UNIVERSITY OF SOUTHAMPTON

FACULTY OF LAW, ARTS AND SOCIAL SCIENCES

School of Social Sciences

PROCESS AND PRACTICALITIES:

MUTUAL LEGAL ASSISTANCE AND THE INVESTIGATION OF TRANSNATIONAL CRIME WITHIN THE EU FROM A UK PERSPECTIVE, 1990-2004

by

Clive Geoffrey HARFIELD BA, MSc, LLM, MPhil

Thesis for the degree of Doctor of Philosophy

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ABSTRACT

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Domestic criminal law helps define State sovereign identity. Over the past fifty years some criminality has become increasingly transnational in character. In the absence of a universal criminal code (as opposed to specified international crimes), States apply municipal law to prosecute offences of a transnational nature relying on mutual legal assistance to secure evidence located outside the prosecuting State.

A comparatively late contributor to the development of mutual legal assistance, the UK now seeks to influence the work of the EU in developing a legal framework upon which to base mutual legal assistance and enhanced international law enforcement co-operation. The course of this development is outlined.

This thesis examines through questionnaire and interview data, investigator and prosecutor experience of mutual legal assistance mechanisms in gathering of evidence from abroad for use at trial in England and Wales. Comparisons are made with data from an earlier survey of UK police (1996) and with an evaluation of mutual legal assistance administrative mechanisms within the EU (1999-2001) in order to identify changes in investigator experiences since the EU began to drive the strategic development of regional international law enforcement co-operation with the *Treaty of Amsterdam* and to assess whether politicians and administrators are delivering the solutions needed by investigators working across national borders.

Set within the legislative context of the *Criminal Justice (International Co-operation) Act* 1990, the data indicate that neither this regime nor the emerging EU framework were addressing all practitioner concerns. Political responses to the New York terrorist attacks of September 2001, which occurred during data gathering for this thesis, accelerated legislative construction in the UK and the EU. Updated to include discussion of these changes (some still not yet entered into force), the thesis now provides a benchmark against which to assess their impact in due course.

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In terms of conducting the research for this thesis I am indebted to a large number of people who agreed to be interviewed or in other ways supplied me with necessary information or facilitated my access to information.

The confidentiality agreements within which the case studies (Chapter 7) were conducted mean, ironically, that I must acknowledge those interviewees anonymously. This anonymity notwithstanding, their contribution to this research is possibly the most significant of all. I am grateful, too, to the many colleagues across England and Wales who took the trouble to complete

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For the library-based elements of this research I enjoyed not only the use of facilities at the University of Southampton but also had permitted access to the National Police Library at Bramshill where staff were extraordinarily helpful in locating research material. My time there was supplemented by their very helpful system of borrowing by mail, a vital facility to a part-time student. In this respect staff at the library of the Australian Federal Police College, Canberra, also exceeded the call of duty by supplying me with material via the diplomatic bag. Back in the UK, permitted access to the libraries at the Institute of Advanced Legal Studies (University of London), the University of Birmingham and the University of Warwick provided me access to secondary material that I could not locate elsewhere.

And so to the many individuals who took time to discuss various aspects of mutual legal assistance and international law enforcement co-operation with me and in many cases also supplemented this assistance with the provision of documentary material: (in no particular order) Frank Gallagher and Paul Swallow, for providing me with copies of their PhDs; Claire Fielder, Judicial Co-Operation Unit, Home Office; Simon Watkins and Lorna Harris, UKCA, Home Office; Alistair Brown, Crown Office, Scotland; Roy Penrose, former Director General, National Crime Squad, London; Bill Hughes, current Director General, National Crime Squad, London; John Abbott, former Director General, National Criminal Intelligence Service, London; Bill Wheeldon and Robert Bland, Crown Prosecution Service, London; Kimberley Prost, Commonwealth Institute, London; Hans Nilsson, Head of Judicial Co-operation, Council of the European Union, Brussels; Mike Kennedy, President of Eurojust, The Hague; Luigi Soreca, Laura Tarragona, Yolanda Gallego-Casilda Grau, Florence Schimdt-Pariset, Federico Prato, and Toby King at the JHA Directorate, European Commission, Brussels; Bill Newton-Dunn MEP, European Parliament, Strasbourg; Alistair MacGibbon, formerly of the Australian Federal Police, Canberra and Washington DC; Alison Brook, New South Wales Crime Commission, Sydney; John MacFarlane, Australian National University, Canberra; Bill McDonald, Georgetown University, Washington DC. To my father, who gave up hours of his well-earned retirement to proof-read the typescript, I am especially grateful.

Midway during the life-time of this research I had the opportunity through work not only to deal with mutual legal assistance in practice but to participate in international policy-making in relation to international law enforcement co-operation. In 2002 and 2003 I represented UK law

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Abbreviations

9/11	11 September 2001: terrorist attacks against World Trade Center, New York
24/7	twenty-four hours a day, seven days a week (i.e. continuous cover)
ACPO	Association of Chief Police Officers [UK]
ATCS Act	*Anti-Terrorism, Crime & Security Act* 2001
CCIC	Cross Channel Intelligence Conference
CCTV	Closed circuit television
CFD	Council Framework Decision [EU]
C(IC) Act	*Crime (International Co-operation) Act* 2003
CJ Act	*Criminal Justice Act* [various dates]
CJ(IC) Act	*Criminal Justice (International Co-operation) Act* 1990
CPI Act	*Criminal Procedures & Investigations Act* 1996
CPS	Crown Prosecution Service [UK]
CS	Case study
CSP	Communication service provider
DLO	Drugs Liaison Officer [UK law enforcement liaison officer posted overseas]
DNA	Deoxyribonucleic acid [genetic finger-printing, forensic identification technique]
DV	Developed Vetting [highest personal security clearance level, UK]
EAW	European Arrest Warrant [EU]
EC	European Commission
ECCP	Experts Committee of Crime Problems [Council Of Europe]
ECHR	*Council of Europe Convention on Human Rights & Fundamental Freedoms*, 1950
ECJ	European Court of Justice [EU]
ECMA	*Council of Europe Convention on Mutual Assistance in Criminal Matters*, 1959
ECPOTF	European Chief Police Officers' Task Force [EU]
EEW	European Evidence Warrant [EU]
EHRR	*European Human Rights Reports*
EJN	European Judicial Network [EU]
EPPO	European Public Prosecutor's Office
EU	European Union
EUCMA	*European Union Convention on Mutual Assistance in Criminal Matters*, 2000
FATF	Financial Action Task Force [OECD]
FBI	Federal Bureau of Investigation [US]
GC	Grand Committee of the House of Lords [UK]
GRECO	Agreement establishing the Group of States against Corruption [Council of Europe]
HC Hansard	*Official Report, Parliamentary Debates, House of Commons*
HL Hansard	*Official Report, Parliamentary Debates, House of Lords*
HMCE	Her Majesty's Customs & Excise
HOC	Home Office Circular
HTCSG	Hi-Tech Crime Sub-Group [G8]
ICC	International Criminal Court [UN]
ICJ	International Court of Justice [UN]
ICT	Immigration Crime Team [UK]
ILO	International Liaison Officer [Interpol]
ILOR	International Letter of Request [*Commission Rogatoire*]
JHA	Justice and Home Affairs [Third Pillar of the EU]
JIT	Joint Investigation Team [*EUCMA*]
LLM	Master of Laws [UK university degree]
MAFF	Ministry of Agriculture, Fisheries and Food [UK]
MDG	Multidisciplinary Group on Organised Crime [EU]
MEP	Member of European Parliament [EU]
MLAC	Mutual Legal Assistance Convention [Multilateral agreement]
MLAS	Mutual Legal Assistance Section [briefly an alternative name for the UKCA]
MLAT	Mutual Legal Assistance Treaty [Bilateral agreement]
MoU	Memorandum/a of Understanding
MP	Member of Parliament [UK]
MPS	Metropolitan Police Service [UK]
NCB	National Central Bureau [Interpol]

