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Criminal Law and the European Communities: Defining the Issues

Dr. Christine Van den Wyngaert*

INTRODUCTION

Within the complicated network of European organizations,¹ the European Communities² are unique, constituting the prefiguration of a federal state. The idea of a "European union" between the member states may be a distant political utopia, particularly because of the great difficulties which have emerged over the past few years. However, the system created in the 1950s bears many characteristics of a federal system, at least insofar as certain economic matters are concerned.³ With respect to these matters, the treaties establishing the European Communities have introduced supranational legislative, executive and judicial authorities,⁴ the acts of which are directly applicable in each of the member states.⁵

In this "prefederal" configuration, problems have materialized which find no direct solution in the treaties. One of these problems concerns the criminal law. Having focused on the aim of promoting and ultimately realizing *economic* integration between the member states, the treaties establishing the European Communities have not dealt with matters which would have been regulated if *political* integration had been the immediate purpose. Criminal law and criminal procedure are among these matters.⁶

The Communities' failure to address issues of criminal law and procedure has raised problems in a number of cases. The commercial policy of the Communities, including the payment of premiums, subsidies and refunds, has paved the way to certain forms of fraud and abuse which are not proscribed by the domestic penal laws of the member states. Because certain crimes, such as obtaining financial aid by false pretenses, tax fraud or the corruption of civil servants, are in general punishable only if committed against national interests, it is possible for similar crimes committed against corresponding Community interests to go unpunished because

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they do not fall within the definitional scope of the national prohibition. Conversely, while national prohibitions may encompass the violation of a Community rule, the sanctions provided for may be so different from one state to another that their infliction distorts competition between the member states and therefore impinges upon one of the basic policies of the Communities.

The progressive disappearance of intra-European frontiers, facilitating and stimulating the free movement of goods, persons, services and capital within the Communities, has also been beneficial to offenders who take advantage of the continued political fragmentation of the states constituting the Communities. As the integration of criminal law and procedure does not fall within the competence of the Communities,⁷ relations between member states in criminal matters are based, not upon *integration* but on *cooperation*, by means of essentially bilateral techniques such as extradition, judicial assistance, and transfer of criminal proceedings. Despite the strong political and economic links between the member states, the rules and principles governing these techniques of mutual cooperation have hardly outgrown the traditional premises based on state sovereignty, which were laid down in the last century. This is evidenced by the fact that most of the classical barriers to extradition and cooperation in criminal matters still exist: reciprocity, double criminality, non-extradition of nationals, the political offense exception, the exception of fiscal and economic crimes.

These impediments, which may seem somewhat anachronistic in a region aiming at an ever growing economic, and ultimately political⁸ integration, often paralyze national efforts to suppress crime and strongly hamper the development of a common criminal justice policy. It is not surprising that the present situation favors the commission of certain, mainly "economic crimes."⁹ At the same time, it attracts certain offenders, not only the ideologically motivated "terrorists" claiming the benefit of the political offense exception,¹⁰ but also common criminals from outside Europe finding the region an attractive and profitable *carrefour* for trafficking drugs, stolen works of art and the like.¹¹

While the development of a common criminal justice policy lies more within the general objectives of the Council of Europe, of which all states composing the European Communities are members, there are nevertheless a number of problems which are specific to the Communities and which may call for a special response on their part. This article makes a short *tour d'horizon* of the different issues at stake and briefly describes the efforts which have been or are being undertaken to resolve them.¹²

THE IMPACT OF COMMUNITY LAW ON DOMESTIC PENAL LEGISLATION

The criminal law as such is not within the competence of the Communities.¹³ Because the *travaux préparatoires* of the treaties establishing the European Communities are secret, it cannot be determined with certainty whether or not this omission stems from a deliberate choice.¹⁴ As observed by Paul de Keersmaecker in his report on behalf of the European Parliament, it seems that the drafters of the treaties, in their enthusiasm for making rules for the creation of a new legal order, have overlooked some of the problems involved in the enforcement of these rules.¹⁵ This is quite understandable from a psychological perspective.¹⁶ In addition, the misadventure of the European Defense Community, in which the creation of a supranational criminal law system for military offenses had been envisaged,¹⁷ may have influenced the drafters to refrain from dealing with criminal law matters. The failure to transfer any legislative competence in penal matters to the Communities could also be explained by the unusual institutional setting. Under most democratic constitutions, this particular competence belongs to a directly elected legislative body or parliament. It is therefore difficult to see how even part of this competence could have been transferred to the Communities—whose legislative organ is *not* the European Parliament but rather the Council of Ministers—which is concurrently an executive organ.¹⁸

Since it is clear that the Communities lack legislative competence in criminal matters, criminal law has remained within the exclusive competence of the states. However, while the Communities are not competent to criminalize behavior which adversely affects them, Community law nevertheless may have some impact on the domestic penal laws of the member states. This is particularly evident in the case of a conflict between Community law and national penal law.¹⁹ It is generally accepted that in case of such conflict, Community law takes precedence.²⁰ There is also no doubt that the national penal laws are subjected to this principle and that national judges must therefore refrain from applying domestic penal provisions which violate Community law. Accordingly, while the Communities are not competent to create new penal legislation, they can nevertheless block the application of domestic penal legislation if the latter appears to be incompatible with Community law.²¹ In other words, whereas the scope of national penal law generally cannot be *broadened* by Community law, it can be considerably *narrowed*.²²

Although states are in principle free to determine which measures they deem appropriate to ensure the fulfillment of their obligations arising out of the treaties or resulting from action taken by Community institutions, the aforementioned principle may nevertheless affect the scope of national

discretion when Community law is implemented. This has unequivocally been accepted by the Court of Justice of the European Communities which consistently holds that national penal or administrative sanctions should not go beyond what is strictly necessary. In its preliminary ruling in the *Casati*²³ case, rendered on November 11, 1981, the Court said:

In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connexion with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.²⁴

Accordingly, the Court has considered certain domestic criminal provisions to be contrary to the principle of proportionality or to the principle of non-discrimination, both protected under Community law. For example, in *Cayrol v. Rivoira*,²⁵ two businesses had been fined by a French court for having imported prohibited goods (table grapes, allegedly from Italy but in reality from Spain) into France. They were jointly sentenced, *inter alia*, to pay a fine of over 500,000 FF in lieu of confiscation and a fine amounting to four times the value of the goods liable to confiscation (over 1,000,000 FF). The European Court of Justice considered these fines to be disproportionate, taking into account the purely administrative nature of the contravention. In its preliminary ruling, the Court held:

Any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty.²⁶

The practical, quantitative importance of this "smiling face of Community law"²⁷ (the effect of which, to a certain extent, is comparable to that of the European Convention on Human Rights)²⁸ should not be overestimated. The narrowing effect of Community law *vis-à-vis* domestic penal provisions applies only to matters which fall, directly or indirectly, within the scope of Community law. Beyond this, national penal law retains all of its severity.²⁹ For example, in *Casati* a person was charged

with unauthorized exportation of money from Italy. Under Italian law, this contravention is punishable by a term of imprisonment of one to six years and a fine of between two and four times the value involved. In its preliminary ruling in this case, the Court, after having confirmed its former ruling concerning the limits imposed on national penal law by Community law, nevertheless held that this rule was not applicable in the present case because the monetary operation under consideration did not fall within the scope of Community law.³⁰

In three situations, Community law has had the effect of broadening the scope of a domestic penal provision. For example, Article 194 of the Treaty Establishing the European Atomic Energy Community ("Euratom") obliges each member state to treat any infringement of the duty of secrecy, as defined in the article, as a corresponding national violation.³¹ This provision was necessary because violation of Euratom secrets would not normally fall within the scope of the definition of a violation of security secrets under national laws. Therefore, states are required to broaden the application of their domestic law to include violations of Euratom secrets, or, in other words, to *assimilate* the "Community offense" to the corresponding national offense. A similar assimilation has been prescribed by Articles 3 and 27 of the Statute of the Court of Justice of the European Economic Community ("E.E.C.") and the corresponding articles in the European Coal and Steel Community ("E.C.S.C.") and Euratom Statutes.³² Article 3 concerns the prosecution of a judge of the Court of Justice before a national court after his immunity has been suspended by the Court of Justice.³³ Article 27 relates to perjury before the Court of Justice and obliges member states to assimilate this crime to perjury committed before national courts.³⁴

