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INTERNATIONAL COOPERATION IN THE EUROPEAN COUNTER-TERRORISM SYSTEM

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ABSTRACT

This paper describes and analyzes the counter-terrorism cooperation structure set up by European countries, analyzing the Bataclan Case in order to illustrate this structure's mode of operation. Terrorism is no longer an exclusively national problem, and requires concerted responses from International Law. European integration has created a complex system of mechanisms for judicial cooperation in criminal matters, besides common authorities that facilitate said cooperation. The counter-terrorism system of the European Union is supported by Europol and Eurojust, bodies responsible for police and judicial cooperation. Both have a wide experience in fighting serious cross-border crime. The system can also count on instruments such as the European Investigation Order and the European Arrest Warrant, aimed at reducing bureaucracy in cooperation mechanisms and ensuring swift criminal investigations and prosecutions. The Bataclan Case demonstrates the operation of this system and highlights the importance of joint and cooperative action in the fight against terrorism. This work employs the inductive method and uses official decisions as its primary sources.

Keywords: Terrorism. The Bataclan Case. European Union.

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INTRODUCTION

The terrorist threat plagues the international community, and has long surpassed the sphere of state criminal law, becoming a matter of international concern. The magnitude of the reaction to the September 11 attacks was such that terrorism became a major source of disruption for international peace and security. In this respect, terrorist acts became comparable to armed aggression. The day after 9/11, the UN Security Council granted the United States carte blanche with S/RES/1368 (2001). This resolution classifies the 9/11 attacks, as well as any act of international terrorism, as a threat to international peace and security, and expressly recognizes the right to self-defense. The "war on terror" was no mere metaphor. According to international law, the terrorist attacks of September 11 were true acts of war.

Since then, several international organizations have set up systems, bodies and mechanisms to prevent or fight terrorism. Naturally, regional integration and the consequent cross-border freedom between EU member states (as well as other geopolitical characteristics of Europe) have emphasized the need for instruments capable of enabling more effective anti-terrorism measures. Due to this close integration between European countries, international organisms and common authorities were established to institute multi-national cooperation in criminal matters. Thus, a hybrid system was created, instituting not only inter-jurisdictional cooperation organisms – a solution typical of Private International Law – but also common bodies – a response more characteristic of Public International Law. These common bodies are the natural development of inter-jurisdictional cooperation mechanisms, as they seek to facilitate the harmonization of national institutions rather than proposing forms of standardization, as is the case with common authorities.

Bodies such as Europol – a police cooperation agency – and Eurojust – a judicial cooperation agency – represent the accumulation of a vast experience in fighting serious transnational crime, and the fight against terrorism is one of their top priorities. In addition, extremely important instruments have been developed for cooperation between Member States. Two examples are the European Investigation Order and the European Arrest Warrant, both of which will be discussed here. While General International Law has long sought – by conventional means and within the UN Security Council – to standardize the fight and prevention of terrorism (going so far as seeking to create a single standard definition of terrorism), in the EU, the system of international cooperation has generated more effective preventive

and repressive measures, while also allowing for diverse treatments of the subject, depending on national legislation.

Thus, the purpose of this article is to carry out a descriptive analysis of the European counter-terrorism system, with an emphasis on international means of cooperation (especially those geared towards criminal matters) and common European bodies. In the end of this article, we illustrate such a system's performance by analyzing the Bataclan Case, which lends itself to a discussion regarding the efforts by Eurojust – with the creation of the first coordination center to deal with a case of terrorism – and Europol – with the creation of the European Counter-Terrorism Centre and of the Taskforce Fraternité, both crucial for the investigations into the Paris attack. For this analysis, the inductive method was employed. Decisions were its primary sources.

2. BRIEF HISTORICAL ANALYSIS

The European counter-terrorism system dates back to 1970. In reaction to increasing attacks by extremist groups from the Middle East, Member States of the old European Community (EC) decided to set up mechanisms for intergovernmental cooperation, so as to strengthen the security system, reducing the likelihood of attacks and shortening reaction time. To this end, the EC's (at the time) nine Member States created a regional counter-terrorism program, developing a two-level – legal and operational – counter-terrorism policy (BURES and AHERN; 2000, p. 188).

At the first level, the policy was aimed at ensuring the full applicability of international terrorism treaties and conventions in each member country. This was aimed at harmonizing and coordinating the public stances of its members regarding terrorism.

The European Council, meeting in Strasbourg on 27 January 1977, approved the European Convention on the Suppression of Terrorism. The convention's initial considerations highlight the growing fear among European countries, as evidenced in the following excerpt from the document's preamble:

> The member States of the Council of Europe, signatory hereto,
> Considering that the aim of the Council of Europe is to achieve a greater unity between its members;
> Aware of the growing concern caused by the

> increase in acts of terrorism; Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment; Convinced that extradition is a particularly effective measure for achieving this result … (EUROPEAN UNION. European Convention on the Suppression of Terrorism.)

Among other measures, it was thus determined that infractions included in the field of application of several international treaties could no longer be considered political. Among these international treaties were the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation . Due to these measures, Member States would be prevented from granting political asylum to offenders suspected of committing the felonies described in the relevant treaties. They would also be unable to avoid extraditing these offenders on these grounds alone.