NCCT	Non-cooperative Countries and Territories [OECD]
NCIS	The National Criminal Intelligence Service [UK]
NCS	National Crime Squad [UK]
NGO	Non-governmental organisation
NHTCU	National Hi-Tech Crime Unit [UK]
NIM	National Intelligence Model [UK, EU]
NIS	National Investigation Service [HMCE, UK]
OECD	Organisation of Economic Co-operation & Development
OJ L	*Official Journal of the European Union (Legislation)*
OJ C	*Official Journal of the European Union (Other Commission Documents)*
OLAF	*Office de Lutte Anti-fraude* [Second & current name for the EU Fraud Office]
RIP Act	*Regulation of Investigatory Powers Act* 2000
SCA	Standing Committee A of the House of Commons [UK]
SCQ	Self-completion questionnaire
SFO	Serious Fraud Office [UK]
SIO	Senior Investigating Officer [UK police]
SOCA	Serious Organised Crime Agency [UK]
SPOC	Single point of contact
TCO	Transnational criminal organisation
TEU	*Treaty of the European Union* (Maastricht) 1992
TLR	*Time Law Reports*
ToA	*Treaty of Amsterdam*, EU, 1997
UCLAF	*Unité de Co-ordination de la Lutte Anti-fraude* [First name for the EU Fraud Office]
UCO	Under-cover officer
UK	United Kingdom of Great Britain & Northern Ireland
UKCA	United Kingdom Central Authority, Home Office
UN	United Nations
UNTOC	*United Nations Convention Against Transnational Organised Crime*, 2000
US(A)	United States of America
WLR	*Weekly Law Reports*
WW2	World War II

Preface

"The motto of the Union shall be: United in Diversity"

Constitution for Europe, Article IV-1

* * * * *

"freedom loses much of its meaning if it cannot be enjoyed in a secure environment and if it is not backed up by a fair and smoothly functioning legal system ...
member States now accept that common problems need common solutions"

Living in an area of freedom, security and justice: justice and home affairs in the European Union
EC information brochure, December 2000, p.1

* * * * *

"In an age of international crime, the response also has to be international.
The EU is a very good starting point."

Lord Clinton-Davis, *HL Hansard*, Second Reading, Crime (International Co-operation) Bill,
2 December 2002 col.998

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"Blblblblll Blblblblll Blblblll"

Nick Hawkins MP, *HC Hansard Standing Committee A*, Crime (International Co-operation) Bill,
12 June 2003 col.143

Introduction

Criminality that crosses national borders and which actively seeks to evade prosecution by doing so, is a phenomenon that has fully emerged in the final quarter of the twentieth century as the global market economic infrastructure provides opportunities for the criminal as well as the law-abiding (Mitsilegas *et al.*, 2003:63-64). All sovereign States are vulnerable to such transnational criminality and as such they are united in adversity. This thesis examines whether or not, in relation particularly to the UK and the EU, governments are approaching, through the mechanism of mutual legal assistance and despite different legal traditions, a position against transnational organised crime in which investigators from different jurisdictions are truly united in diversity.

All PhD theses are supposed to be characterised by relevance and topicality but there can be too much of a good thing. As will be illustrated here, and has been supported by other commentators (*ibid.*:59-61), the arena of mutual legal assistance and international law enforcement co-operation, already rising up the EU political agenda, received added impetus following the events of 9 September 2001 in New York and Washington DC [hereafter 9/11]. Occurring as these did, twenty months into a planned programme of research, there were consequences for this thesis that have become manifest in the unconventional structure here presented. During the lifetime of any research, changes to the subject or research sample might be anticipated, but in this case the changes were quite significant.

The original intention (September 2000) was to examine the practical issues faced by investigators reliant upon the mutual legal assistance regime prescribed in the *Criminal Justice (International Co-operation) Act 1990* [*CJ(IC)*] in order to inform the ongoing debate within the Home Office about how best to implement the UK's obligations assumed in May 2000 when the UK signed the EU *Convention on Mutual Assistance in Criminal Matters* [*EUCMA*]. The UK had also just been subject of a peer review by other EU Member States in relation to mutual legal assistance structures and so these two drivers had initiated a complete review of the UK's administrative infrastructure and statutory regime. The author was assured by a Home Office official (interview 29 August 2000), that because of this review there was no realistic prospect of statutory changes being made to ratify the *EUCMA* during the lifetime of this research. There was thus a potential role for a thesis that looked at investigator's experiences alongside those of administrators examined in the EU peer review in informing policy considerations.

The need of European governments to be seen to be responding robustly in the confused aftermath of 9/11 changed all that. The legislation that previously could not realistically be anticipated before the submission deadline of summer 2006, was attempted in vain in late 2001 and summer 2002 (in order to meet an EU deadline of December 2002) and eventually made the statute books in the winter of 2003. In the third quarter of 2004, much of it is still yet to come into force. And preparing this legislation diverted Home Office staff from other mutual legal assistance considerations, necessitating a suspension of the Home Office review, which was only reinitiated in January 2004 and which is not expected to report until the end of 2004.

The effect of these events, the original research having been completed, was that it was necessary to revisit certain areas to identify recent changes to the statutory and political context in which the original research had now to be viewed. This force of circumstance had dictated that this thesis cannot follow structural conventions. It divides into four parts: initial discussion of literature and context, discussion of relevant associated research to date and presentation of the methodology applied here, presentation of this original research and then further discussion in the light of changed circumstances in order to update the context for the research.

Chapter 1 introduces the reader to the concept of mutual legal assistance and explains why such formal interaction is necessary between States. Chapter 2 considers relevant theoretical models, both legal and political, to identify current approaches to the issues. Chapter 3 completes the presentation of general context by explaining the development and evolution of the mutual legal assistance regime adopted in the UK in 1990.

Chapters 4 and 5 move from the literature review and contextual discussion toward the original research by discussing first the EU peer review evaluation and then a previous piece of UK police research concerning mutual legal assistance. Against this background the research gaps are identified, thus demonstrating the scope of original research in this thesis, before the methodology applied in this instance is presented, dictated both by previous research and by the personal circumstance of this part-time research student simultaneously engaged in full-time employment.

Chapters 6 and 7 present the findings of the two research exercises conducted for this thesis, a self-completion questionnaire and a programme of semi-structured case study interviews. In Chapter 8 the emerging themes from the research results are discussed and to the extent possible, compared with the research discussed in Chapters 4 and 5.

The way in which the statutory and political contexts have changed during this research are briefly outlined in Chapter 9, pointing the way towards newly identified research gaps before general conclusions are reached in Chapter 10.

A number of appendices support the main text.

One final comment on the geographical parameters of this research: the original research has been conducted amongst police investigators in England and Wales, an area which comprises one of the three separate criminal jurisdictions within the United Kingdom of Great Britain and Northern Ireland. The jurisdictions of Scotland and Northern Ireland are considered too distinct in character and circumstance for inclusion here given the constraints of a PhD thesis. However, there are a number of issues considered within this thesis for which the distinction between the different UK jurisdictions has no relevance and in those circumstances it has been convenient to make reference to the UK rather than England and Wales. No disrespect is intended but for the sake of shorter sentences, references to 'England' and 'English' are taken to include 'Wales' and 'Welsh'.

Chapter 1

Why do States need mutual legal assistance?

In 1,215 pages of a standard text recognised as one of the most comprehensive guides to international law currently available, Malcolm Shaw makes just a single reference in passing to the concept of mutual legal assistance between States (2003:598). In the previous edition of his seminal work he made no reference to it all (1997). Nor, tellingly, does he include the 1959 Council of Europe's *Convention on Mutual Assistance in Criminal Matters* in his seventy-three-page 'Table of Treaties and Agreements'.[1] Yet he takes forty-nine pages to discuss the various interpretations of and approaches to the concept of national jurisdiction and it is this very plethora of paradigms that gives rise to the need for mutual legal assistance between States.

Nor is Shaw alone in such academic abstinence. Whilst probing the mechanics of international law and the uses to which it is put, in a more modestly-sized yet no less thought-provoking work, Rosalyn Higgins considers problems and processes in international law without reference to the concept of mutual legal assistance (1994). Which begs a number of questions. If lawyers versed in the international law determining the horizontal norms of legal equality by which States regulate their relations with each other (*ibid.*:1) find no occasion to discuss it, is 'mutual legal assistance between States' really a tool of international law as the phrase suggests? Is it perhaps rather political, diplomatic, or administrative in nature? Does it serve the purposes of States or of organisations and agents working on behalf of States? Are there States that do not need or resort to mutual legal assistance? What are the characteristics of this concept with particular reference to investigations into transnational crime? How does mutual legal assistance relate to international law enforcement co-operation?

What is meant by the term 'mutual legal assistance'?