In the three situations mentioned, member states assimilate the "Community violation" with the corresponding domestic infringement, but no provision is made to determine *which* national law will be applicable in a particular case. Accordingly, all member states are equally competent in case of a violation, and the penal laws of each are simultaneously applicable.³⁵ As there is no provision establishing priority of jurisdiction, or a provision concerning *non bis in idem*, the possibility of two or more consecutive prosecutions and/or condemnations for the same violation exists. So far, however, the problem of double jeopardy only exists theoretically, since there have been no practical applications of these articles to date.³⁶

The situation is nevertheless quite exceptional. As Johannes has pointed out, it is from the viewpoint of the penal jurisdiction of states *ratione loci*, a case of *regional universal jurisdiction* in which all member states are simultaneously competent *vis-à-vis* certain offenses against the Communities.³⁷ Johannes has also drawn attention to the fact that the theoretical foundation of this particular jurisdiction is from the Communities' viewpoint to

be explained by the *protective principle*, while from the perspective of the member states it is the *universality principle*.³⁸ This is especially the case for violators of the Euratom secrets, in respect of which the *locus delicti* can be any place in the world.³⁹

COMMUNITY SANCTIONS: PENAL IN NATURE?

A more practical question is whether the sanctions imposed by the Communities for certain infringements of the E.C.S.C. Treaty or of the E.E.C. regulations on competition law are to be considered as penal sanctions.⁴⁰ If the answer is yes, one might conclude that there is a penal law of the Communities for the substantive matters in question. The question is highly debated, although there seems to be a majority opting for the non-penal character of Community sanctions.⁴¹

While the treaties themselves are silent on the subject, it is highly improbable that the drafters intended to transfer any penal competence whatsoever upon the Communities.⁴² In addition, the Council regulations for the implementation of the Communities' antitrust policy have explicitly provided that the sanctions (penalties and periodic penalty payments) are of a non-penal nature.⁴³ Is this assertion to be considered as a fiction, as some authors argue,⁴⁴ or "*une sauce pour faire passer le poisson*"?⁴⁵ There are arguments on both sides, a detailed discussion of which, however, would go beyond the scope of this article.⁴⁶ The least one can say is that the situation is rather ambiguous, which is also the conclusion of De Keersmaeker in his report on behalf of the European Parliament.⁴⁷

While there may have been a number of arguments for recognizing the penal character of these sanctions,⁴⁸ the Communities have probably opted for the most pragmatic solution by considering them non-penal, administrative sanctions.⁴⁹ As such, a number of delicate problems have been avoided, including the penal responsibility of corporations and the enforcement of the sanctions by the member states.⁵⁰ The recognition of the penal character of Community sanctions could also mean that the procedure before the Court of Justice pursuant to Article 172 of the E.E.C. Treaty would be considered a penal procedure.⁵¹ Thus, it could be argued that the guarantees applicable in criminal procedure⁵² would apply.⁵³ This might be overly protective, given that the type of behavior which is contemplated by the antitrust policy of the Community is mainly economic delinquency.⁵⁴

Some authors believe that the Court of Justice has implicitly recognized the penal character of the sanctions by applying general principles of criminal law to the antitrust sanctions, including the principle of proportionality, the principle *non bis in idem* and the principle requiring that the

action taken by the Commission should be barred by a statute of limitations.⁵⁵ Others submit that this is not *per se* an indication of the penal character of Community sanctions, as the same principles have been applied to civil and commercial cases.⁵⁶ Even if one accepts that the sanctions inflicted by the Communities are penal in nature, the quantitative importance of the "transnational penal law"⁵⁷ developing from the Communities is nevertheless restricted: it can develop only with respect to the very limited category of acts susceptible of being sanctioned by the Communities.⁵⁸

THE PENAL ENFORCEMENT OF COMMUNITY LAW BY THE MEMBER STATES

As the competence of the Communities to lay down penal sanctions for the enforcement of Community rules has not been recognized so far by the Communities or the member states, the implementation of these rules is left to the discretion of member states, who are free to choose the appropriate measures for the fulfillment of their obligations arising under the treaties.⁵⁹ These measures can be penal or non-penal in nature. As explained above, this freedom of discretion is restricted only by the principle that domestic sanctions implementing Community legislation should be limited to that which is strictly necessary.⁶⁰

It is clear that discrepancies among national measures enforcing Community rules may have undesirable results. Major differences in criminal procedure and in the severity of the sanctions (imprisonment, fines, professional interdiction), even if the principle of proportionality is respected, may distort competition and thus impinge upon one of the fundamental rules of Community law. Therefore, the need for a harmonization of certain national implementation and enforcement measures of community legislation has been emphasized.⁶¹ There is, however, much discussion about the legal foundation under Community law of such a harmonization.⁶² Consequently, it is unlikely that the problem will find a solution in the short run.

In addition to this problem, there are serious *lacunae*, inherent to a system leaving the penal enforcement of Community legislation to the discretion of member states. These *lacunae* are: (i) lack of jurisdiction *ratione materiae*; (ii) lack of jurisdiction *ratione loci* and (iii) *lacunae* in the current system of interstate cooperation in criminal matters.

Lack of Jurisdiction *Ratione Materiae*

In most states, crimes which can be gathered under the broad denomination "economic crimes" (including tax fraud, embezzlement of public money, corruption of civil servants, abuse of regulations concerning the agricultural market, and obtaining financial aid from the government by false pretenses)⁶³ are usually punishable only if they are committed against *national* interests. Accordingly, the member states of the European Communities are not, in normal circumstances, legally equipped to punish similar, factually corresponding crimes committed against the interests of another member state or the Community. For economic crimes against the interests of another member state, this means that there is a *relative vacuum juris*, in the sense that the crimes in question are punishable only under the law of the state which is affected. For economic crimes against Community interests, the *vacuum juris* may be *absolute*, in that the crimes in question may not be punishable at all because the constitutive elements of the crime fall outside the definitional scope of national statutes. As such, prosecution and punishment by the member states may be impossible.⁶⁴ States can, of course, remedy this situation by unilaterally adapting their national legislation; in that case they broaden the scope of their corresponding domestic penal provisions so as to encompass infringement of Community interests.⁶⁵

This solution would correspond to the one laid down by the Euratom Treaty provision concerning violations of Euratom secrets and by the provision on false testimony contained in the Statute of the Court of Justice.⁶⁶ It is the process known as *assimilating* the Community offense with the corresponding national offense.⁶⁷ This process, however, has a number of drawbacks. As was pointed out above, it creates the risk of double jeopardy.⁶⁸ The unilateral determination of sanctions for Community offenses could also lead to discrepancies between national standards of severity for the same offense which is likely to distort competition within the Communities. Furthermore, the "domestication" of Community offenses deprives them, to a great extent, of their stigma as offenses against the interests of the Communities.⁶⁹ All of these drawbacks suggest that the problem of penal enforcement of Community law should be regulated on the level of the Communities, instead of on the level of the member states. As the Communities themselves seem to lack the competence for issuing such legislation,⁷⁰ they are presently studying the legal basis on which a common system for the suppression of Community crimes could be developed.⁷¹