In 1979, the Member States approved the Dublin Convention. It sought to harmonize EC asylum policies, adopting standard criteria and procedures, and to ensure full and uniform application of the European Convention on the Suppression of Terrorism.

According to Bures and Ahern, the implementation of the treaties was hampered by several Member States, who refused to ratify both the European Convention on the Suppression of Terrorism and the Dublin Convention on asylum. This was mainly because they feared that dealing with terrorism on an independent and intergovernmental basis would frustrate their autonomy (BURES and AHERN: 2000, p. 189). This obstacle was only overcome in the mid-1980s, as a result of the acute impact of the various terrorist attacks suffered by the Member States at the time. The consequent increase in inter-state integration led to a significant development of the European counter-terrorism policy at the operational level.

In discussing this suject, Bures and Ahern (2000, p. 189) underline the importance of the TREVI Group (*Terrorisme, Radicalisme, Extrémisme et Violence Internationale*), defined by the European Community as a forum for discussion and cooperation in law-enforcement and intelligence matters. The TREVI Group was formed during meetings held in Rome in December 1975, and consisted of Ministers and senior officials from the Ministries of Justice of the EC Member States. The inter-governmental effort carried out by the

Member States and the group's meetings led to the Area of freedom, security and justice, which later became known as the third pillar of the Maastricht Treaty.

Moreover, the TREVI Group was responsible for further developing international cooperation, initiating regular and systematic work aimed at implementing existing treaties on terrorism. Its activities included the exchange of intelligence, the compilation of lists of suspected terrorists (blacklists), the analysis of international treaties, the study of specific terrorist groups and of the problems faced by countries in the region in regards to border control, among other functions (BURES and AHERN: 2000, p. 189).

The Group made several breakthroughs and has been considered by many as a successful forum when it comes to database security and the exchange of intelligence on international terrorism (LODGE: 1989, p. 28-47). With the approval of the Maastricht Treaty and the creation of the European Union in February 1992, the TREVI Group gave rise to the Justice and Home Affairs Council (JHA).

Thus, the Maastricht Treaty solidified the EU's instance on international terrorism, demonstrating its aversion to this criminal practice and even indicating means of international cooperation for European countries to prevent and fight it. As argued by Bures and Ahern (2000, p. 190):

> The Maastricht treaty specifically referred to terrorism as a serious form of crime to be prevented and combated by developing common action in three areas:
>
> - Closer cooperation between police forces, customs authorities, and other competent authorities, including Europol;
> - Closer cooperation among judicial and other competent authorities of EU member states; and
> - Approximation, where necessary, of rules on criminal matters.

Since then, various mechanisms have been developed within Europol and Eurojust to facilitate cooperation in the prevention and suppression of terrorist attacks. In this sense, the structure of the European Union is a key factor for the success of these cooperative measures, as France points out in the following passage:

> The institutional structure of the European Union allows for a level of counter-terrorism cooperation unmatched by other regional organizations. This is why greater emphasis has been placed on efforts within this environment. In criminal cooperation, for example, there are instruments such as the European Arrest Warrant, the Europol and the Eurojust, all of which have important functions. (FRANCE: 2017, p. 51, our translation)

After terror struck the world with the September 11 attacks, the European Council developed the European Arrest Warrant to ensure mutual recognition of judicial decisions and speed up the transfer of terrorism suspects to the applicant authority.

According to Helmut Satzger and Frank Zimmermann (2010, p. 410–411), the European Council created the Area of freedom, security and justice at a meeting held in Tampere in 1999. It was an important step towards regional integration between EU Member States. The meeting counted among the first to openly defend the need to abolish the formal extradition procedure. However, the effective optimization of the extradition procedure only occurred with the creation of the European Arrest Warrant in 2002.

Beyond judicial cooperation, Europol is another very important mechanism for EU counter-terrorism. It acts as a centralizing unit for Member States' law enforcement agencies, with the main goal of promoting effective cooperation between member countries' police authorities, so as to prevent, investigate and fight international crime. (FRANCE: 2017, p. 52)

To answer to the 2004 Madrid attacks, Europol established the Counter Terrorist Task Force. Acting as an intelligence sector, its main functions were, according to Kaunert (2010, p. 656): (1) to collect relevant counter-terrorist information and intelligence, (2) to analyze this information from an operational and strategic point of view, (3) to formulate threat assessments, (4) to request the opening of investigations and share information with external authorities.

The EU's insertion in international cooperation efforts against crime is the focus of the European counter-terrorism system. Thus, it will be emphasized in this article, and further analyzed in the sections below.

3. COOPERATION AROUND CRIMINAL MATTERS WITHIN THE SCOPE OF THE EUROPEAN UNION

European Union's cooperation in criminal matters has developed as a response to attacks on its Member States' territories. The greater the level of regional integration and cross-border freedom, the greater the need for instruments capable of enabling this cooperation.