Immediately a difference in phraseology is encountered. Whereas the Home Office in England uses 'mutual legal assistance' (for instance in the *Mutual Legal Assistance Newsletter* published quarterly by the UK Central Authority [UKCA] and in Home Office Circulars [HOC] 16/1997; 23/2004), other States prefer the phrase 'mutual judicial assistance'. The language of nearly all international legal instruments, meanwhile, employs the less specific (and thus more accommodating) 'mutual assistance' (for instance, the Council of Europe

European Convention on Mutual Assistance in Criminal Matters 1959, the *United Nations [UN] Model Treaty on Mutual Assistance in Criminal Matters* 1995; and the Commonwealth *Scheme Relating to Mutual Assistance in Criminal Matters* (as amended in 1999)). [2] In relation to non-criminal law enforcement and regulation (such as customs and excise law), the term 'mutual administrative assistance' is used (for instance in the *Explanatory Report on the Convention Drawn Up on the Basis of Article K3 of the Treaty of the European Union, on Mutual Assistance and Cooperation between Customs Administrations*, *OJ* 98/C 189/01)

Such diversity is founded upon different legal traditions. The Common Law system applicable in England and Wales, Commonwealth countries and the USA differs from the Civil Code (also known as the Roman Code or Napoleonic Code) used in European continental States and their former colonies (Hatchard *et al.* 1996, chapter 1). In the former, pre-trial investigation is undertaken by designated investigative agencies such as the police or customs officers. With the exception of certain intrusive investigative actions that require independent authorisation by judicial warrant, the judiciary does not become involved at any stage of evidence gathering. In Common Law States criminal judicial proceedings commence at trial (McEwan 1992). Pre-trial criminal investigations in Civil Code countries are supervised, and in a minority of cases actually undertaken, by the judiciary (which comprises both trial judges and prosecutors). Hence criminal judicial proceedings begin with the investigation and not merely at trial (Merryman 1985). It is immediately apparent, therefore, that judicial co-operation would have a different meaning according to the particular tradition prevailing. Seeking investigative assistance between Civil Code countries presents no problem as judiciary will talk to judiciary, but Common Law investigators have no judicial status and so within the international mutual legal assistance framework cannot directly request assistance from Civil Code investigators. There would be an "inequality of benefits and obligations" (UN 1995, 29, paragraph 4).

The *UN Model Treaty* "was designed as a vehicle for international co-operation between all countries regardless of legal system or background" (*ibid.* paragraph 2). Hence it speaks of "the widest possible measure of mutual assistance in investigations or court proceedings" (*UN Model Treaty*, Article 1). This language echoes and elaborates upon the "the widest measure of mutual assistance in proceedings" provided for in the earlier *ECMA* (Article 1), the first such instrument to address assistance (other than extradition) in *criminal* matters between Civil Code and Common Law States (European Committee on Crime Problems [ECCP] 1971:10). The *Harare Scheme* makes provision for assistance "in respect

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[1] He makes only two references to one of the several international conventions addressing crime suppression (the 1988 Vienna convention against drugs) and both of these are in footnotes.
[2] Hereafter the '*ECMA*', the '*UN Model Treaty*' and the '*Harare Scheme*' respectively.

of criminal matters" between "competent authorities" within Commonwealth States (*Harare Scheme*, Article 1(3)) and does not preclude Commonwealth States from entering into bilateral or multilateral assistance treaties with non-Commonwealth countries (Article 1(1)).

Given the sensible flexibility afforded by use of the term 'mutual assistance', it is interesting to observe that the *Manual on the UN Model Treaty* draws a very clear distinction by noting: "that the expression 'mutual assistance in criminal matters' (as in the title of the Model Treaty) is not the same as 'mutual legal assistance' (as in Article 7 of the *UN Convention against Drug Abuse and Illicit Trafficking in Narcotic Drugs and Psychotropic Substances* of 1988" (UN 1995, 29, paragraph 3). [3] The Manual explains this distinction by citing the differences in legal tradition between Common Law States and Civil Code States (*ibid.*). At first sight this explanation seems to equate 'mutual legal assistance' with 'mutual judicial assistance' and the subsequent paragraph (4), does indeed refer to such equivalence. But the distinction is less obvious when the original texts are consulted.

Article 7 of the *UN Drugs Convention* requires signatory Parties to afford one another "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings" relating to the offences specified in the treaty. As will be seen below, the actual activities provided for are almost identical to those of the more general *Model Treaty*. The provisions of Article 7 of the *UN Drugs Convention* are sufficiently broad and inclusive for the distinctions between different legal traditions to be immaterial.

The same wording appears in Article 14 of the *UN Convention against Transnational Organised Crime* [*UNTOC*] signed at Palermo, Italy, November 2000. Neither the *UN Drugs Convention* nor *UNTOC* is a mutual assistance convention *per se*, being rather treaties aimed at suppressing specific criminality, but both make provision for "mutual legal assistance" in relation to multilateral agreements to combat specific forms of criminality. In both cases a list of activities held to comprise mutual legal assistance is presented by way of definition (for instance evidence-gathering, service of judicial process documents, search and seizure, handling evidential exhibits). All of these activities feature in the *UN Model Treaty* and in conventions established for mutual assistance in criminal matters and the purpose of crime suppression treaties, in making such provision, is to ensure that mutual legal assistance measures are available to facilitate co-operation between Signatory Parties in the absence of any formal mutual legal assistance treaty [MLAT].

The relationship between the *ECMA* and the European Union's 2000 *Convention on Mutual Assistance in Criminal Matters* [*EUCMA*], introduces yet another perspective in which mutual legal assistance occupies a hybrid position between international treaty law and

[3] The *UN Drugs Convention* is also often referred to, as the *Vienna (Drugs) Convention*.

European Community law (Schomburg 2000:58). As things currently stand, the *EUCMA*, like other Justice and Home Affairs [JHA] instruments within the European Union [EU], is an intergovernmental treaty similar in status to the *ECMA* and the crime suppression conventions. It remains to be seen whether the new EU constitution (*OJ* C169/1 2003) will provide the starting point for a migration of JHA instruments from Third Pillar intergovernmental status to First Pillar direct effect status. (On this there is further discussion below, Chapter 9).

The Home Office preference for the phrase 'mutual legal assistance' instead of 'mutual assistance' defines a rather different distinction (Lorna Harris, UKCA interview, 29 August 2000). 'Mutual legal assistance' refers to formal requests for assistance using treaty provisions whereas 'mutual assistance' refers to informal direct contacts between UK investigating agencies and their foreign counterparts, for instance police-to-police or customs-to-customs sharing of information and intelligence about criminal activities, also known as international law enforcement co-operation. It is a position that was established during the Parliamentary debate on the *Criminal Justice (International Co-operation) Bill*.

> "By mutual legal assistance is meant the process whereby one state provides assistance to another in the investigation and prosecution of criminal offences ... a 'broad consensus' has developed as to the core measures which are covered. These include ... providing written and documentary evidence for use in foreign courts proceedings; the service of summonses and other judicial documents on behalf of another country. Making arrangements for the personal attendance of witnesses at court hearings abroad; and, the search for and seizure of materials for use in evidence in overseas proceedings. More recently a trend has developed ... to extend the traditional reach of mutual assistance to encompass the tracing, freezing and confiscation of the proceeds of crime" (Home Office Minister of State, *HL Hansard*, 12 December 1989, col.1215).

It will be noticed that this definition excludes direct police-to-police co-operation (the international law enforcement co-operation generally referred to as mutual assistance by the Home Office) and extradition. The latter has been comprehensively dealt with in other legislation and is a subject too vast to be incorporated here. [4] The definition hints at the third aspect of mutual legal assistance which was then just emerging, asset recovery and money laundering investigation, which is also subject of extensive legislation and is also a specialism too vast to be included here. It is also clear that the UK government regard mutual legal assistance as a process of assistance between States, rather than between agencies of a State. Assistance between agencies constitutes international law enforcement co-operation. In this present work, which focuses on pre-trial investigative assistance, the Home Office distinction will be employed and the relationship between these two forms of assistance is explored further below.

[4] Extradition legislation was enacted in 1870, 1873, 1877, 1989 and 2003.

What is mutual legal assistance between States intended to achieve?

The rightful power of a State to exercise jurisdiction over its own territory and its own citizens is derived from the concept of the independent nation State in international law (Shaw 1997:151; see also Giddens 1987:171; Mitsilegas *et al.* 2003:8-9). During the last quarter of the twentieth century globalisation of economic interaction and communication (Cooke 1993; Buckley 1998; Findley 1999; Scholte 2000; Mitsilegas *et al.* 2003:54-58) has brought with it an increasingly transnational aspect to criminal behaviour (UN 1989:8; House of Commons 1995; Council of Europe 1997:chapter 1; see also McDonald 1997). There is a consequential *de facto* interdependence between States notwithstanding their *de jure* individual sovereignty (Shaw 1997:99; Mitsilegas *et al.* 2003:chapters 1-2). In enforcing domestic laws, States increasingly find themselves seeking, abroad, evidence of crimes committed against their own laws because one or more of the actions needed to prove an offence or liability has taken place outside the investigating State's territorial jurisdiction. There are limitations to this. "A State cannot purport to enforce its laws in the territory of another State, nor may it despatch policemen or other governmental officials to arrest alleged criminals residing abroad without the consent of the State concerned" (Shaw 1997:152; see also Walker 1994:24).