Lack of Jurisdiction *Ratione Loci*

As a rule, states are competent only *vis-à-vis* offenses which have been committed on their territories. The territoriality principle is accepted by all member states as the most important legal basis for the exercise of penal jurisdiction.⁷² Other principles supplement this basis of jurisdiction. The most important is the personality principle, which allows states to judge their nationals for certain offenses they have committed abroad.⁷³ However, the applicability of this principle does not normally extend to the economic crimes which confront the Communities.⁷⁴ In some member states, including Great Britain, the personality principle applies only to the crimes for which it has been expressly provided; these do not include most economic crimes.⁷⁵ Most other member states accept a more general application of the personality principle but have laid down restrictions which exclude economic crimes: double criminality;⁷⁶ minimum standard of severity of the sanction;⁷⁷ requirement of a complaint of the victim or official notice of the state where the offense was committed;⁷⁸ requirement of the presence of the offender;⁷⁹ and the like.⁸⁰

Turning to the other principles of jurisdiction, the protection principle, governing mainly crimes against the state,⁸¹ is without relevance for economic crimes, while the universality principle, applicable to the most serious international crimes,⁸² does not, so far,⁸³ offer a jurisdictional basis for the suppression of economic crimes. Accordingly, it is possible that a member state, while being competent *ratione materiae vis-à-vis* a given offense, nevertheless lacks the necessary jurisdiction *ratione loci* to judge the case and eventually punish the offender.⁸⁴

Different solutions to this problem have been suggested. Johannes advocates the introduction of a system of a regional, European universal jurisdiction, an extended application of the territoriality principle;⁸⁵ conversely, Mulder has pleaded for an extended application of the personality principle.⁸⁶ It has also been submitted that an improvement of the system of extradition and judicial assistance could fill most of the loopholes.⁸⁷ These and other solutions have been envisaged in the two draft Protocols which are presently under discussion.⁸⁸

Lacunae in the Current System of Interstate Cooperation in Criminal Matters

Most member states of the European Communities are linked, bilaterally or multilaterally, by treaties of extradition and judicial assistance. Other forms of cooperation in criminal matters, such as transfer of criminal proceedings, execution of foreign penal judgments and transfer of sentenced offenders, have hardly been developed.⁸⁹ As instruments of an

international criminal justice policy, the further elaboration of these procedures on a multilateral basis is to be expected from the Council of Europe, rather than from the European Communities.⁹⁰

There are, however, a number of obstacles to inter-state cooperation in criminal matters which have greater impact within the Communities than within the Council of Europe, because of the particular activities for which the Communities constitute a pre-federal entity, that is to say economic integration and crimes relating to this policy. It is precisely for these economic crimes that the current barriers to extradition and judicial assistance exert their obstructing effect, as many of these barriers, either *per se* (the exception for fiscal offenses) or for other reasons (lack of double criminality, lack of jurisdiction *ratione loci*, non-extradition of nations) exclude the use of the procedures for the crimes in question.

While extradition may not be the appropriate instrument for economic crimes,⁹¹ non-extradition nevertheless has the undesirable result of leaving the offense unpunished, since the state which refused extradition usually lacks the jurisdictional basis (*ratione materiae* and/or *loci*) to prosecute the offender.⁹² A possible solution would be the transfer of the criminal proceedings by the state where the offense was committed to the state which denied extradition. However, in the present state of the law, this possibility seldom exists.⁹³

Even in those cases where the prosecuting state has jurisdiction, proceedings may be paralyzed by a refusal to grant judicial assistance on one of the grounds listed above. As economic crimes against Community interests may be committed on the territories of more than one member state, judicial assistance may be essential to the prosecution's case. This is particularly true if the state of residence of the offender is not the state where he committed the crime. In many cases economic crimes can be established only after an examination of the corporate books and accounts of the alleged offender (usually in his state of residence).⁹⁴ Thus, prosecution in the state where the crime was committed may require extensive judicial assistance from the state of residence. A refusal to assist may block the proceedings and leave the offender unpunished.

Finally, if proceedings are successful and the offender can be convicted in the state where the offense was committed, the execution of the sentence may still be rendered impossible by the fact that the offender resides in another state.⁹⁵ Execution of the sentence in the state of residence could be a workable solution, but the present law usually does not provide for such an outcome.⁹⁶ As extradition in these cases is usually both impossible and inappropriate, the offender, again, will go unpunished. All these loopholes taken together have made the Communities a "paradise for economic criminals."⁹⁷

EFFORTS TOWARD THE COMMON PREVENTION AND SUPPRESSION OF CERTAIN OFFENSES AGAINST COMMUNITY INTERESTS

In 1962, a working group composed of governmental experts of the member states and civil servants of the Communities was established to discuss the problem of investigating and suppressing violations of Community regulations, directives and decisions. They elaborated a draft convention, which was elaborate and rather ambitious: there were sixty-seven articles divided over seven chapters, covering such areas as jurisdiction, judicial assistance, execution of penal sentences and such matters as pardon, amnesty, and *trial in absentia*.⁹⁸ Priority of jurisdiction was given to the state of which the offender was a national or a resident (personality principle). The convention provided for the execution of both prison sentences and pecuniary sanctions.

The work on the draft was nearing completion when, in 1966, the French refused any further cooperation. The French delegation argued, *inter alia*, that the cooperation between member states envisaged in the draft convention had not been contemplated by the Treaty of Rome. Some provisions were unacceptable to France as they implied a considerable infringement of certain sovereign rights, including the right to pardon offenders.⁹⁹

After questions were raised in the European Parliament,¹⁰⁰ the problem was reexamined in 1971 by the Ministers of Justice of the member states at their meeting in Luxembourg; they invited the Commission of the Communities to study the problems of criminal law in the economic sphere and to submit new proposals.¹⁰¹ Thereafter, the Commission established a new working group which drew up the preliminary drafts of two new conventions: one concerning penal protection of the financial interests of the Communities, and the other concerning penal responsibility of civil servants of the Communities. Both drafts were subsequently submitted to the European Court of Justice for its opinion, which was delivered in 1975.¹⁰² They were then transmitted to the Council of Ministers¹⁰³ where they have been under consideration ever since.¹⁰⁴

The first draft convention, the Protocol Concerning the Penal Protection of the Financial Interests of the Community,¹⁰⁵ focuses on a system of transfer of proceedings. The offenses to which it applies are: (a) all infringements of the treaties (E.C.S.C., E.E.C. and Euratom), provisions adopted by the Community institutions in application of the treaties and provisions adopted by the member states for the implementation of Community law (provided the infringements are susceptible of penal sanctions in the member states); and (b) the new offenses created by articles 14 and 15—in general terms, unlawful reduction of Community revenues, refunds

and financial aid and the production of false declarations or documents relating to these infringements and new offenses.¹⁰⁶

Transfer of proceedings is contemplated whenever a member state, having jurisdiction under its own law, considers itself unable, even when having recourse to extradition, to prosecute a person alleged to have committed one of the infringements listed above; in that case, proceedings may be transferred to the member state in which the person concerned habitually resides or the member state in which he is present.¹⁰⁷ Subsidiary jurisdiction is vested in the state to which proceedings are transferred.¹⁰⁸ For the new offenses created by the protocol,¹⁰⁹ no specific definition of the crimes under Community law is given. Instead, the protocol adopts the process of assimilation with corresponding national provisions.¹¹⁰ Provision is made for mutual assistance,¹¹¹ and the protocol further gives the Court of Justice competence to issue preliminary rulings.¹¹²

The second convention, the Protocol on the Liability and the Protection under Criminal Law of Officials and Other Servants of the Community,¹¹³ focuses on extradition. The offenses to which it applies can be summarized as follows: (a) acceptance of bribes, forgery, circulating forged instruments, making false statements and misappropriation of funds by civil servants of the European Communities; (b) breach of professional secrecy by officials and former officials of the Communities and other persons bound by a formal obligation of secrecy on behalf of the Communities; and (c) offering bribes to officials of the European Communities.¹¹⁴ Here too, the process of assimilation with the corresponding national offense has been used.¹¹⁵ Priority of jurisdiction is given to the state of which the accused is a national, but the proceedings can be transferred to the state where the offense was committed.¹¹⁶ The emphasis, however, remains on extradition.¹¹⁷ Finally, the protocol gives the Court of Justice competence to issue preliminary rulings in the same way as the other protocol.¹¹⁸