The main normative precedent for strengthening cooperation in criminal matters in the EU is the 1985 Schengen Agreement between Germany, Belgium, France, Luxembourg, and the Netherlands. Its aim was to establish a common area for the free movement of persons (EUROPEAN UNION. Official Journal L 239, 09/22/2000 p. 0013 – 0018). Such a broad freedom of movement required measures to prevent the distortion of the regional integration effort. As a result, the Agreement provided for the harmonization of national legislation in respect to certain aspects, establishing several accords regarding police cooperation (Articles 18 and 19 of the Schengen Agreement).

With the broadening of the EU integration process, the need for an expansion of Member States' cooperation models arose. The Maastricht Treaty realized this to a greater extent. The Treaty, which established the foundations of the European Union, developed these models on the basis of three pillars: (i) European communities, (ii) common foreign and security policy and (iii) cooperation in the fields of justice and domestic affairs. Initially, the first pillar was developed in observance to the idea of supranationality[3], while the other two were guided by the principle of cooperation.

This first experience of EU cooperation in criminal matters was very limited. Decisions regarding the adoption of any instruments of cooperation were the sole responsibility of the Council, and had to be unanimously approved, at a ministerial level, by the representatives of the Member States (2010, p. 1163–1164). The initiative to bring the matter before the Council could fall to any Member State or to the Commission itself.

Primarily, the European Union was endowed with three mechanisms to exercise its competence in matters of criminal cooperation, namely: (i) common positions, (ii) joint actions and (iii) conventions. Common positions

[3] Supranationality can be defined on the following bases: a) the existence of decision-making bodies independent of state power, which are thus not subject to its control; (b) the overriding of the unanimity rule and of the consensus mechanism, since decisions – within the powers established by the founding treaty – can be made by a (weighted or unweighted) majority, and (c) under the rule of community law, supranational institutions can have immediate applicability in domestic legal systems and do not require any measures of reception by member states (REIS: 2001, p. 650).

indicated the EU's approach to certain issues. Joint actions aimed at greater coordination between Member States' respective positions. Conventions, on the other hand, established common normative bases in matters important to the EU (2010, p. 116–40). However, this system of criminal cooperation was never successfully developed. It was later modified by the Treaty of Amsterdam.

In establishing the European area of freedom, security and justice, the Treaty of Amsterdam greatly expanded the scope of regional integration between EU countries. At that point, in order to ensure the effectiveness of the European area, cooperation in criminal matters became a major EU objective.

One of the changes brought about by the Amsterdam Treaty was the commonalization of certain issues – related to asylum, immigration, etc. – within the field of justice and domestic affairs. Thus, these issues began to be dealt with outside the scope of criminal cooperation mechanisms. These would go on to be defined in the Treaty on European Union (BORGES: 2010, p. 1165).

However, the most significant change in the area of criminal cooperation was promoted by Article 10, which amended Title V of the Treaty on European Union (provisions related to common security and external policies). This amendment introduced an ideal standard for the action of Member States based on the spirit of loyalty and mutual solidarity, as well as the imperative of abstaining from decision-making contrary to the interests of the Union.

According to Talitha Borges, this normative instrument introduced new mechanisms for criminal judicial cooperation in the EU, as shown in the following excerpt:

> The Council made international agreements in the area of criminal cooperation. Common actions gave way to decisions and framework decisions, so that the EU now had: (1) common positions, (2) decisions, (3) framework decisions and (4) conventions (BORGES: 2010, p. 1165, our translation).

In accordance with Article 34.2 (b) of the Treaty on European Union, framework decisions were the responsibility of the Council, which had to deliberate unanimously. Their primary objective was to homogenize the Member States' national laws, in order to facilitate criminal cooperation on

the field of justice and domestic affairs. Although they did not directly oblige Member States to adopt a certain stance, framework decisions bound them to the intended effect, i.e., homogeneity in public stances regarding certain matters. Decisions differed from framework decisions only in the sense that they established objectives independent from the goal of homogenization.

Common positions were acts adopted unanimously by the European Council and sought to specify a global approach to a specific geographical or thematic issue[4].

An extraordinary session of the European Council in Tampere, decided, among other things, to create Eurojust, and also discussed the creation of the Area of freedom, security and justice. To this end, the Council introduced as principles for the effectiveness of the European area the mutual recognition of judicial decisions and the cooperation in preventing and combating serious crime. Thus, according to the Presidency Conclusions[5]

> 5. The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgements and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved.
>
> 6. People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union (EUROPEAN PARLIAMENT. 1999).

[4] Title V of the Treaty on European Union.

[5] The summary of the conclusions reached during the meetings promoted by the European Council is published in the form of a Presidency Conclusion.

In regard to the principle of mutual recognition of judgments, the Council recommendation placed a greater emphasis on the issue of the formal extradition procedure, which should be "abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 [of the] TEU (EUROPEAN PARLIAMENT. 1999)." Subsequently, with the creation of the European Arrest Warrant, the extradition procedure for cases of serious offenses was considerably simplified.