There are five principles within international law by which a State can claim jurisdiction over an issue (Table 1; see also Shaw 1997:458-470).

Table 1: The five principles of national jurisdiction

Territorial	A State can prosecute crimes committed wholly or partially within its national boundaries.
Nationality (*Active personality*)	States claim jurisdiction over any of their nationals who are alleged perpetrators of an offence wherever committed.
Nationality (*Passive personality*)	States claim jurisdiction where their nationals are the victims of an alleged offence wherever committed.
Protective (State)	States claim jurisdiction over offences against its own national interests.
Universality	Every State has jurisdiction to prosecute particular offences regarded as offences against the international community.

Some States - generally Civil Code administrations (Shaw 1997:466) - claim jurisdiction over their resident nationals who commit offences in a foreign State (and then return to their home nation) because the domestic State will not extradite its own nationals. Common Law States, particularly the UK (Chase & Leigh 1998:203), prefer the territorial

principle, although increased political emphasis on 'sex tourism', terrorism and computer-enabled criminality has led to extraterritorial jurisdiction being claimed by the UK for certain offences in accordance with the active personality principle (*Computer Misuse Act* 1990 §4; *Anti Terrorism, Crime and Security Act* [ATCS] 2001 §17, 44, 51, 109; *Sex Offenders Act* 1997 §7).

Either of these principles can accommodate the investigation of transnational offending. Civil Code States claiming the active personality nationality principle can prosecute their nationals for illegal activities committed abroad (there is usually a requirement for double criminality as there is for extradition, (Van Den Wyngaert 1989)). This requires trust and confidence on the part of the requesting State that the requested State will indeed prosecute its own citizens as rigorously as would the offended State. States applying the territorial principle rely on the fact that if the criminality is cross-border, then some part of it that constitutes an offence against domestic law will probably have been committed within their territory and can thus be prosecuted.

This latter point occasionally requires a broad interpretation. A criminal in England, for instance, might arrange with persons in foreign state A for profit-motivated criminality to take place in foreign state B, the proceeds of which were deposited in foreign state C: all of this achieved without necessarily leaving England or committing any offences contrary to UK criminal law. A UK citizen can be prosecuted for being concerned in the importation of illicit drugs, for example, even though acts done in respect of this occurred entirely abroad (*ibid.*).

Such broad interpretations of the territoriality principle create "extensions to jurisdictions [that] enable prosecutions to be brought in respect of transnational crime" (*ibid.*). An alternative approach to extending jurisdiction is to construct domestic laws so as to include cross-border activity. "Statutory criminal offences in the past few years have often provided their own extended jurisdiction so as to ensure that the offence will capture typical foreign elements" (Chase & Leigh, 1998:209). Concerning EU revenues, the UK also "has the ability to prosecute people for acts done in the UK that assist or induce the commission of offences in other Member States of the EU" (Bolt 1998:189).

Claiming jurisdiction is one matter; enforcing it another. Enforcement, which includes the gathering of evidence, engages the issue of State sovereignty. In seeking to enforce the vertical legal relationship with its own citizens (either as victims or offenders) a State imperils its horizontal legal relationship with another State (Shaw 1997:99) if it takes unilateral enforcement action within the territory of the other State. One State cannot directly employ its own criminal procedures within the territory of another State because to do so

would infringe the sovereignty of the foreign State in the territory of which the enforcement action was executed.

Thus it is necessary for a State seeking enforcement action beyond its territorial borders to request the assistance of the foreign State in whose territory the enforcement action must take place. This is mutual legal assistance and within this context the "authorities of the requested State act only on behalf of the requesting authority by virtue of a delegation of powers" (ECCP 1971:44). The *ECMA* "starts from the idea that a State which carries out a measure necessary to criminal proceedings in progress in another State, relinquishes a small part of its own sovereignty" (*ibid.*:13). Such a relinquishment will only be conceded if the requesting State "considers that it is compatible with its fundamental concepts and that it does not prejudice its essential political or economic interests" (*ibid.*:15).

Mutual legal assistance between States seeks to achieve extra-territorial enforcement actions that would otherwise be unachievable by peaceful and lawful means. The assistance is codified in agreements between nations either on a bilateral or multilateral basis. Such agreements define procedures to be followed and the circumstances in which such procedures will apply. Such instruments do not create substantive offences, being only procedural in character, yet this corpus, which has expanded exponentially in the 1990s, has come to be known as international criminal law (Van den Wyngaert 2002: 225-239).

What is the status of a mutual legal assistance treaty in law?

The legal characteristics of a MLAT fall into two categories: domestic and international. The relationship between these two categories is complex (Shaw 1997:Chapter 4; see also Brown 1999:16-20) and an examination in detail beyond the scope of this chapter. In summary there are two broad theoretical approaches to interpreting the relationship.

The first, *dualism*, "stresses that the rules of the systems of international law and municipal [domestic] law exist separately and cannot purport to have an effect on, or overrule, the other" (Shaw 1997:100). The second, *monism*, holds a unitary view of law as a complete entity and therefore perceives a direct relationship between domestic and international law (*ibid.*:101).

These different approaches have individual implications for the application of international law rules within the domestic context. Countries adopting a dualist position (usually Common Law States) accept with it the doctrine of *transformation*. Before any rule of international law can apply domestically "it must be expressly and specifically transformed" into domestic law through the enactment of domestic legislation (*ibid.*:105; see

also Bennion 1997:523 for a further tripartite break-down of how this can be achieved). Within the context of UK law for instance, it was necessary for HM Government to enact the *Criminal Justice (International Co-operation) Act 1990* [*CJ(IC) Act* 1990] to give effect to UK obligations under the *ECMA*. A similar legislative process was required to give effect in UK law to the provisions of the *EUCMA*: the *Crime (International Co-operation) Act* 2003 [*C(IC) Act*]. The logic of this approach argues that the executive within a State should not be in a position to create legislation outside the legislature (Shaw 1997:110-111).[5] The interpretation and implementation of this approach is something with which UK courts have occasionally struggled (Brown 1999:31-32).

The monist approach, familiar within Civil Code constitutions, recognises the automatic *incorporation* of international law as part of domestic law once a State has signalled its intention to ratify a treaty and so avoids "the interposition of a constitutional ratification procedure" (*ibid.*:105). For most of the signatory Parties to the *ECMA*, the provisions of that MLAT were adopted without further issue as soon as each State ratified the treaty.

International treaty law concerns the relations between States, or occasionally between States and international organisations. It has as a fundamental principle the notion that such agreements are binding upon the Signatory Parties and must be observed in good faith. Articles 31,46 and 69 of the *International Convention on the Law of Treaties 1969* refer directly to good faith. [6] If an agreement does not create legal relations or binding obligations, then it is more in the nature of a political statement and is non-justiciable (Shaw 1997:635).

From this comity arise issues of compliance and compulsion. Treaty provisions may be binding but within a peaceful context there are practical and political limitations on what can be done in the event of a breach of a treaty by a signatory Party. The International Court of Justice [ICJ] may determine or advise on disputes between States in relation to their treaty obligations (*ibid.*:749-776), but in reality it has no mandatory powers of jurisdiction and only limited powers through the UN Security Council to enforce its judgements (Wheatley 1996:23). A fundamental breach may automatically terminate a treaty but this would be exceptional. There is an expectation of good faith, but the provision of mutual assistance in criminal matters cannot meaningfully be enforced against the will of the requested State. Mutual legal assistance obligations are binding but ultimately not justiciable.

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[5] In the UK entering into international treaties is a prerogative of the Crown but the Crown cannot legislate.

[6] Shaw (1997:634) discusses the conventional definition of a treaty. Treaties, conventions, protocols and agreements are, for all intents and purposes, synonymous. For convenience in this present work, 'treaties' will be used to describe bilateral agreements and 'conventions' used for multilateral instruments.

The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* [*ECHR*] is unique among international conventions in providing its own permanent justiciable enforcement mechanism, the European Court of Human Rights at Strasbourg. States in breach of their obligations under the *ECHR* may be brought before the Court either by another State or by an individual citizen (Articles 19 & 32 *ECHR*; Starmer 1999:693-713). There is no equivalent mechanism within any mutual legal assistance conventions. The relationship between convention and citizen is different. The *ECHR* protects individuals and so there is a direct relationship. The *ECMA* regulates State interaction and engages no direct relationship with the citizen.

The continuing development of the EU is witnessing the gradual establishment of supranational jurisdiction and this is enforced through the European Court of Justice [ECJ] (Leonard 1998:chapter 9). The ECJ currently has limited jurisdiction over JHA issues within EU Member States and no jurisdiction whatsoever over law enforcement operational matters (Article 35(1) and 35(5), *Treaty of Amsterdam 1997* [*ToA*]). The ECJ will, however, have jurisdiction over disputes arising from interpretation of the *EUCMA* when it comes into force, and this extends in a small but significant way, supranational jurisdiction in the arena of mutual legal assistance within that part of Europe comprising the EU. [7]

What assistance may be sought under mutual legal assistance treaties [MLATs]?