It is too early to appraise the two protocols, as they are still under discussion. The Council of the Communities has submitted both drafts to the European Parliament. In its report of January 3, 1979, the Parliament suggested a number of valuable amendments to the original proposals of the Commission.¹¹⁹ The Council subsequently established a new working group to give the protocols further consideration. So far, however, little progress has been made. The work on the second protocol (protection under criminal law of civil servants) has been provisionally tabled and the *ad hoc* working group is now focusing on the first protocol (protection under criminal law of Community financial interests). It is highly unlikely, however, that a consensus can be reached in the short run, as there are still a number of fundamental issues on which no agreement exists. These include: the scope of the protocol; the relative merits of adopting the territoriality principle or the personality principle as the main basis for

jurisdiction; the relative merits of emphasizing extradition or transfer of criminal proceedings as the most suitable instrument for interstate cooperation; the propriety of preliminary jurisdiction being conferred upon the Court of Justice for questions arising under the Protocol; and, concomitantly, the question of the legal basis for the draft itself.¹²⁰

Recently, the member states of the European Communities envisaged the elaboration of a network of general conventions on international cooperation in criminal matters, including extradition, judicial assistance, transfer of criminal proceedings, execution of foreign penal judgments and transfer of sentenced persons. The regulation of these procedures on a common basis for all the member states would, it was submitted, make the Communities into one single European legal area, or *espace judiciaire européen*, to use the words of its founding father, the former French president, Valéry Giscard d'Estaing. This concept differed from the efforts described above in two major respects. First, the project *espace judiciaire européen*, grew out of the idea of combatting terrorism, but was intended to encompass all common crimes; as such, it was much broader than the ongoing efforts described above, which are restricted to a specific category of crimes—certain economic crimes against Community interests. Second, the legal basis for the creation of the *espace judiciaire européen* was not found within, but outside the treaties establishing the Communities. The *espace* would be gradually set up within the framework of political cooperation between the member states. Therefore, unlike the efforts described above, no role was reserved for the Commission or the European Parliament in the elaboration of the treaties, and no competence was to be conferred upon the Court of Justice for their interpretation.

Only the "first step" toward the creation of the *espace judiciaire* was taken: on December 4, 1979, the Agreement Between the Member States of the European Communities for the Application of the European Convention on the Suppression of Terrorism was signed.¹²¹ This agreement contemplates a more flexible application within the Communities of the Council of Europe's anti-terrorism convention of 1977.¹²² As it requires the ratification of all member states, it is all but impossible that this agreement will ever enter into force, since France has declared its intention not to ratify it before the adoption of the Draft Convention on Cooperation in Criminal Matters.¹²³ This draft convention, which would have been the second step toward the *espace judiciaire*, was never adopted. Its signature by the Heads of State of the members of the Communities, scheduled for June 1980, never took place because the Netherlands refused further cooperation. Since both signature and ratification of all member states were required, the Convention, and together with it the whole project, ran aground.

The effort to establish an *espace judiciaire européen* has been rightly criticized for various reasons. The main legal argument against it is that it does not

contribute anything new as compared to the already existing conventions of the Council of Europe¹²⁴ and that therefore member states of the European Communities should ratify those conventions instead of adopting new, almost identical Community conventions.¹²⁵ The main *political* argument against the *espace judiciaire européen* focuses on its organizations *outside* the framework of the Communities. The role and influence of Community institutions was deliberately avoided; both the Parliament and the Commission were kept out of the negotiation of the treaties, and no role was given to the Court of Justice.¹²⁶ Another fundamental objection is that the instrument of political cooperation between the member states was being abused by its use for internal purposes, whereas the political cooperation was meant as a tool for the coordination of the external policies of the member states.¹²⁷

Especially because the matter under consideration—cooperation in criminal matters—is so strongly related to fundamental rights and liberties, I believe that the Communities are *not* the appropriate regional context for the elaboration of general conventional arrangements in the field of criminal law.¹²⁸ As long as the problem of the protection of fundamental rights in the Communities has not been settled,¹²⁹ the Community member states should implement the existing criminal law conventions of the Council of Europe by signing and ratifying them.

FINAL OBSERVATIONS

The foregoing plainly illustrates the great difficulties in developing common transnational rules of a penal character, both substantive and procedural, even in a pre-federal regional context such as the European Communities. As De Keersmaeker has observed:

Criminal law is not only an area in which there are the widest possible divergences between the legal systems of the Member States but it is also one which affects vitally the liberty of the citizen and the order and security of the state, and therefore is regarded as particularly a matter of national sovereignty.¹³⁰

For the moment, the European Communities are going through a very difficult period, perhaps a real crisis. Many of the ambitious objectives contemplated by the founding fathers in the early 1950s have only been partly realized, at best. As the political divergences among the member states have steadily increased over the past few years, it is unlikely that there will be considerable progress in the near future. In such a situation, problems which were overlooked, postponed, or simply not dealt with

when the treaties establishing the Communities were drafted (when the political willingness to solve these problems was relatively great) have little or no chance of being resolved under the present circumstances. This may explain the lack of enthusiasm on the part of the experts who have been working on the drafts concerning the penal protection of certain Community interests since the early 1960s. In this respect, the effort to create an *espace judiciaire européen* outside the institutional framework of the Communities has rightly been characterized an alibi, meant to hide the more fundamental contradictions existing among the member states.¹³¹

As the solution of all the problems described above will undoubtedly be a time-consuming process, the easy way out in the short run would be for the member states of the European Communities to ratify the already existing Council of Europe conventions on cooperation in criminal matters. This would allow the member states to fill in many of the *lacunae* described above. This does not preclude the continuation of ongoing efforts to develop an appropriate system for certain economic crimes, in particular by developing comprehensive and uniform statutory prohibitions in each of the member states.

While the ultimate objective should remain the further elaboration and adoption of the protocols which are presently under consideration, a number of problems could be resolved in the short run—unilaterally, by the states, or on the Community level, by means of Community regulations or directives. Mulder has formulated a number of interesting suggestions in this respect: a directive, based on Article 100 of the E.E.C. Treaty could be issued, which would oblige states to apply their penal laws to corresponding offenses in other member states; similarly, a regulation or directive could impose upon member states the duty to grant judicial assistance to one another in criminal cases involving the application of community rules.¹³²

It may be that the problem of developing common rules for the suppression of certain offenses against the Communities is just another "childhood disease" on the way to economic and ultimately political integration. Its solution depends largely on the solution of the other, more fundamental issues causing the present crisis in the Communities.

NOTES

¹ Including, *inter alia*, the Council of Europe, the European Free Trade Association, the Benelux Economic Union, the Nordic Council, the Organization for Economic Cooperation and Development, the Western European Union, and the North Atlantic Treaty Organization. See generally A. ROBERTSON, *EUROPEAN INSTITUTIONS* (1973).

² The European Coal and Steel Community (E.C.S.C.), established by the Treaty of Paris, April 18, 1951, *Treaties Establishing the European Communities* [T.E.E.C.] 8 (1973), 261

U.N.T.S. 140; the European Economic Community (E.E.C.), established by the Treaty of Rome, March 25, 1957, T.E.E.C. 163, 298 U.N.T.S. 11; the European Atomic Energy Community (Euratom), established by the Treaty of Rome, March 25, 1957, T.E.E.C. 507, 298 U.N.T.S. 167.

³ See Mok, *Europees economisch strafrecht*, 4 DELIKT EN DELINKWENT 268, 272 (1974).

⁴ For the institutional aspects, see generally A. PERRY & S. HARDY, E.E.C. LAW (1973).