Cooperation in criminal matters in the European Union underwent other gradual changes until the approval of the Lisbon Treaty, which laid the current cooperative foundations. The Treaty promoted changes in the structure of the European Union and its three pillars. There was also a rapprochement between matters of criminal cooperation and other areas of cooperation, leading to a change in the mechanisms of cooperation around criminal matters. Thus, rather than instruments adopted exclusively to institute this cooperation (such as framework decisions), the rapprochement of cooperation themes brought cooperation around criminal matters into the EU's general cooperation regime.

In this sense, traditional community mechanisms became applicable to cooperation in criminal matters, namely regulations, directives, decisions, recommendations, and opinions.

Regulations are unilateral acts adopted by the EU's institutions – be it the Parliament, the Council or the Commission – with the aim of producing legal effects in general and abstract situations. They are provided for in Article 288 of the Treaty on the Functioning of the European Union (TFEU). As stated in the article, regulations are general, binding in their entirety and directly applicable in all Member States. They are usually adopted when a regime is to be unified among all Member States (BORGES: 2010, p. 1170-1171).

Directives are aimed at achieving a general outcome, and are thus only indirectly binding. Decisions, in turn, are a normative instrument capable of producing effects in both abstract and concrete situations. In accordance with Article 28 of the TFEU, decisions are binding in their entirety and in principle apply to all Member States. However, their application can also exclusively target certain Member States (BORGES: 2010, p. 1170-1171). Finally, as soft law norms, recommendations and opinions are non-binding.

Enhanced cooperation stands out as an important mechanism for

cooperation in criminal matters. It was deepened by the Treaty of Lisbon. This institute allows some Member States to conclude agreements that increase the degree of rapprochement and integration between them. According to Talitha Borges (2010, p. 1166), the idea is that the refusal of some Member States to increase cooperation should not affect the pursuit of closer integration by other Member States.

Article 329.2 of the TFEU sets out the procedure required for enhanced cooperation in matters affecting the common foreign and security policy, as follows:

> 329 2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information. Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

In addition to these mechanisms, the European Union has set up bodies to provide assistance and rapprochement between Member States in criminal matters, in particular with regard to preventing and fighting terrorism, drug trafficking and other types of serious transnational crime. These include the activities of Europol – the police cooperation agency – and Eurojust – the judicial cooperation agency – and the instruments of the European Arrest Warrant and the European Investigation Order, which shall be analyzed below.

3.1. EUROPOL

Europol is the intelligence and law enforcement agency of the European Union. It was set up with the aim of improving "the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime" (Art. 2.1 of EUROPEAN UNION. Europol Convention).

Its first normative source was the 1997 Europol Convention, adopted on the basis of Article K.3 of the Treaty on European Union, and integrated and modified by three additional protocols. This Convention was replaced by Decision 2009/371/JHA, which postulated that the "simplification and improvement of Europol's legal framework can be partially achieved by the establishment of Europol as an entity of the Union, funded from the general budget of the European Union, due to the subsequent application of the general rules and procedures (Decision 2009/371/JHA)."

Decisions 2009/934 /JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA were adopted in order to implement Decision 2009/371/JHA. However, it was with Regulation 2016/794 of the Parliament and the European Council that the European Union Agency for Law Enforcement Cooperation had its shape clearly outlined.

Initially, the Agency's duties were related to the fight against drug trafficking, human trafficking, and the clandestine development of nuclear and radioactive material, among other crimes. The development of counter-terrorism mechanisms and policies came *a posteriori*, but nonetheless remains one of Europol's central objectives.

Its activities are based on international cooperation with the 28 EU Member States. In this regard, it is important to note that Europol does not have any powers or attributions to conduct investigations independently or to arrest suspects. Its primary function is to support the police agencies of each member country with the collection, analysis and dissemination of information and the coordination of police investigations that depend on the integration of police agencies from different countries (EUROPEAN POLICE OFFICE. 2011, p. 3).

Europol's activities fulfill three major roles: (i) that of a support center for police operations; (ii) that of an information center on serious international crime; (iii) that of a center for police expertise (EUROPEAN POLICE OFFICE. 2011, p. 6).

The agency has more than 100 criminal analysts who use integrated systems to process and cross-check data, providing analysis files that can be

used in investigations conducted by national law enforcement agencies and providing them with a range of strategic and operational data (EUROPEAN POLICE OFFICE.2011, p. 6).

In order to enable information exchange to take place quickly and meet the requirements of support and cooperation between countries, Europol maintains the 24/7 Operational Centre, which acts as a point of contact between Member States and the Agency. It receives operational support and information requests from member countries. According to information published by Europol, the Operational Centre provides assistance in over 40,000 cases of serious crime and terrorism per year (PORTAL EUROPOL. About Europol: 2017).

The integrated system at the core of Europol and operated by analysts and criminal experts is known as SIENA (Secure Information Exchange Network Application). SIENA is an intermediary between Europol National Units in each Member State and the European Agency's centralizing team.

Information sharing has three stages: (i) the competent bodies of the Member States create intelligence information and forward it to the Europol National Unit; (ii) The National Unit, in turn, enters this information into the SIENA Data System, so it can be received by the Hague-based Europol centralizing unit; (iii) the centralizing unit processes the data, cross-referencing it with data provided by other countries and performing other necessary processing, and then sends the results to the Member States interested in the investigation – or even to states outside the European Union, such as the United States. These stages are presented in the following organogram:

Figura 1 – Funcionamento do SIENA

Fonte: Serviço Europeu de Polícia, 2011, p. 7.