MLATs and conventions providing for mutual legal assistance define what assistance States are prepared to afford each other. Such instruments do not prohibit individual States from providing further assistance over and above that which is described in the treaty or from concluding supplementary agreements to elaborate upon the principal treaty rules. Article 26(3) *ECMA*, for example, makes just such a provision and within its context EU signatory Parties to the *ECMA* have concluded the *EUCMA* (House of Lords 2000:5 paragraph 1 & p.19). [8] Multilateral MLACs frequently include Reservations where individual signatory Parties opt out of specific provisions (see, for example, the UK Reservations to the *ECMA* in Murray & Harris 2000:225) and too many Reservations can neuter the effectiveness of the instrument, a concern raised by *rapporteurs* in relation to Article 23 of the *ECMA* which allows for such Reservations (ECCP 1971:70; as of August 2002 only 24 Commonwealth States had ratified and implemented the *Harare Scheme*, Kim Prost, Commonwealth Mutual Legal Assistance Conference, Oxford, August 2002: hereafter the Oxford Conference). Treaties also provide grounds for refusing to accede to a request (see, for instance, Articles 2

[7] The ECJ has no jurisdiction, of course, over Council of Europe treaties.
[8] In the preamble to the *EUCMA* the High Contracting Parties "resolved to supplement" the *ECMA* and other conventions in force in this area. *OJ* C197/1, 12 July 2000.

& 19 *ECMA*). There is, then, an inherent flexibility that further distinguishes the horizontal relationships of comity in international law from the compulsory vertical relationships in domestic law.

Key areas of mutual legal assistance treaties concern the gathering of evidence for use at trial and the *ECMA* provides a working model of this. [9] Thus interviewing witnesses (under oath if required) and searching for and seizing evidential exhibits are provided for (Art.3 *ECMA*). The next stage of the process is to secure the court testimony of witnesses and provisions for this cover both witnesses at liberty (Art.10 *ECMA*) and those who are themselves offenders, convicted and imprisoned (Art.11 *ECMA*). Hence it is possible to transfer prisoners in one jurisdiction temporarily to another in order to give evidence. There is no compulsion in any of these measures (Art. 8 *ECMA*) and so although the service of court process documents such as a witness summons is enabled in such treaties, it cannot be enforced. The requested State is obliged in good faith to serve the process documents, but witnesses so served cannot be compelled to act upon them, as they might were they resident in the issuing State.

Some practical issues concerning how a witness might give oral testimony to a court are revisited in the *EUCMA* in the light of technological developments that avoid the absolute necessity for witnesses to travel abroad (Articles 10 & 11 *EUCMA*). That which is possible may not always be acceptable and there remains a preference, particularly in Common Law States reliant upon the adversarial trial model, for a witness to testify in person at court and not via a live electronic link. In the UK a body of statute and case law on this subject is already developing apace. [10]

Where particular measures involve a degree of coercion, for instance in search and seizure, protection for those subject to search is provided in the form of a three-fold criteria-based requirement. The principle of double criminality applies (the offence must be a crime in both the requesting and the requested States), the offence should be one for which a suspect may be extradited and the execution of the request should be consistent with the laws of the requested State (Art. 5 *ECMA*).

For less coercive measures, however, these restrictions do not apply. "The principle adopted is that, unlike extradition, the execution of letters rogatory shall not be subject to any basic condition other than the general conditions governing mutual assistance defined in Articles 1 and 2 [*ECMA*]. It is, for example, unnecessary for the offence to be punishable in

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[9] Its features are reproduced in the suggestive *UN Model Treaty* intended to provide a template for States to adopt, it not being itself a mutual assistance treaty *stricto sensu*.

both the requesting State and the requested State" (ECCP 1971:15). The basic condition provided in Article 1 is that the offence under investigation should fall within the proper jurisdiction of the requesting authorities. Under Article 2 the requested State may refuse assistance where *it* deems the offence under investigation to be political, an offence connected with a political offence or a fiscal offence, or where the execution of the request is likely to prejudice its own sovereignty, security, *ordre public* or other essential interests.

The requested State must, at the express request of the requesting State, state when and where the request is to be executed. The requested State may consent to "officials and interested persons" being present at the execution (Art. 4 *ECMA*).[11] This clause allows agents from the requesting State to be on hand and observe proceedings. Depending upon the approach adopted by the requested authorities, unforeseen supplementary issues arising from the interview of a witness can be addressed on the advice of the observers who will be conversant with facts of the case. Under this clause it is also possible for representatives of the suspect or the accused to be present and a request for interview could be framed in such a way as to permit these representatives also to suggest supplementary lines of questioning to the requested authorities.

<u>Who can do what within the mutual legal assistance arena?</u>

The possibility of observers being present at the execution of a mutual legal assistance request (Art. 4 *ECMA*) invites further consideration of who can ask for what, who does what and who pays.

The latter is answered relatively easily: unless otherwise agreed between the States concerned, costs in general shall be borne by the requested State (*ECMA* Art.20; UN *Model Treaty* Art.19). The *EUCMA* preserves this principle in relation to some activities, for instance the transfer of prisoners (Art. 9(5)), but sensibly reverses it in relation to costs incurred by telecommunications operators or service providers in assisting investigating authorities prescribing that these costs shall be paid by the requesting State (Art.21). (Authorities in the State in which the service provider is located are unlikely to undertake any executive actions other than to ensure that requests to such service providers are in accordance with the local laws.)

The *ECMA* (Art.1(1)) applies to "proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial

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[10] Sections 23,25 and 32 of the *Criminal Justice Act 1988* concern the adducing of evidence in the physical absence of a witness. *R v Hurst* [1995] Cr.App.R 82, *R v Castillo* [1996] 1 Cr.App.R 438 and *R v Radak* [1999] 1 Cr.App.R 187 illustrate the interpretation of this statute.

authorities of the requesting Party." Article 24 allows a contracting Party to define "what authorities it will, for the purposes of the Convention, deem judicial authorities." The reference to authorities with responsibility for imposing punishment seems a neat device to enable English participation. The issue, as introduced above (p.2), is that English investigative authorities, the authorities most likely to be seeking assistance at the pre-trial stage, are not judicial in character. And indeed, examination of the UK definition of judicial proceedings confirms such use of the Convention language. "From the [UK's] perspective, any proceedings which could result in a criminal conviction being recorded against a person will be treated as judicial proceedings" (Murray & Harris 2000:8). Nevertheless, the UK did not sign the Convention until 21st June 1991 (*ibid.*:6) by which time, in respect of police enquiries at least, an independent prosecuting authority, the Crown Prosecution Service [CPS], had been established. This at least enabled English independent prosecutors to make requests to prosecuting/investigating counterparts in European Civil Code States who hold judicial office.

After the enactment of the *CJ(IC) Act* 1990, the following authorities in England (aside from a Magistrate or Crown Court Judge) were designated by the Home Secretary (*Statutory Instrument* 1991/1224) as authorities able to issue a *Commission Rogatoire* (also known as an International Letter of Request [ILOR]) to request mutual legal assistance of their own volition within the prescribed circumstances: the Attorney General for England & Wales; the Director of Public Prosecutions and any Crown Prosecutor; the Director of the Serious Fraud Office [SFO] (or anyone designated under §1(7) *CJ Act* 1987, the legislation that established the SFO); the Secretary of State for Trade and Industry; and the Commissioners of HM Customs and Excise (HOC 16/1997, paragraph 34).

The *CJ(IC) Act* 1990 does not presume reciprocity. This echoes the *ECMA* which does not, except in cases of coercive action, require either reciprocity or dual criminality. This approach affords flexibility when receiving a request and enables the UK to live up to the requirement in Art.1 *ECMA* to provide the widest possible measure of assistance.

There is more than one way for an English investigator lawfully to secure foreign evidence. It may be that the relevant foreign authority does not require a request to be made in the form of an ILOR, in which case a direct approach or an approach facilitated either by Interpol or the NCIS will be lawful for the purpose. Direct transmission from investigator to foreign authority has no detrimental effect on the probative value of the evidence. However, English investigators must currently be able to demonstrate three requirements. Firstly that a request for evidence to be secured abroad was proper; secondly that the evidence

[11] Austria and Greece have entered Reservations to the article (ECCP 1971:44).

subsequently obtained was secured lawfully under the *locus regit actum* principle; [12] and that the evidence was obtained expressly for use at trial (interview Simon Watkin, then deputy head of UKCA, 7 September 1998).