⁵ See generally Dumon, *La notion de 'disposition directement applicable' en droit européen*, 1968 CAHIERS DE DROIT EUROPEEN [C. DE D.E.] 369; M. MARESCAU, DE DIRECTE WERKING VAN HET EUROPESE GEMEENSCHAPSRECHT (1978); H. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES § 145 (1979).

⁶ Although most nations organized as federations lack a harmonized criminal law, a certain integration of the criminal procedure of the various states usually exists. For example, acts of procedure and judicial proceedings of one state of the federation are in general given full faith and credit in the other states, and the principle on non-extradition of nationals is usually not applicable. See Johannes, *Das Strafrecht im Bereich der Europäischen Gemeinschaften*, 1 EUROPARECHT 67 (1968); Mok, *supra* note 3, at 272.

⁷ See *infra* text accompanying notes 13-20.

⁸ See L. Tindemans, *Report on European Union*, BULL. EUR. COMM. (Suppl. 1/76); Charpentier, *La coopération politique entre les états membres des Communautés européennes*, 25 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 753 (1979) P. DE SCHOUTHEETE, LA COOPERATION POLITIQUE EUROPEENNE (1980).

⁹ For the definition of this term, see *infra* text accompanying note 63.

¹⁰ See Stein, *Die Bekämpfung des Terrorismus im Rahmen der Mitgliedstaaten der Europäischen Gemeinschaften*, 1980 ZEITSCHRIFT FÜR AUSLÄNDISCHE OFFENTLICHES RECHT AND VOLKERRECHT 312-18.

¹¹ A. Bossard, *L'entraide policière européenne*, Report submitted to the national section of the International Association of Penal Law at its Colloquium on the "espace judiciaire européen" 17 (Nice, October, 1980).

¹² It is assumed that most of the readers are non-Europeans and as such not directly familiar with the technicalities of the law of the European Communities; therefore, only the fundamental issues are discussed and the more technical aspects of the problem are omitted.

¹³ See COMMISSION OF THE EUROPEAN COMMUNITIES EIGHTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES § 145 (1974), for the view of the Commission; for that of the European Parliament, see De Keersmaeker, *Report Drawn up on Behalf of the Legal Affairs Committee on the Relationship between Community Law and Criminal Law*, 1976-1977 EUR. PARL. DOC. (No. 531) 7 (1976).

¹⁴ According to Mr. Bel, Head of Division, Commission of the Communities, the choice was deliberate. See his discussion at a colloquium held in 1968 at the Université Libre de Bruxelles published in DROIT PENAL EUROPEEN 232 (1970).

¹⁵ De Keersmaeker, *supra* note 13, at 12-13.

¹⁶ See Van Binsbergen, *Le droit pénal des communautés européennes* in DROIT PENAL EUROPEEN 203, 209; Rigaux, *Sur la route du droit pénal européen* 88 JOURNAL DES TRIBUNAUX 53, 56 (1973); Van Acker, *Communautaire sanctionering van particuliereu: een onderzoek naar sancties van burgerrechtelijke en administratieve aard* 1 (1981) (unpublished doctoral dissertation).

¹⁷ The Treaty establishing the European Defense Community was signed on February 27, 1952 by Belgium, France, the German Federal Republic, Italy, Luxembourg and the Netherlands. It never entered into force because the French Assemblée Nationale refused to ratify it. For the penal law aspects of the Treaty and its additional protocols, see Gillissen, *L'application des lois pénales aux militaires à l'étranger, dans les rapports intra-européens*, in DROIT PENAL EUROPEEN 299; Jescheck, *Das Strafrecht der Europäischen Verteidigungsgemeinschaft*, 1953 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTOWISSENSCHAFT 122.

¹⁸ See A. PARRY & S. HARDY, *supra* note 4. Cf. Megret, *Les Conseils* in DROIT DES COMMUNAUTÉS EUROPÉENNES 221 (1969).

¹⁹ This aspect was studied in depth at a colloquium held October 25, 1979 at the University of Parma, Italy. The reports are published in DROIT COMMUNAUTAIRE ET DROIT PÉNAL (1981): deCocq, *Le conflit entre la règle communautaire et la règle pénale interne*, at 3; Hartley, *L'impact du droit communautaire sur le processus pénal*, at 34; Pedrazzi, *Droit communautaire et droit pénal des états membres*, at 49; Capelli, *Directives communautaires et droit pénal des états membres*, at 93.

²⁰ This is true provided the Community rule has "direct effect." See M. MARESCEAU, *supra* note 5; H. SCHERMERS, *supra* note 5, at §§ 158, 175; deCocq, *supra* note 19, at 4.

²¹ Pedrazzi, *supra* note 19, at 49, 53.

²² *Id.* Cf. deCocq, *supra* note 19, at 31.

²³ Criminal Proceeding Against Casati, 1981 E. Comm. Ct. J. Rep. 2595 (Preliminary Ruling).

²⁴ *Id.* at 2618.

²⁵ 1977 E. Comm. Ct. J. Rep. 2261.

²⁶ *Id.* at 2284. For other cases making this point, see Pietia di Milano v. Watson, 1976 E. Comm. Ct. J. Rep. 1185; Donckerwolcke v. Procureur de la République, 1976 E. Comm. Ct. J. Rep. 1921 (Preliminary Ruling); Criminal Proceedings Against Sagulo, 1977 E. Comm. Ct. J. Rep. 1495.

²⁷ Olmi, *La sanction des infractions au droit communautaire*, in DROIT COMMUNAUTAIRE ET DROIT PÉNAL 168 (1981).

²⁸ See Mari, *Quelques réflexions sur la "mesure excessive" de la sanction pénale par rapport au droit communautaire*, in DROIT COMMUNAUTAIRE DROIT PÉNAL 164-165.

²⁹ For an analysis of relevant Court case law see *id.* at 158-166; Pedrazzi, *supra* note 19, at 45. Cf. Mertens de Wilmars, *L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers*, 1981 CAHIERS DE DROIT EUROPEEN 379, 403.

³⁰ ". . . With regard to capital movements and transfers of currency which the Member States are not obliged to liberalize under the rules of Community law, those rules do not restrict Member States' power to adopt control measures and to enforce compliance therewith by means of criminal penalties." 1981 E. Comm. Ct. J. Rep. at 2619.

³¹ Article 194(1) of the Euratom Treaty, *supra* note 2, reads:

The members of the institutions of the Community, the members of committees, the officials and other servants of the Community and any other persons who by reason of their duties or their public or private relations with the institutions or installations of the Community or with Joint Undertakings are called upon to acquire or obtain cognizance of any facts, information, knowledge, documents or objects which are subject to a security system in accordance with provisions laid down by a Member State or by an institution of the Community, shall be required, even after such duties or relations have ceased, to keep them secret from any unauthorised person and from the general public.

Each Member State shall treat any infringement of this obligation as an act prejudicial to its rules on secrecy and as one falling, both as to merits and jurisdiction, within the scope of its laws relating to acts prejudicial to the security of the State or to disclosure of professional secrets. Such Member State shall, at the request of any Member State concerned or of the Commission, prosecute anyone within its jurisdiction who commits such an infringement (emphasis added).

³² Statute of the Court of Justice of the E.E.C., Apr. 17, 1957, T.E.E.C. 699, 701, 709, 298 U.N.T.S. 147, 148, 153; Statute of the Court of Justice of the E.C.S.C., Apr. 18, 1951, arts. 3, 28, T.E.E.C. 675, 678, 688-89, 261 U.N.T.S. 247, 259-60; Statute of the Court of Justice of the Euratom, Apr. 17, 1957, arts. 3, 28, T.E.E.C. 715, 719, 728, 298 U.N.T.S. 256, 257, 263.