Although these mechanisms seek to make international cooperation viable, in practice they are not able to provide Member States with the necessary confidence to share intelligence produced within their national police bodies.

According to Bures and Ahern, even after the September 11 attacks and the consequent growth of Europol's operations, the Agency appears to act more as an information-coordinating body than as an operational headquarters (BURES and AHERN: 2000, p. 190-200).

For Bures, there is a certain distrust of Member States' police and intelligence authorities regarding the activities of the European Union Agency for Law Enforcement Cooperation. National authorities fear that sharing investigation data with a supranational body may reduce their sphere of autonomy and authority over the investigated case (BURES; 2016, p. 61).

In addition, the possibility of sharing data collected and processed by Europol with countries that are not part of the European Union's regional approximation agreement also creates insecurity for Member States. In this sense, this mechanism is criticized by many scholars, seemingly due to lacking control and protection of sensitive data[6]. As a result, EU member countries tend to opt for smaller bilateral partnerships. This greatly undermines Europol's field of action.

3.2. EUROJUST

Eurojust is the European Union's Judicial Cooperation Unit

and was set up to "stimulate and improve the coordination of investigations and prosecutions and the cooperation between the competent authorities in the Member States in relation to serious cross-border crime (EUROJUST, 2017. Annual Report 2016)."

Attempts to set up a judicial cooperation unit in criminal matters began in 1998, when the European Judicial Network was established by Decision 98/428/JHA, so the EU could comply with Recommendation 21 of the Action plan to combat organized crime (adopted by the Council in 1997). In 1999 the Council decided to formalize the creation of an Area of freedom, security and justice by means of the Amsterdam Treaty. This strengthened the idea of greater judicial cooperation (BURES: 2010, p. 237–238 and BURES: 2000, p. 200–201).

[6] On this topic, cf.: NINO:2010, p. 64–69; KAUNERT: 2010, p. 656; O'NEILL: 2010: p. 219–224.

As we discussed, Eurojust was first mentioned at the Tampere European Council meeting in 1999, when participants called for the establishment of a judicial cooperation body consisting of prosecutors, magistrates and police officers holding the necessary national prerogatives in each Member State. The Council indicated that the establishment of this body should be finalized by the end of 2001 (BURES: 2010, p. 237–238).

In 2000, the Pro-Eurojust provisional unit was created. It was replaced in 2002 by Eurojust, the latter established by Decision 2002/187/JHA of the European Council. According to Bures, Eurojust became the world's first permanent body for joint work between judicial authorities (BURES: 2010, p. 237–238). The 2001 Treaty of Nice provided Eurojust with new foundations by amending Article 31 of the Treaty on European Union, listing ways in which the European Council could use the judicial cooperation body to promote collaborative ties.

Its structure and internal functioning – including matters concerning decision-making procedures and voting quorums – were delimited by the Council by means of Rules of Procedure 2002/C 286/01, hereinafter referred to as Rules of Procedure of Eurojust.

According to the Rules of Procedure, Eurojust is operationally composed of a College of National Members. Each College Member is entitled to one vote, and all are responsible for Eurojust's organization and operation. This Board is responsible for electing the President and the Vice-Presidents of the judicial cooperation body, who represent Eurojust in their official communications and who convene, chair and conduct all meetings of the College (EUROJUST. Rules of Procedure of Eurojust. 2002/C 286/01).

Eurojust's activity of supporting, cooperating with and coordinating joint investigations of Member States has approximately four phases, which may vary depending on the case's complexity.

In the first, the Member State sends a request for assistance to its Eurojust representative (Art. 13 of the Rules of Procedure of Eurojust. 2002/C 286/01). Subsequently, the representative registers the case and presents it to the Eurojust Board, starting the second phase. The second phase entails operational meetings, also known as Level I Meetings, which are central for Eurojust's decision of taking in a case (Art. 15 of the Rules of Procedure of Eurojust. 2002/C 286/01).

The third phase begins after the acceptance and registration of the case by Eurojust. At this stage, the concerned National Delegations may request a meeting with representatives of other Member States or Eurojust

magistrates, thus setting up a Level II Meeting (Art. 16 of the Rules of Procedure of Eurojust. 2002/C 286/01). At this meeting, the representative of the requesting Member State presents the case and opens the debate on the relevant legal or organizational matters, asking for the support of the agency or of the other National Delegations in order to find a solution.

Many cases can be resolved in the third phase. For instance, cases dealing with jurisdictional conflicts may be resolved within the Level II Meeting, as Eurojust jurists may designate a particular state as legitimate for the exercise of jurisdictional activity, avoiding an extension of the case to the other stages. However, if the case in question requires greater intergovernmental coordination, with the implementation of joint actions, for example, coordination meetings (also known as Level III Meetings) can be held (Art. 17 of the Rules of Procedure of Eurojust. 2002/C 286/01).