If the requested State requires an ILOR UK investigators must follow procedures set down in §3 *CJ(IC) Act 1990*. Two methods of obtaining an ILOR are available.

§3(1) provides that where a justice of the peace or a judge is satisfied that an offence has been committed or that reasonable grounds exist for suspecting that an offence has been committed and that proceedings in respect of the offence have been instituted or that the offence is being investigated, he or she can issue an ILOR. Application is made to the courts by a prosecuting authority or by a person charged with an offence (§3(2)).

In the second (more commonly used) method designated prosecuting authorities can issue their own ILORs (§3(3)) following the same criteria as specified in §3(1). [13] The CPS issue ILORs on behalf of police investigators.

§3(4) *CJ(IC) Act* requires ILORs generated within the UK to be "sent to the Secretary of State for transmission" to the appropriate foreign authority. The UKCA - briefly termed the Mutual Legal Assistance Section [MLAS] during 1999 - was established for this purpose to fulfil the Home Secretary's obligations under the *ECMA*. The UKCA also receives, and then disseminates to the appropriate investigative authority, ILORs sent to the UK. Investigators familiar with ILOR procedures, who have established contacts abroad in order to facilitate their own enquiries, are increasingly sending ILORs direct to the foreign authorities informally in parallel with formal transmission via the UKCA, as will be seen in Chapter 7 below. The product of such contacts is transmitted back formally via the UKCA, although there appears to be no barrier to investigators acting upon knowledge of the product or its contents before it is formally received if appropriate to do so. §8 *C(IC) Act* 2003 enacts the *EUCMA* provision for direct transmission of requests between competent judicial authorities (Art. 6(1)). Quite how this is going to work in practice in England is still subject of debate and consultation (Home Office 2004a) but the structure of the criminal justice system in England is such that the UK has insisted that all requests from foreign authorities continue to be made via the UKCA (*EUCMA* Art. 6(3)), pending the ability to give greater effect to Art. 6(1) in the UK.

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[12] This principle, enshrined in Art's 5(1) and 13(2) *ECMA* for instance, requires requests to be executed according to the law of the requested State. It is a principle reversed by Art 4 (1) *EUCMA*.
[13] The Designated Prosecuting Authorities are the Attorney-General for England & Wales, the Director of Public Prosecutions and any Crown Prosecutor, the SFO, the Secretary of State for Trade & Industry, and the Commissioners of HM Customs and Excise.

To demonstrate these processes let it be assumed for sake of example that an English police officer requires a witness residing in France to be interviewed. The CPS will issue an ILOR to this effect which is then transmitted to the appropriate (i.e., local) *juge d'instruction* (prosecuting or investigating magistrate) in France. The *juge* will in nearly all cases delegate the enquiry to a suitably qualified officer in either the *Gendarmerie* or the *Police Nationale.* (These two agencies have different geographical areas of jurisdiction. In both agencies officers have either a basic level of investigative powers (*Agent de Police Judiciare*) or, in a minority of cases, a more advanced level (*Officier de Police Judiciare)* which carries with it the equivalent of the UK power of arrest.) That officer will then conduct the enquiry, perhaps with a UK officer attending as an observer.

In the reverse circumstances any such request from France would be directed to the UKCA, from whence it would be forwarded to the local police force (or other agency if appropriate) for execution. Again, an officer from the requesting State may attend as an observer. The statement would be taken as requested and returned via the UKCA.

These examples demonstrate the processes involved in straightforward enquiries. Constitutional structures in Civil Code States dictate that requests must be generated and received by judicial bodies. In the UK Common Law special arrangements have been put in place to enable a foreign judicial request to be acted upon by a UK non-judicial agency. [14]

The innovation of direct transmission (*EUCMA* Art.6(1)) is intended to streamline this process within the EU although all EU Member States will retain a central authority for the transmission of requests to and from non-EU States, particularly those States such as the US that insist upon a central authority within the bilateral MLATs that they negotiate (for example Art.2 of the UK/US treaty on mutual legal assistance between the US and the Cayman Islands 1986; Art.3 of the Mexico-US MLAT 1987; and Art.2 of the UK/US MLAT 1994).

Art.13 *EUCMA* takes innovation in mutual legal assistance procedures a stage further with the introduction of joint investigation teams [JITs]. "By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period ..." comprising law enforcement officers from the States participating in the JIT. The agreement upon which any given JIT is founded will be in the form of an ILOR, which will be the formal authority by which information lawfully obtained by any member of the JIT can be made available to and utilised by any other member of the JIT (Article 13(10)). In practice JITs are likely to be established only for the

[14] The issue really lies only with England & Wales. The role of Procurator Fiscal in Scotland provides a suitable judicial recipient of direct requests that are transmitted via the UKCA to the Crown Office and so to the Procurator.

most serious cases of transnational crime. Because evidence and information can be shared between the different national members of a JIT on the basis of the founding ILOR, much of the diplomatic mutual legal assistance process is thus short-circuited with a structure more conducive to the facilitation of international law enforcement co-operation.

This, then, is the current evolving state of mutual legal assistance within Europe, the geographical focus of this research. Taking into account the *ECMA*, the *Harare Scheme*, the *UN Drugs Convention*, and various individual bilateral arrangements (Murray & Harris 2000: Appendices Q, T & W), there are not many countries with whom the UK does not have some form of mutual assistance arrangement. "Mutual legal assistance exists to provide within jurisdiction A, a service for jurisdiction B connected with the administration of justice in B. It does not necessarily relate to the investigation of serious international crime, or even to crime at all. At its most simple, it may consist only in the service of documents from a court in one jurisdiction to an individual in another. On the other hand, it may also involve complex evidence gathering operations in a criminal matter" for evidence to be secured that can subsequently be used in judicial proceedings (Murray & Harris 2000:5).

Mutual legal assistance exists because the sovereign rule of law within nation States does not permit one State unilaterally to enforce its domestic laws within the territory of another State, yet there is a common interest in ensuring that criminals find no safe havens and cannot ultimately frustrate justice by exploiting international boundaries. It provides an official mechanism accepted by governments for sub-government agencies to pursue this common interest and carry out their regulatory and administrative functions within a foreign context if needs be. Above all, it acts rather like an electrical adapter or travel plug, facilitating the interaction through mutual legal assistance 'treaty law' of different bodies of substantive criminal law and different bodies of criminal procedure law.

<u>The relationship between mutual legal assistance and mutual assistance</u>

It is worth considering further the relationship between mutual legal assistance and mutual assistance (also known as international law enforcement co-operation). This is a distinction that the Home Office finds useful to employ. It distinguishes between requests for assistance that must be supported by an ILOR (mutual legal assistance) and assistance that is not so supported, for example a direct contact between UK investigators and their foreign counter-parts or inter-agency contact established through a third party such as Interpol, Europol, the Drugs Liaison Officer (DLO) or the Crime Liaison Officer (CLO).

These lines of distinction appear decidedly blurred when, as is so often the case, mutual assistance prepares the way for subsequent mutual legal assistance or when mutual

assistance lines of communication are used to facilitate the transmission of mutual legal assistance requests. The use of the term 'legal' in the one phrase seems almost to imply that mere mutual assistance, if not actually illegal or unlawful, is in some way less authoritative than mutual legal assistance. Is this true?

An ILOR is not always necessary when gathering foreign evidence. Many States, however, will not provide any form of formal assistance, including the gathering of evidence, without the issuing of an ILOR. This is usually the case when one or both of the States concerned is a Civil Code State although it does not preclude the possibility of informal preparatory assistance. There have been examples of direct assistance between law enforcement agencies in Common Law States providing evidence for each other or even allowing each other's enforcement agents into their territory to gather their own evidence unsupported by an ILOR (HMCE interview 28 July 1999, National Crime Squad interview 5 July 1999; Sussex Police interviews 3 August 1999).

The *CJ(IC) Act* provides a mechanism for using ILORs but it is not exclusive. The question arises as to whether an ILOR is required by the *requested* State or the *requesting* State. It does not follow that, having concluded a treaty, the signatory Parties are exclusively bound by its provisions (Gane & Mackarel 1996:103). The legal status of the *ECMA* is such that a signatory party can refuse to comply with an ILOR, or it can render evidential assistance without recourse to an ILOR. If a requested state does not require an ILOR from English investigators then the *CJ(IC) Act* certainly does not invalidate any evidence obtained without an ILOR. Nor does it render all evidence obtained with an ILOR automatically admissible (Beijer *et al.* 1995:298; see also Gane & Mackarel 1996:103).