³³ Article 3 reads:

The judges shall be immune from legal process. They shall continue to benefit from such immunity after their functions have ceased for all acts done by them in their official capacity, including words spoken or written. The Court, in plenary session, may suspend this immunity. *Only a court competent to judge the members of the highest national judiciary in each Member State shall have jurisdiction in criminal proceedings against judges whose immunity has been suspended.* (Emphasis added.)

Statute of the Court of Justice of the E.E.C., *supra* note 32, art. 3.

34 Article 27 reads:

Each Member State shall regard any violation of an oath by a witness or expert as if the same offense had been committed before a national Court dealing with a case in a civil proceeding. When the Court reports such a violation the Member State concerned shall prosecute the offender before the competent national court.

Id. art. 27.

35 For a thorough analysis of this problem, see Johannes, *supra* note 6, at 65-98.

36 This is according to the Commission of the European Communities. However, there may be cases in which member states have initiated prosecution without a previous request by the Commission or by another member state. For one such example, see Johannes, *supra* note 6, at 88 (Germany initiated prosecution for breach of Euratom secrets).

37 Johannes, *supra* note 6, at 70.

38 *Id.* at 81.

39 *Id.* See also Bricola, *Alcune osservazioni in materia di tutela penale degli interessi delle comunità europee*, in *PROSPETTIVE PER UN DIRITTO PENALE EUROPEO* 189-219 (1968).

40 For a recent study of the sanctions of the Communities, see the richly documented doctoral dissertation of Van Acker, *supra* note 16. See generally R. WINKLER, *DIE RECHTSNATUR DER GELDBUSSE IM WETTBEWERBSRECHT DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT* (1971); MASSE, *L'INFRACTION AU LIBRE JEU DE LA CONCURRENCE EN DROIT INTERNATIONAL* (1977); W. BRUNS, *DER STRAFRECHTLICHE SCHUTZ DER EUROPÄISCHEN MARKTORDNUNGEN FÜR DIE LANDWIRTSCHAFT* (1980).

41 Van Acker, *supra* note 16, at 304-05, notes the difference in approach according to the nationality of the author: for example, French writers tend to think in terms of "administrative" sanctions whereas German scholars label the E.C. prohibitions as "Ordnungswidrigkeiten" which, under German national law, belong to the criminal law. She further observes that there is a tendency for specialists of certain disciplines either to widen or to shield the scope of their respective branches by either advocating or opposing a recognition of the penal character of Community sanctions.

42 See *supra*, text accompanying notes 13-18.

43 Council Reg. No. 17/62, art. 15, para. 4, 1962 J.O. Comm. Eur. 210 (1962) (Legislation); *cf.* Council Reg. No. 1017/68, art. 22, para. 4, 11 O.J. Eur. Comm. (No. L 175) 11 (1968) (Legislation); Council Reg. No. 11/60, art 19, 1960 J.O. Comm. Eur. 1126 (1960).

44 See C. LOMBOIS, *DROIT PENAL INTERNATIONAL* 189 (2d ed. 1979). *Cf.* Legros, *La pénétration du droit pénal européen dans la justice répressive belge*, in *L'AMELIORATION DE LA JUSTICE REPRESSIVE PAR LE DROIT PENAL EUROPEEN* 39 (1970); Melchior, *Contribution à l'étude de la sanction des infractions aux règlements de la C.E.E. particulièrement en matière d'organisation des marchés de produits agricoles*, in *1 LES FRONTIERES DE LA REPRESSION* 328 (1974).

45 Van Binsbergen, *supra* note 16, at 204.

46 For an analysis see Van Acker, *supra* note 16, at 304; R. WINKLER, *supra* note 40, at 50-62.

47 See De Keersmaeker, *supra* note 13, at 10.

48 See the summary in Legros, *supra* note 44, at 41-42.

49 The distinction between penal and administrative sanctions is, as Van Birsbergen, *supra* note 16, at 204, observes, far from being absolute. It may be interpreted differently from state to state, and for the Community legal order itself, it is not of great relevance because there is no clear distinction between the different branches of the law in Community law as there

is in domestic law. See also Van Acker, *supra* note 16, at 307, who advocates the recognition of a special *sui generis* character of European sanctions.

50 Presently, the enforcement of decisions imposing a pecuniary obligation is governed by the rules of *civil* procedure of the member states. See T.E.E.C., *supra* note 2, art. 192.

51 This conclusion is suggested in C. LOMBOIS, *supra* note 44, at 185.

52 Including, *inter alia*, articles 6 and 7 of the European Convention on Human Rights.

53 This is apart from the general, ongoing debate on the question of whether the Communities as such should be bound by the European Convention on Human Rights and whether it would be desirable for the Communities to adhere to this convention. See *The Protection of Fundamental Rights as Community Law Is Created and Developed*, BULL. EUR. COMM. (Supp. 5/76). Cf. L'ADHESION DES COMMUNAUTES EUROPEENNES A LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME (1981). In the meantime, the Court of Justice has, without explicit reference to the European Convention on Human Rights, accepted that "fundamental rights form an integral part of the general principles of law, the observance of which it ensures." *Nold v. Commission*, 1974 E. Comm. Ct. J. Rep. 491, 507 (Second *Nold* Case). Explicit reference to the Convention was made in the *National Panasonic* case. See *infra* note 54.

54 Recent case law, however, seems to go in that direction. In *National Panasonic v. Commission*, 1980 E. Comm. Ct. J. Rep. 2033, 2057, the Court held that the powers of investigation enjoyed by the Commission in competition matters under Regulation No. 17 are compatible with Article 8 of the European Convention on Human Rights.

55 C. LOMBOIS, *supra* note 44, at 185; Legros, *supra* note 44, at 40; Spreutels, *Vers un droit pénal international des affaires?*, 96 JOURNAL DES TRIBUNAUX 189 (1981). Cf. Goffin, *La jurisprudence de la Cour de Justice sur les droits de la défense*, 1980 CAHIERS DE DROIT EUROPEEN 127.

56 Cf. Van Acker, *supra* note 16, at 309; Vogler, *Bemühungen um eine Europäische Strafrechtsvereinheitlichung*, in ZBORNIK 579 (1978).

57 Spreutels, *supra* note 55, at 189.

58 There is a controversy about the scope of this category, the question being whether the Council of the Communities has a general competence to introduce sanctions (the broad interpretation of art. 172 of the E.E.C. Treaty), or if this competence is limited to those cases which derive directly from the treaties (the narrow interpretation of the same article). For a broad interpretation, see Mulder, *Europées Recht en Internationaal Strafrecht*, 1962 SOCIAAL EKONOMISCHE WETGEVING 642; Olmi, *supra* note 27, at 169. For a narrow interpretation, see Pedrazzi, *supra* note 19, at 51; De Keersmaeker, *supra* note 13, at 13.

59 See T.E.E.C., *supra* note 2, art. 5.

60 See *supra* text accompanying notes 13-18.

61 See generally Johannes, *Zur Angleichung des Straf und Strafprozessrechts in der Europäischen Wirtschaftsgemeinschaft*, 83 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 531 (1971); Allen, *Criminal Offenses Against the Law of the European Community*, 11 COMMON MKT. L. REV. 183 (1974) (summarizing the Johannes article); Pedrazzi, *Il ravvicinamento delle legislazioni penali nell'Ambito della Comunità Economica Europea*, in PROSPECTIVE PER UN DIRITTO PENALE EUROPEO 459 (1968). Mulder, *supra* note 58, has proposed the idea of a Community regulation concerning the procedure for the enforcement of sanctions. Cf. Mulder, *Handhaving van Europees Economisch Recht*, in SPECULUM LANGEMEIJER 345 (1973). See also Vogler, *supra* note 56.

