</sup>

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390. See VERMEULEN ET AL., BLUEPRINT FOR AN E.U. CRIMINAL DATABASE, *supra* note 81, at 80-84.

391. *Id.*

392. Reichstein, *supra* note 339.

393. *Id.*

394. *Review of National Criminal Records Systems in the European Union, Bulgaria and Romania with a view to the Development of a Common Format for the Exchange of Information on Criminal Records*, Final Report, UNISYS, Brussels, July 2006 (on file with author). Although most EU countries have centralized systems, some countries' criminal records are held by individual courts or in independent systems that are not interconnected. Most, but not all, EU Member States' criminal registers are computerized. *Id.* Latvia and Bulgaria do not maintain criminal records in electronic form. *Id.*

395. For example, imagine five countries, each with a comprehensive database of all criminal records. A search for the criminal records of five individuals would generate twenty-five searches. If each of the five countries scans all five individuals, the number of

Finally, even if a sufficient international or regional system for sharing criminal records could be established, there would be substantial problems interpreting criminal records compiled in different legal, political, and linguistic cultures. Language differences alone pose a huge challenge. Criminal jurisprudence is complex and nuanced. How confidently will decision makers be able to comprehend convictions and sentences rendered in a foreign language and based on foreign law and jurisprudence?

## V. CONCLUSION

It is hard to imagine any diminution in the desire for more access to foreign criminal records in the future as threats of international organized crime and terrorism will continue to loom large. Terrorism and serious crime will likely increase the demand for more law enforcement cooperation and information sharing. The IT revolution has accustomed decision makers to having more information at their fingertips. Greater information availability increases demand because technological advances create opportunities for novel uses of such information.<sup>396</sup>

There are several different models for future international sharing of electronic criminal records databases. The first model would modernize the methods for making and responding to requests for criminal background information, but would also give the requested state discretion to refuse to comply with a request (e.g., MLATs, EU criminal records system, NJR). The second model would provide countries with computer access to other participating countries' criminal record repositories' database(s) (e.g., U.S.-Canada fingerprint exchange). A watered-down ("hit/no-hit") variation of this model would tell the inquirer if the requested country's database holds information about the person of interest; the requesting country would then have to formally request the information (Prüm Convention). The third model would create a merged database, to which all participating

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reports jumps to 625, a five-fold increase on each country's electronic criminal records system.

396. NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION, *supra* note 10, at 2-3 ("A new and emerging culture of information access and use facilitated by personal computers, browsers, search engines, online databases, and the Internet has helped to create a demand for, and a market in, information, including criminal justice information . . . . Revolutionary improvements in information, identification, and communications technologies . . . and the increased affordability of these technologies, fuels the appetite for information . . .").

countries would contribute and have access (e.g., SIS, IS, VIS, Interpol's databases). The fourth model would combine elements of models two and three by merging the participants' identification databases (fingerprints, DNA profiles or "soft identifiers"); the system would direct the inquiring party to the record-holding country. The participants could grant one another automatic or discretionary access to their databases (e.g., the FBI's III, CAFE). Each of these models has its advantages and disadvantages and each can be recognized in one or more current criminal record-sharing arrangements. New computer and IT breakthroughs will undoubtedly make more models possible.

The United States, although a single country, demonstrates the complexity of linking and integrating the criminal records of over fifty constituent jurisdictions. Only recently has it achieved an effective linking and integration of state and federal criminal record systems. Even now, however, the system does not work perfectly. Dispositional data often are not recorded on rap sheets. Inquiring law enforcement agencies and courts, therefore, must contact local officials to obtain the details of a particular defendant's case.

The EU provides an excellent laboratory for studying institution building in cross border criminal record sharing. The EU has been building cooperative mechanisms for decades, but its efforts have significantly accelerated over the past five years. While the most recent framework decisions mark important progress, they do not come close to the creation of an integrated system like the one operating in the United States.

Interpol has been the most active international organization working to promote the international exchange of criminal information. It has focused on police and immigration enforcement cooperation methods closer to the U.S. model rather than to the EU court-based model. Interpol's new databases make valuable information available to officials all over the world. Time will tell whether they become the foundation for an even more advanced worldwide system of criminal record sharing.

APPENDIX  
CHRONOLOGICAL DEVELOPMENT OF EU POLICY ON

*Exchange of Criminal Records:*

	<b>Requests for information and Replies</b>	<b>Notification of convictions to the home state</b>
<b>1959 Council of Europe Convention on Mutual Assistance in Criminal Matters</b>	<ul style="list-style-type: none"> <li>* Requesting authority=national judicial authorities, requested authority= 'appropriate' national authorities</li> <li>* No time frame for responding to a request for information</li> </ul>	<ul style="list-style-type: none"> <li>* Communication via the convicting and home states' Ministries of Justice</li> <li>* At least once a year</li> </ul>
<b>2000 Convention on Mutual Assistance in Criminal Matters Between the Member States of the European Union</b>	<ul style="list-style-type: none"> <li>* Direct communication between national judicial authorities</li> </ul>	<ul style="list-style-type: none"> <li>* Communication via the convicting and home states' 'central authorities'</li> </ul>
<b>Council Decision 2005/876/JHA of 21 November 2005</b>	<ul style="list-style-type: none"> <li>* Communication via national 'central authorities'</li> <li>* Reply immediately within ten working days</li> </ul>	<ul style="list-style-type: none"> <li>* Communication via national 'central authorities'</li> <li>* Without delay</li> </ul>
<b>Draft Council Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records between Member States</b>	<ul style="list-style-type: none"> <li>* Communication via national 'central authorities'</li> <li>* Reply immediately within ten working days</li> </ul>	<ul style="list-style-type: none"> <li>* Communication via national 'central authorities'</li> <li>* As soon as possible</li> </ul>
<b>NJR project</b>	<ul style="list-style-type: none"> <li>* Electronic communication via TESTA (French judicial authority, French criminal register, TESTA, German criminal register, German judicial authority)</li> <li>* Immediately</li> </ul>	<ul style="list-style-type: none"> <li>* Electronic communication via TESTA</li> <li>* Immediately</li> </ul>

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