The ILOR procedure is a means of structuring contact between agencies that would not normally have contact with each other. Practitioners testify to its cumbersome bureaucracy and inadequacies in relation to the proactive policing of transnational organised crime (ECCP 1971; National Crime Squad interview 28 July 1999) but it has no bearing on the authenticity, or legality of evidence so obtained. Nevertheless many investigators perceive that foreign evidence is inadmissible without the support of a properly structured ILOR (Kent County Constabulary interview 22 October 1998; National Crime Squad interviews 27 May 1999, 17 June 1999 & 5 July 1999) even though this communication between prosecuting authorities would seem to constitute documentation subject to legal privilege (§10(1)(b) *PACE*) and so is beyond the scrutiny of an opposing advocate at trial.

Practitioner interviews have revealed that routine liaison accounts for the majority of transnational investigator contact (Harfield 1999). This constitutes mutual assistance rather than mutual legal assistance but it is contact that may reveal material of evidential value in an

enquiry. Should courts exclude evidence discovered through liaison (mutual assistance) rather than by means of an ILOR (mutual legal assistance) (Gane & Mackarel 1996:112)? Unanimously law enforcement practitioners indicated that under such circumstances, within Europe, an ILOR would be sought in order to secure the information evidentially. (Which is consistent with the advice and guidance offered by the Interpol NCB in London, November 2002.) In which case the concern of Gane and Mackarel would not arise. Even if such circumstances did occur, the absence of an ILOR does not of itself appear to render the evidence inadmissible.

Excluding evidence unlawfully obtained is provided for in English trial procedure (§78 *PACE Act 1984*) but case law also provides that relevant evidence may sometimes be admitted not withstanding the unlawfulness of its acquisition (Gane & Mackarel 1996:109-111; the key case-law is *R v Sang* [1979] 2 All ER 1222, [1980] AC 402). To seek the exclusion of evidence on issues surrounding the method of request is a tactical obfuscation. Acceding to such an argument creates a danger that case law will develop that, in the UK, elevates a diplomatic procedure to the status of the law of evidence. The only degree of consistency that seems to emerge from this complex variety is that a particular sample of UK law enforcement agents would, as a matter of routine, seek to formalise any evidence from other European States that came into their possession or of which they became aware, by means of an ILOR. But that is only to be expected given that they would be dealing with Civil Code jurisdictions.

There are some key issues susceptible to further research (for instance through case studies) in characterising the relationship between mutual legal assistance and mutual assistance. At what point do investigators resort to mutual assistance, and on what criteria do they extend this to mutual legal assistance? At what point does mutual assistance need to become 'legal'? Perhaps the simplest explanation is that mutual legal assistance activity is defined by international treaty. Any activity that falls outside the strict application of any given mutual assistance convention should be regarded as mutual assistance rather than mutual legal assistance.

How then, do international police organisations fit into this relationship? Of relevance to a European-based study are Interpol and Europol. The status of these two institutions is rather different although it was the desire for facilitation leading to improved agency-to-agency contacts that lay behind the creation of them both.

Interpol, although recognised as a public international organisation by the UN, is not founded upon any intergovernmental treaty. Essentially a private association of police organisations, its primary purpose is to facilitate communication between law enforcement

agencies across the world (Anderson 1989:150; Anderson *et al.* 1995 50-52). As such its usefulness is recognised in the *EUCMA* which provides that in cases of urgency requests for mutual [legal] assistance may be transmitted via Interpol (Art 6(4)). But such requests would still have to be generated by a domestic judicial authority for the consideration of a judicial authority in the requested State. Interpol would merely seek to provide a speedier means of transmission that might be achieved through diplomatic means or via Central Authorities.

The same article provides for the transmission of urgent request via "any body competent under provisions adopted pursuant to the Treaty on European Union" and this would seem to include Europol. Having been created initially as the European Drugs Unit to enable the exchange of intelligence between law enforcement agencies about drugs trafficking, Europol is now a fully adopted institution of the EU (Title VI, *Treaty of Amsterdam* 1997). Hence it acts with the authority of intergovernmental agreement. Indeed, a co-ordinating and tasking role is envisaged for Europol under the *Treaty of Amsterdam* (Art 30(2)) and when the *EUCMA* comes into force, there will exist arrangements by which Europol officials may participate in the work of joint investigation teams (Art.13(12)), although the UK government opposes Europol staff performing anything more than an analytical, support function in such ventures (House of Lords 2000:13, paragraph 41).

The function of these organisations is to facilitate in their different ways, mutual assistance. They both have a recognised role to play in what the Home Office would term mutual legal assistance but only in limited and urgent circumstances. In addition to these two organisations there is in UK Embassies around the world, a network of DLOs, CLOs, and some Immigration Liaison Officers. These are officers seconded from their UK domestic law enforcement or regulatory agency to act as liaison officers for all UK law enforcement agencies seeking assistance in the country to which the liaison officers have been posted. Co-ordinated by the NCIS, they present an alternative means of facilitation to that provided by the international organisations. The relationship between these individuals and the organisations can sometimes be characterised as competitive (HMCE interview 28 July 1999) with individual DLOs expressing dissatisfaction if a UK-based agency leaves the DLO 'out of the loop' either by arranging its own direct contact with foreign authorities or else relying solely on either Interpol or Europol. The jealous guarding of channels of communication potentially generates the counter-productive raising of 'Chinese walls'.

Channels of communication are not the only closely guarded possession. Organisational interests likewise are increasingly being guarded, often through broad interpretation of statutory remits, as some agencies in particular seek to adjust or redefine their roles. The size of Europol may not be a threat to Interpol but the constitutional status may well be, at least in Europe. The tension between Europol and Interpol was recently

apparent as Europol sought a mandate to seek extension of its convention remit into the area of cyber crime. [15] Since cyber crime is, almost by definition, global, the view was expressed that Europol was pitching for a global function that was rightly Interpol's.

There remains one further aspect of the relationship between mutual legal assistance and mutual assistance that deserves comment: the role of the political action plan.

The G8 (or 'Group of Eight') is a political association (informal in that it is not established by treaty law) of leading industrialised democracies that was originally drawn together as a group of five nations in 1975 at an economic summit convened by the then French President, Giscard d'Estaing. As the group has increased its membership, and its summits have become more formalised, so it has expanded its areas of interest beyond the merely economic. In 1996 a group of experts brought together by the G8 heads of state, known as the Lyon Group, was commissioned to look at better ways to combat international crime (Sussmann 1999:482) in order the better to protect legitimate global economic markets.

The Lyon Group made forty recommendations for combating transnational organised crime efficiently (G8 communiqué, Paris, 12th April 1996; see also the G8 communiqué, Moscow, 19th-20th October 1999) which has subsequently been revised in 2002 (www.g8j-i.ca/english/doc1.html, accessed October 2002). Various sub-groups have been established as part of the Lyon Group, one of which exists specifically to consider issues arising from the use by criminals of IT to further their criminality. The G8 heads of state have adopted ten principles and a ten-point action plan to combat high-tech crime (the text of which is reproduced in Sussmann 1999:482 footnote 135). "Essentially an international template for fighting high-tech crime ... It is the first time a group of powerful world leaders have jointly adopted a detailed plan for fighting computer crime" (*ibid.*:484).

It is not the first time that groups of nations have formulated an action plan. The EU published its own *Action Plan to Combat Organised Crime* in 1997 (document number 7421/97) and has since followed this up with an action plan to implement the JHA provisions of the *ToA* (*OJ* C19, 23rd January 1999, pp.1-15). Under the Finnish Presidency, a European Council meeting was held at Tampere (15th-16th October 1999) and its concluding statement endorsed previous policy work and promised more. The Council called for better co-operation in the Union-wide fight against crime including joint investigation teams which have since been provided for in the *EUCMA*. (House of Lords 1999 HL Paper 101; for the Presidency Conclusions see http://europe.eu.int/council/off/conclu/oct99/oct99_en.htm). Regarding the

[15] High-level meeting of experts in cyber crime, Europol, the Hague 6th-7th November 2000. Attended by author as part of UK delegation.

prevention and control of organised crime, an EU strategy for the new Millennium has been published (*OJ* 2000/C 124/01).

But the G8 action plan in respect of high-tech crime has gone further. A network of 24 hour, seven days-a-week contact points is being established both for G8 States and other States to enable speedy investigation of high-tech crime (Sussmann 1999:484). This policy agreement sits outside conventional international law. Its very purpose is to by-pass routine mutual legal assistance communication channels in the first instance to ensure that evidence in electronic form can be secured as quickly as possible before either criminals have an opportunity to destroy it, or it is destroyed routinely under data protection rules and Internet Service Providers' [ISP] business practices. Once preservation is secured, the production of the evidence can be formally requested by means of an ILOR through normal mutual legal assistance channels. In the world of IT crime, mutual legal assistance must be capable of working literally at the speed of light down an optic fibre cable. Rather faster then than Home Office civil servants and indeed law enforcement agencies have hitherto been used to.