62 See De Keersmaeker, *supra* note 13, at 19-23.

63 For the delimitation of the concept "economic crime," see Tiedemann, *Phenomenology of Economic Crimes*, in CRIMINOLOGICAL ASPECTS OF ECONOMIC CRIMINALITY 9, 15 STUDIES ON CRIMINOLOGICAL RESEARCH (1977); COUNCIL OF EUROPE, REPORT OF THE EUROPEAN COMMITTEE ON CRIME PROBLEMS ON ECONOMIC CRIMES (1981).

64 See generally Mulder, *supra* note 58, at 360. The real scope of this lacuna still needs to be examined. The Commission of the Communities does not seem to be convinced of its very

existence. See Olmi, *supra* note 27, at 171, (assistant director at the legal service of the Commission). So far, however, no systematic study exists.

65 This solution was recommended by Mr. Bel of the Commission of the Communities, *supra* note 14. For examples of such national solutions, see Melchior, *supra* note 44, at 346-47; Bigay, *L'Application des règlements communautaires en droit pénal français*, 1971 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 53.

66 See *supra* text accompanying notes 31-39.

67 *Id.*

68 *Id.*

69 See also Van Binsbergen, *supra* note 14, at 209-13.

70 The issue is strongly debated, however. The problem mainly lies in the question of what legal foundation can be found for such legislation under Community law. For a discussion of the different possibilities, see Mok, *supra* note 3, at 272. See also Bricola, *supra* note 39, at 212.

71 See *infra* text accompanying notes 100-120.

72 See generally Trousse, *Le Règlement au plan européen des compétences législatives et judiciaires des états en matière pénale*, in DROIT PENAL EUROPEEN 387 (1970).

73 Some states, including the German Federal Republic, Belgium and France, also accept the principle of "passive personality," which allows them, under certain circumstances, to prosecute offenses committed abroad against their nationals.

74 See *supra* text accompanying note 63.

75 See generally Lew, *The Extraterritorial Criminal Jurisdiction of the English Courts*, 27 INT'L & COMP. L.Q. 168 (1978).

76 This term means that the crime committed should be punishable under the laws of both the state of commission and the state of prosecution. As "economic crimes" committed in one member state often do not fall within the definitional scope of the corresponding crime in another state, see *supra* text accompanying notes 63-67, the condition of double criminality is, in many cases, unfulfilled.

77 For example, in Belgium the personality principle applies only to crimes and *délits*, not to *infractions*. See Titre préliminaire du Code d'Instruction Criminelle, art. 7 (1878). A comparable rule exists in France and the Netherlands. See generally Enschede, *La compétence personnelle dans les législations de l'Europe occidentale*, in LE DROIT PENAL INTERNATIONAL 38 (1965).

78 Cf. Titre préliminaire du Code d'Instruction Criminelle, *supra* note 77, art. 7.

79 *Id.*

80 For a fresh analysis, see Mok & Cuk, *Toepassing van Nederlands strafrecht op buiten Nederland begane delicten*, 101 HANDELINGEN DE NEDERLANDSE JURISTENVERENIGING 87 (1980).

81 *Id.* at 135.

82 Including piracy, war crimes, hijacking, crimes against internationally protected persons, etc. See generally M. Bassiouni, A DRAFT INTERNATIONAL CRIMINAL CODE 1-36 (1980).

83 There seems to be, however, a growing tendency toward the international suppression of certain "economic crimes." Some international conventions on this subject are in the process of being drafted, and it is possible that they will adopt the "universality principle" for the crimes in question. See, e.g., the 1977 Draft Convention on Bribery of Public Officials, E.C.O.S.O.C., Report of the Secretariat, Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions, U.N. Doc. E/A.C. 64/3. See also Crime and Abuse of Power: Offenses and Offenders Beyond the Reach of the Law?, U.N. Doc. A/Conf. 87/6; Council of Europe, Recommendation No. R(81)12 of the Committee of Ministers to Member States on Economic Crimes (June 25, 1981).

84 See Johannes, *supra* note 62, at 533-36 for a number of striking examples. See also Allen, *supra* note 62, at 183-185.

85 Johannes, *supra* note 62, at 556.

86 Mulder, *supra* note 58, at 362.

87 Mok, *supra* note 3, at 273.

88 See *infra* text accompanying notes 89-129.

89 The Council of Europe has developed a network of treaties on cooperation in criminal matters covering all the procedures referred to, except for the transfer of sentenced persons, the treaty on which is still in the process of being drafted. Only the Convention on Extradition, Dec. 13, 1957, 1 European Conventions and Agreements [E.C.A.] 173, Europ. T.S. No. 24, and the Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, 1 E.C.A. 283, Europ. T.S. No. 30, have been ratified by a great number of states. The status of ratification of the other treaties reflects the reluctance of states to accept these forms of cooperation in criminal matters. See F. THOMAS, *DE EUROPESE RECHTSHULPVERDRAGEN IN STRAFZAKEN* (1980); Mok, *Les conventions européennes d'entraide judiciaire en matière pénale—possibilités et limites*, 58 *REVUE DE DROIT PENAL ET DE CRIMINOLOGIE* 463-501 (1973).

90 For a general survey of the efforts of the Council of Europe in the penal field, see THOMAS, *supra* note 89; Golsong, *L'effort du Conseil de l'Europe en matière répressive*, in *L'AMELIORATION DE LA JUSTICE REPRESSIVE PAR LE DROIT PENAL EUROPEEN*, 107-121 (1970); Velu, *Le rôle du Conseil de l'Europe dans l'élaboration du droit penal européen* 84 *JOURNAL DES TRIBUNAUX* 721-731 (1969).

91 The major reason for this is that the sanction usually contemplated for extraditable crimes, imprisonment, generally does not apply to economic crimes, which, in most cases, call only for pecuniary sanctions. Another reason why extradition would not be appropriate is that economic crimes are often committed by corporations.

92 See *supra* text accompanying notes 63-88.

93 The European Convention on the Transfer of Criminal Proceedings, May 15, 1972, 3 E.C.A. 7, Europ. T.S. No. 73, has been ratified by only one member state of the European Communities, Denmark. The European Convention on Extradition, *supra* note 89, provides at article 6(2) for transfers of proceedings, but only if extradition has been refused because of the nationality of the offender. The Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, Belgium-Luxembourg-Netherlands, art. 42, sets down a general provision for the transfer of proceedings.

94 Mulder, *supra* note 58, at 362.

95 If the sentence is imprisonment, extradition would be appropriate, but is often excluded for one or more of the reasons listed above. If it is a pecuniary sanction and the offender has no seizable property in the territory of the state where the sanction was inflicted, it will be materially impossible for the latter to obtain satisfaction if the offender does not voluntarily comply.

96 The European Convention on the International Validity of Criminal Judgments, May 28, 1972, 2 E.C.A. 426, Europ. T.S. No. 70, has been ratified by only one E.C. state, Denmark. See generally Grützner, *Les effets dans un état européen des décisions pénales rendues dans un autre état européen*, in *DROIT PENAL EUROPEEN*, 357-384 (1970); Dumon, *Les effets internationaux des jugements répressifs*, in *ACTES DU IIE CONGRES INTERNATIONAL DES MAGISTRATS* 211 (1963).

97 Croft, cited by Spreutels, *supra* note 55, at 182.

98 This effort was inspired by the European Convention on the Transfer of Criminal Proceedings, *supra* note 93; the Benelux Treaty Concerning Cooperation in the Field of Customs and Excises, Dec. 5, 1952, 1953 *Tractatenblad van het Koninkrijk der Nederlanden* [T.K.N.] No. 388, the Benelux Treaty on cooperation concerning import, export, and transit, Mar. 16, 1961, 1961 T.K.N. No. 44; and the Benelux Draft Treaty concerning administrative and penal cooperation with respect to arrangements relating to the realization of the purposes of the Benelux Economic Union, Apr. 29, 1969, 1969 T.K.N. No. 124.