Co-ordination meetings aim to bring the concerned Member States and their national authorities closer together, in order to encourage a consensus between then on the possibility and appropriate means of cooperation. Furthermore, this step also lends itself to coordinating joint investigative or prosecution activities in order to adopt a faster and simplified law enforcement procedure, extraditions, etc.

According to Eurojust's 2016 Annual Report, coordination meetings are used to facilitate information exchange, as well as identify and implement means to support: the execution of requests for mutual legal assistance; the enforcement of measures such as search and imprisonment warrants; the possible establishment and operation of joint investigation teams; the coordination of ongoing investigations and prosecutions, avoiding jurisdictional conflicts; the breach of the *non bis in idem principle*, and also deal with other probative and legal problems.

In the specific case of counter-terrorism, Bures points out that Eurojust holds meetings on the issue at three levels: (i) the operational level, where the focus lies on ongoing investigations; (ii) the tactical level, whereby there is an incentive for Member States to share valuable information about specific terrorist groups and map out possible links between them as well as counter-terrorism methods that have proven effective in their own national experiences; (iii) the strategic level, comprised of annual meetings to reaffirm the duties of each Member State to share with Eurojust all the relevant information concerning ongoing criminal investigations (BURES: 2010, p. 240).

Eurojust, like Europol, has no legal authority to initiate investigations

and has no coercive capacity to impose any penalty on Member States if its recommendations are not met. However, the Annual Reports published by Eurojust includes a list of cooperation failures. Piovesan (2013, p. 249-250) calls this a 'power of embarrassment,' capable of generating political and moral imbroglio.

3.3. EUROPEAN ARREST WARRANT

The European Arrest Warrant (EAW) is an implication of the principle of mutual recognition of judgments and judicial decisions, inscribed in the Treaty of Lisbon. This instrument acts as a form of simplification of the formal extradition procedure, ensuring expedience and effectiveness without, in theory, any harm to the legal guarantees of the individual being charged.

As mentioned, the extraordinary Council meeting in Tampere raised the possibility of abolishing the formal extradition procedure within the European Union in certain cases, replacing it with a simple transfer of persons. After 9/11, the European Arrest Warrant was introduced in the EU primarily as a means of fulfilling the immediate demand for a simple way to surrender suspected terrorists (SATZGER and ZIMMERMANN: 2010, p. 411).

In June 2002, the Council issued Framework Decision 2002/584/JHA, establishing the EAW's foundations and regarding it as "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order (Art. 1.1 of EUROPEAN UNION. Framework Decision 2002/584/JHA)."

It is characterized as essentially judicial, being exempt from the executive procedure of concession (SATZGER and ZIMMERMANN: 2010, p. 413), therefore removing political discretion from the decision of whether or not to grant extradition.

Moreover, it establishes cases in which the non-execution of the Arrest Warrant is mandatory. Grounds for execution refusal are laid out in Article 3 of the Framework Decision, and include amnesty, the ongoing or complete serving of the sentence in the requested state, and the non-imputability of the accused according to the requested state's domestic law. Article 4 of the Framework Decision sets out optional forms of refusal, which include the existence of an ongoing criminal prosecution of the same case in the requested state, and cases where the requested state has jurisdiction over the criminal process.

The EAW reduces the applicability scope of the principles of double

criminality[7] and specialty, and deems exceptions in the extradition of nationals of the requested state as inappropriate. According to Satzger and Zimmermann, the non-applicability of the national extradition exception clearly shows that the European Arrest Warrant is based on the notion of European citizenship, thus breaking with several principles of traditional national sovereignty (SATZGER and ZIMMERMANN: 2010, p. 413).

The possibility of transferring nationals has cast doubt on the EAW's conformity to Member States' Constitutions. The German Federal Constitutional Court considered it undemocratic to allow nationals to be tried on the basis of legal devices to whose construction they were not allowed to contribute[8].

However, the Court also found that nationals could be extradited if constitutional principles were respected. Thus, the process of admissibility of the European Arrest Warrant in Germany has two important aspects: the guarantee of an appeal before the judiciary, and the proper ascertaining of double criminality (VENANCIO: 2010, p. 35–36). Thus, the EAW remains valid in Germany, realizing the aspirations of a genuine area of freedom, security and justice within the EU.

It is opportune to mention the time limits for the application of the EAW, its main differential. For suspect transfer requests without the suspect's consent, the deadline for warrant execution is 60 days after the arrest of the requested person (Art. 17.3 of Framework Decision 2002/584/JHA). In cases where the suspect consents to the transfer, this period is reduced to 10 days (Art. 17.2 of Framework Decision 2002/584/JHA).

According to the European Justice website (EUROPEAN UNION. European Arrest Warrant.), the EAW is used often by most countries; the warrant is executed within an average of 16 days when consent is given, or within an average of two months when it is not. The table below shows how often member countries use the EAW and its rate of positive execution:

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[7] According to information from the European Commission, via the European Justice website: "For 32 categories of offences, there is no verification on whether the act is a criminal offence in both countries. The only requirement is that it be punishable by a maximum period of at least 3 years of imprisonment in the issuing country." (Available at <https://e-justice.europa.eu/content_european_ arrest_warrant-90-en.do>. Accessed on 12/14/2017.

[8] FEDERAL CONSTITUTIONAL COURT OF GERMANY (BUNDESVERFASSUNGSGERICHT). July 18, 2005. Case BVerfGE 113, 273 Europäischer Haftbefehl. Available at <http://www.servat.unibe.ch/dfr/bv113273.html>. Accessed on 12/14/2017.

Tabela 1 – Análise Temporal da emissão de Mandado de Detenção Europeu

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Emitidos	6.900	6.750	11.000	14.200	15.800	13.900	9.800	10.450	13.100	14.700
Detetadas e/ou detidas	1.770	2.040	4.200	4.500	6.150	6.460	6.490	5.840	7.850	9.660
Entregues	1.530	1.890	3.400	3.630	5.580	5.370	5.230	4.480	3.460	5.480

Fonte: Portal de Justiça Europeia, Outubro de 2016.

3.4. EUROPEAN INVESTIGATION ORDER

The European Investigation Order (EIO) is a court order issued by the judicial authority of a Member State to carry out one or more specific investigative measures in another Member State, ensuring that the evidence necessary for national criminal investigations can be obtained.

Introduced by Directive 2014/41/EU of the European Parliament and of the Council, the European Investigation Order was set up to replace Framework Decision 2003/577/JHA (on the execution in the European Union of orders for freezing property or evidence) and the European Evidence Warrant – EEW (Framework Decision 2008/978/JHA).

Prior to the creation of the EIO, it was necessary to apply for forfeiture of property or seizure of evidence to ensure its freezing. One was unable, however, to transfer this evidence. Thus, it was necessary to issue an EEW so that the frozen evidence could actually be used by the judicial authority of the requesting state. One could also make use of other, more traditional mechanisms for obtaining evidence, such as letters rogatory (SATZGER and ZIMMERMANN: 2010, p. 432–433). It should be noted that in 2003–2008, when the Framework Decision establishing the EEW came into force, only the second alternative was viable.

Directive 2014/41/EU of the European Parliament and of the Council states that while there is an effective need of a judicial cooperation mechanism for the sharing and production of evidence, the system set up by Framework Decision 2003/577/JHA and the EEW was extremely fragmented and complex. A "comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition" was thus necessary (Item 6 of EUROPEAN UNION. Directive 2014/41/EU/European Parliament and EU Council).

This gave rise to the EIO as the sole instrument for requesting this type of aid among Member States, contemplating specific investigative

measures with a view to obtaining evidence. The issuance of an EIO is possible for the realization of any investigative measure, except the establishment of joint investigation teams. The latter should follow the rules set forth in Article 13 of the European Convention on Mutual Assistance in Criminal Matters. Thus, EIOs may be issued by the executing state in order to provide evidence related to criminal proceedings. They can also be issued for administrative proceedings investigating criminally punishable matters.

In order to ensure promptness in fulfilling the request, maximum time limits are set for the executing authority's compliance. Thus, when a requesting state issues an EIO, the executing state must communicate whether the request was accepted or not within 30 days. In case of acceptance, the executing state must forward the required evidence to the requesting state within 90 days. There are a few exceptions that allow for compliance to be postponed, provided for in Article 15 of the Directive[9].

The stipulation of these deadlines is of great value to counter-terrorism, since a swift investigation after a terrorist attack can prevent others in the immediate aftermath. The slowness and bureaucracy of traditional means of international cooperation does not lend itself to the effective criminal prosecution of these dynamic crimes, which transcend countries' geographical boundaries.

The grounds for refusal to execute the EIO are listed in Article 11 of the Directive, and are quite limited. A state may refuse to execute the EIO when legal privileges or immunity make its enforcement impossible, when enforcement is likely to be harmful to national security interests, when it contravenes the *non bis in idem* principle, etc.

According to an European Commission Press Release, the creation of the EIO is observant of the fundamental rights of defense, considering that:

> The issuing authorities must assess the necessity and proportionality of the investigative measure requested. A European Investigation Order has to be issued or validated by a judicial authority, and the issuing of an order may be requested by a suspected or accused person, or by a lawyer on his/her behalf

[9] Compliance with an EIO may only be postponed if: (a) its execution could hamper an ongoing criminal investigation or prosecution, assuming that investigation has a conclusion timeline considered reasonable by the executing state; (b) the objects, documents or data concerned are already in use in another process.

> in line with the defence rights and with national criminal procedures. Member States must ensure legal remedies equivalent to those available in a similar domestic case and ensure that persons concerned are properly informed of these possibilities (EUROPEAN UNION. Press Release).

The normative basis of the instrument seems to allow Member States to more readily access the evidence necessary to carry out their investigations, greatly expanding possibilities for cross-border cooperation in criminal matters.

4. THE BATACLAN CASE

The Bataclan case was part of the series of terrorist attacks that took place in France in November, 2015. Three explosions were carried out concurrently at various locations, together with six mass shootings, including the attack on the Bataclan venue, where 89 people were killed. All in all, 180 people died and around 350 were injured (BBC News; 2015).