99 See generally Van Binsbergen, *supra* note 16, at 214; Johannes, *supra* note 61, at 539; Mok, *supra* note 3, at 277; Mulder, *Europees strafrecht-Verslag van een trieste geschiedenis*, 1979 *SOCIAAL EKONOMISCHE WETGEVING* 466.

¹⁰⁰ Written question No. 196/68, 12 O.J. EUR. COMM. (No. C 5) 1 (1969); Written question No. 596/74, 18 O.J. EUR. COMM. (No. C 108) 1 (1975). For more references, see Calewaert, *Naar en Europees Strafrecht?*, in LIBER AMICORUM HERMANN BEKAERT 1 n.3 (1977).

¹⁰¹ See De Keersmaeker, *supra* note 13, at 17.

¹⁰² Opinion of 19 March 1975 (unpublished).

¹⁰³ 19 O.J. EUR. COMM. (No. C 222) 2 (1976).

¹⁰⁴ The legal foundation for the new drafts as proposed by the Commission is drawn from article 236 of the E.E.C. Treaty (and the corresponding articles 96 of the E.C.S.C. Treaty and 204 of the Euratom Treaty). Accordingly, the idea is to have the three treaties (E.E.C., E.C.S.C. and Euratom) amended and to have the drafts annexed to the treaties in the form of additional protocols. In proposing this procedure, the Commission closely followed the opinion of the Court.

¹⁰⁵ The full title of this Protocol reads:

Protocol on the protection under criminal law of the financial interests of the Community and the prosecution of infringements of the provisions of the Treaty establishing the European Coal and Steel Community, of provisions adopted by its institutions in pursuance thereof or of provisions laid down by Member States by law, regulation or administrative action for the implementation thereof.

The Protocol may be found at 19 O.J. EUR. COMM. (No. C 222) 5 (1976).

¹⁰⁶ The full text of these articles reads as follows:

Article 14: The provisions of the criminal law of each Member State which relate to infringements committed with intent to cause, or actually causing the unlawful reduction of its revenue, or, the unlawful collection of its public subsidies, refunds or financial aid, shall apply in like manner to acts or omissions committed with intent to cause, or actually causing the unlawful reduction of revenue forming part of the Communities' own resources, or the unlawful collection of public subsidies, refunds, financial aid or other moneys financed directly or indirectly from the budget of the Communities.

Article 15: The provisions of the criminal law of each Member State which relate to the production of a false document or to the making of a false declaration to any authority having a public function shall, in relation to documents or declarations required for the purposes of applying or executing the provisions referred to in Article 1, apply in like manner to the production of any similar false document or the making of any similar false declaration to any Community authority having a similar function.

Id. at 6.

¹⁰⁷ See art. 2, which reads:

Any Member State, having jurisdiction under its own law, which considers that it is unable, and that extradition would not enable it, itself to prosecute the author of an infringement referred to in Article 1, may request the Member State in which the accused person habitually resides or the Member State in which such person is present to bring the proceedings in respect of the infringement in question (emphasis added).

Id. at 5.

¹⁰⁸ *Id.*, art. 3.

¹⁰⁹ *Id.*, arts. 14, 15, quoted *supra* note 106.

¹¹⁰ *Id.* Cf. art. 2, quoted *supra* note 107.

¹¹¹ *Id.*, arts. 11-13.

¹¹² See *id.*, art. 18, which reads:

The provisions of Article 177 of the Treaty establishing the European Economic Community concerning the jurisdiction of the Court of Justice to give preliminary rulings and the corresponding provisions of the Protocol on the Statute of the Court of Justice of the European Economic Community shall apply to this Protocol.

Where a matter is referred to the Court of Justice by virtue of the first paragraph and if the accused is in custody, the Court of Justice shall give its ruling within a period of three months following the notification of the decision of the national court which suspends its proceedings.

For this purpose the rules of procedure may provide for a simplified procedure in urgent cases reducing the length of the time limits set, including that of Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community.

113 The Protocol may be found at 19 O.J. EUR. COMM. (No. C 222) 15 (1976).

114 The relevant articles read:

Article 3: (1) The provisions of the criminal law of each Member State which penalize the commission by officials of that State of acts constituting: (a) acceptance of bribes; (b) forgery, uttering forged instruments, and making false statements; (c) misappropriation of funds; shall apply equally to officials of the European Communities. (2) In the case of misappropriation of funds, paragraph 1 shall apply only to the misappropriation of public funds.

Article 4: The provisions of the criminal law of each Member State which relate to breach of professional secrecy shall apply also to breaches of professional secrecy committed by: (a) officials and former officials of the European Communities, (b) persons on whom a competent department of the European Communities has imposed a formal obligation of secrecy which has been accepted individually by the person concerned.

Article 5: The provisions of the criminal law of each Member State which relate to the offering of bribes to officials of that State and the provisions thereof which govern the protection of such officials acting in the performance of their duties shall apply equally to protect officials of the European Communities.

Id.

115 *Id.*

116 *Id.*, art. 6.

117 *Id.*, art. 7.

118 *Id.*, art. 8.

119 P. Krieg, Report Drawn upon Behalf of the Legal Affairs Committee on the proposals from the Commission of the European Communities to the Council for (1) a draft for a treaty amending the treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of those treaties; (2) a draft for a treaty amending the Treaty establishing a single Council and a single Commission of the European Communities so as to permit the adoption of common rules on the liability and protection under criminal law of officials and servants of the European Communities, 1978-1979 EUR. PARL. DOC. (No. 498) 12, 20 (1979). For an analysis, see Rinoldi, *Domaine communautaire et dispositions pénales: deux projets de traités*, in *DROIT COMMUNAUTAIRE ET DROIT PENAL* 223 (1981). For the subsequent resolution on the matter, see 22 O.J. EUR. COMM. (No. C 39) 30 (1979).

120 The author wishes to thank Mr. V. Scordamaglia, Head of the Division of Intellectual Property at the Council of the Communities and Secretary of the ad hoc Working Group, for kindly informing her of the latest developments.

121 Dec. 4, 1979, 4 E.C.A. —, Europ. T.S. No. —.

122 European Convention on the Suppression of Terrorism, Jan. 27, 1977, 4 E.C.A. —, Europ. T.S. No. 90. For an analysis, see Stein, *supra* note 10; Charpentier, *Vers un espace judiciaire européen*, 24 *ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL* 927 (1978).

123 *Le Monde*, Dec. 1, 1979, at 16, col. 5. See also Thomas, *L'espace judiciaire européen "Een alibi?"*, 11 *DELICT EN DELINKWENT* 543-53 (1981).

124 The original idea was the development of a network of conventions which would be more flexible than those of the Council of Europe in the sense that the grounds for refusing extradition and the other forms of cooperation would be restricted to such an extent that the instruments would in practice operate almost automatically. This idea was predicated on the assumption that the member states of the European Communities, being smaller in number and politically more cohesive, would be able to develop closer cooperation machineries as compared to the Council of Europe. This assumption proved to be wrong in the course of the negotiations on the draft convention on cooperation in penal matters. There, it appeared that the same contradictions and discrepancies between civil law countries and common law countries, which had determined the final drafting of the Council of Europe's conventions, also existed within the Communities, and that consequently, it was practically impossible to work out instruments that would go beyond that which already had been realized within the Council of Europe. See Van den Wyngaert, *L'espace judiciaire européen: vers une fissure au sein du Conseil de L'Europe?*, 61 REVUE DE DROIT PENAL ET DE CRIMINOLOGIE 511-543 (1981).

125 *Id.*

126 See Charpentier, *supra* note 122; Thomas, *supra* note 123.

127 See Charpentier, *supra* note 122; Thomas, *supra* note 123.

128 Cf. Van den Wyngaert, *supra* note 124; Charpentier, *supra* note 122; Thomas, *supra* note 123.

129 See *supra* note 53.

130 De Keersmaeker, *supra* note 13, at 7.

131 See Thomas, *supra* note 123.

132 Mulder, *supra* note 58, at 364.