The attack was the worst in the European Union since the 2004 Madrid attacks. Then-French President François Hollande decreed a state of national emergency, the first since 2005, and placed temporary controls on French borders. He also decreed the first curfew since 1944, ordering people to leave the streets of Paris (TELES: 2017, p. 16).

Hollande requested the cooperation of other EU Member States by evoking – for the first time since its inception – the mutual defense clause provided for in the Treaty of Lisbon. This request was unanimously accepted. On the basis of the mutual defense clause, the requesting state has considerable decision-making leeway to pursue bilateral negotiations and implement any cooperation measures whatsoever. These bilateral arrangements amount to obligatory assistance, but they are not binding in regards to the type of cooperation the requested state must undertake or even in regards to its scope (TELES: 2017, p. 16).

To implement the French presidential request, motions for resolutions B8-0043/2016 and RC-B8-0043/2016 were signed. Thus, France requested the assistance of the Member States and the EU to set up an EU civil-military headquarters: "this structure should be tasked with strategic and operational contingency planning, including for collective defence as foreseen by Articles

42(7) and 42(2) TEU" (Item 9 of Motion for a resolution B8-0043/2016).

In Joint Motion for a Resolution RC-B8-0043/2016, France underlined the importance of implementing a precautionary approach to relieving tensions, in particular those stemming from young nationals, preventing the underlying causes of extremism. In addition, it called for a common EU foreign policy regarding the future of Syria and the entire Middle East.

Eurojust stressed that its "operational and strategic

activities in the field of counter-terrorism reflected the need to strengthen Member States' ability to fight terrorism in a common, effective and coordinated manner (EUROJUST. Annual Report 2015)." To this end, several coordination meetings were held, and the first center for coordinating a terrorism case was implemented.

In its 2015 annual report, Europol (EUROPOL. Annual Report 2015) had already highlighted the importance of conducting new studies on a possible change in the focus of the Islamic State's attacks, arguing that the group had shifted its main emphasis to obtaining territory and other global motivations. In addition, it warned of the need for greater control of people traveling to Syria and other places of conflict and then returning to their home country, as the attacks were carried out by so-called "returning foreign fighters."

The attacks in France intensified the debate and the process of setting up the Europol-linked European Counter-Terrorism Centre. According to a Communication from the European Commission (COM/2016/0602), the Centre "is the backbone of the EU's action against terrorism, acting as an information and cooperation hub in support to Member States, also analyzing terrorism, assessing threats, and supporting the development of counter-terrorism operational plans (EUROPEAN COMMISSION. COM/2016/0602)."

On December 7, 2015, Taskforce Fraternité was set up, gathering information mainly originated in France and Belgium. This led to around 2,500 messages being entered into SIENA and to the creation of 1,247 intelligence reports (EUROPOL. One year of ECTC activities, infographic). The Taskforce consisted of more than 60 analysts who conducted a full and detailed investigation on the attacks, compiled intelligence data on the funding of the groups involved, identified misconceptions in the security forces' approach and discussed the possible implications of counter-terrorism policies (EUROPOL. ECTC – European Counter-Terrorism Center – Infographic). The ECTC was also responsible for coordinating a joint international operation, which began shortly after the attack in Belgium (which occurred just four

months after the Paris attacks).

Europol's intense information-sharing work was critical to the identification and location of Salah Abdeslam, the only living member of the jihadist cells that promoted the attack. Salah was arrested on March 18, 2016 in Molenbeek, Belgium and was transferred to France as a result of the execution of the European Arrest Warrant issued by the country on March 19, 2016 (BBC NEWS: 2016).

On 5 February 2018, Abdeslam appeared before the court in Brussels, where he is being prosecuted for the Belgium attack. The case is still pending and the accused remains in detention (G1; 2018). The Belgian trial is seen as a preamble to the Paris attacks trial, which still has no set date.

5. CONCLUSION

The European counter-terrorism system stands out for being primarily based on unorthodox methods of international cooperation aimed at optimizing the rapprochement of Member States by sharing data, conducting joint operations, and bringing together experts, among other measures. Many of the instruments developed within this system have conferred special meaning to principles such as the mutual recognition of judgments, also in some cases restricting the application of the principles of double criminality and specialty.

These innovations seek to bring countries closer together, form an investigative network, reduce red tape and the time to respond to cooperation requests, as well as lessen the chances of request denials, ensuring greater cooperative effectiveness.

However, the bodies set up by the European system have several obstacles in the way of reaching their idealized potential. Raising the confidence of states to allow for active collaboration is no easy feat. Thus, developing a structure to foster international cooperation is a task that requires constant commitment from EU Member States. The constant enhancement of the means of cooperation and the increase of consensus among Member States can be ways of deepening this commitment, making cooperation more effective.

Moreover, the counter-terrorism system itself must be constantly improved. As in every social issue, the challenges posed by terrorism are frequently changing and renewing, thus requiring an academic dialogue to update and review efforts seeking new solutions. With patience and dedication, we must continue to pursue the promotion of an integrated

international society that is increasingly able to maintain the peace and security of all.

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