Where the G8 leads, in this area the Council of Europe is following. Its *Cyber Crime Convention 2001* has formalised many of the actions advocated by the G8 experts. It is recognised that mutual legal assistance agreements for securing evidence in a manner that does not infringe national sovereignty, are incapable of ensuring the preservation of certain types of evidence. Enforcement action up to a point must now be taken on trust with the scrutiny of judicial and political authorities coming, *ipso facto*, after the event.

Political action plans, particularly those emanating from the EU in the half dozen years either side of the millennium, shed new light on mutual legal assistance and mutual assistance. Where once national leaders placed preservation of sovereignty over mutual (legal) assistance, now the recognition that crime recognises no sovereignty has forced the pace. No longer are States primarily concerned about capturing fugitives. The emphasis is now very much on protecting their own citizens and economies and in this regard the practicalities of mutual assistance are beginning to take priority over the processes of mutual legal assistance. A subtle shift may be detected in the politics of policing. So much so that it can seriously be suggested that within the EU, international law enforcement co-operation become a supranational First Pillar issue for the sake of enhanced co-ordination and judicial supervision, rather than remain an intergovernmental Third Pillar matter (Schalken & Pronk, 2002).

Mutual legal assistance and domestic police primary functions

The politics of policing encompasses a further aspect of work arising from consideration of the wider issues of mutual legal assistance. A Home Office official recounted a telling vignette (UKCA interview 7 August 1998). An ILOR from a foreign State was received at the UKCA and duly forwarded to the police force for the area in which the enquiries had to be undertaken. Upon completion the paperwork was returned to the UKCA for onward transmission to the requesting authority. As the request had filtered down the chain of command in the police force concerned to the person ultimately delegated to deal with the matter, so a senior police officer had at some stage scribbled in the margin of the request letter: "this has nothing to do with my policing targets, but I suppose we had better do it anyway."

Operational discretion, starting with the Chief Officer and within the parameters set by this individual afforded to the constable on the beat also, enables the UK police to decide for themselves (within the broad constraints of the local policing plan §10(2) *Police Act* 1996 and the National Policing Plan, *Police Reform Act 2002* Part I) what criminality is to be investigated and how the investigation might be carried out. That discretion has been considerably focused by performance targets following the imposition of the New Public Management philosophy of the 1980s (Audit Commission 1986, 1994; Butler 1992; Flynn 1993). This focus has been reinforced in statute with provision now being made for multi-agency community safety strategies required by law (§5&6, *Crime and Disorder Act* 1998).

If providing mutual legal assistance on request is vulnerable to concerns about performance figures in other areas, then it is an activity that may receive less attention that it merits. This will not be universally true. So reliant are the National Crime Squad and the National Hi-Tech Crime Unit, for instance, on assistance from foreign agencies, any in-coming request passed to these agencies for execution is likely to receive prompt attention on a *quid pro quo* basis. The same is true for the NIS [16] and its counterparts. Central authorities are provided for in treaty law in order to establish a single point of contact for requesting States. A foreign agency can hardly be expected to know which of the fifty or so UK police forces it should contact for assistance with interviewing a witness. Indeed, the proper authority to execute such a request may not be a police force. The UKCA, however, plays no role in assessing the quality of responses to requests (UKCA interview 7 August 1998). It merely transmits the paperwork back and forth.

[16] National Investigation Service, the proactive plain-clothes investigation department of HM Customs & Excise.

The quality of UK responses to requests for assistance received is an issue that appears initially to have escaped any UK domestic attention, even in the performance-focused culture that now thrives. (This was to change under an Union-wide peer evaluation of mutual legal assistance arrangements, discussed below Chapter 4.) Yet it is an issue that impacts upon the quality of assistance that UK agencies might themselves receive. High-level diplomatic intervention was required to persuade the *juge d'instruction* at St Omer, France, once again to accept UK ILORs after he refused to do so citing poor co-operation from English authorities as justification for his unilateral action. Had persuasion not worked, he could not have been compelled to provide the requested assistance (Kent County Constabulary interview 22 October 1998).

With the exception of the NCIS and the National Crime Squad (§2(2) & §48(3) *Police Act 1997*), it is not the statutory - or measured - function of UK law enforcement agencies to assist foreign counter-parts, although permissive legislation allows local forces the discretion to do so subject to Home Secretary authority (§26 *Police Act* 1996). UK police forces are required to deliver the intentions expressed in the plans of local police authorities (§10(2) *Police Act 1996*). An assessment of attitudes towards ILORs amongst UK law enforcement agencies would be an interesting balancing exercise to the largely negative conclusions of Nicholson & Harrison (1996) concerning the effectiveness and value of mutual legal assistance to UK-based investigators.

A study of the relationship between political action plans at the international level and structures for delivering policing priorities at local level within the context of performance measurement might be an illuminative exercise but there is also another facet to this issue: the relationship between national and supranational provision. Supranational jurisdiction arguably has the potential to render redundant the need for mutual legal assistance structures. Both in the global and European arenas much has been written (on supranational jurisdiction within the EU see Donà 1998; House of Lords 1999 HL Paper 62; Vervaele 1999; Schomburg 2000; Schalken & Pronk 2002; whilst on the International Criminal Court see Stewart 1998, Stevens 1998). There may yet be much more to be said on these matters, but for some years to come such discussion will remain hypothetical because of the prevailing political contexts (House of Lords 1999 HL Paper 62).

Conclusion

This chapter has sought to identify why States need mutual legal assistance. The simple answer is that it allows them to enforce their laws without geographic restriction but also without infringing the sovereign rights of other States. It is also the only practical means

of combating transnational organised crime that has become a significant threat to transnational and world security because it undermines legitimate economic activity and fiscal revenues, and because it destabilises embryonic democracies and emerging States. Some subsidiary issues in relation to mutual legal assistance have also been considered to help illuminate the context within which mutual legal assistance operates. Having thus considered the legal issues from the perspective of the State academic theoretical approaches to the study of mutual legal assistance are discussed in the next chapter.

Chapter 2

Models of mutual assistance

Models of jurisdiction and mutual legal assistance provide opportunities of interpretation and there are a variety of models seeking to explain different aspects of the mutual (legal) assistance and international law enforcement co-operation arenas. Some focus on the relationships between national and supranational policies, others on the relationships between jurisdictions and concepts in law, yet others on the relationships between practitioner agencies. What follows is a summary of the principal examples.

At the strategic conceptual level Gregory identifies "three expressions of severity" within the international criminal law arena (2000:101):

- "war crimes and crimes against humanity";
- "acts which attract universal condemnation"; and
- offences that transcend "domestic law sphere".

The first of these levels of criminality lies outside the scope of this thesis. International armed conflict not only generates military atrocities but also undoubtedly offers opportunities for transnational organised crime groups to raise revenue and expand their business. There is evidence that the various protagonists in the recent Balkans conflicts engaged with criminals in a number of ways to their mutual benefit - the combatants were supplied with resources, the criminals with new markets (Nick Ridley, Europol presentation to International Law Congress, Nicosia, April 2000). Enforcement action against such criminality is, during the period of hostilities at least, an international military issue rather than a matter for domestic law enforcement agencies acting either individually or in concert. Whilst not unimportant, this level of criminality falls outside the day-to-day activity of domestic law enforcement agencies under consideration in this thesis.

The other two expressions identified by Gregory capture the level and types of activity that is of interest to agencies charged with providing mutual legal assistance required in criminal investigations. Trafficking in humans, drugs and arms have all attracted universal condemnation as demonstrated in various international instruments, whilst any given individual offence against a national law may involve evidence-gathering abroad now that international travel is so frequent. The UKCA regularly receives, for instance, *commissions rogatoire* from French authorities seeking to prosecute UK truck drivers for traffic offences committed in France (Simon Watkins, UKCA, interview 7 August 1998; Serges Roques, Prosecutor's Office, Dieppe, interview 18 May 1999).

Approaches to dealing with these degrees of severity can also be modelled. The International Criminal Court [ICC] has been established with international jurisdiction to deal with the first of these (*New Law Journal* 25 September 1998 p.1381; *HL Hansard* 15 January 2001 col.924) although it conception has provoked vigorous debate amongst jurists (for opposing views see Bassiouni 1999 (for) and Rubin 1999 (against)). Politicians equally are divided. President Clinton actively supported the ICC (Stevens 1998:237) and signed the Rome Treaty but President George W. Bush has "no plans to send it forward to [the] Senate for ratification" (Colin Powell, US Secretary of State quoted in *The Independent (Review)* p.10, 20 February 2001) and has actively been lobbying other States such as Australia, to 'unsign' the ICC treaty ('Howard sympathetic to US on international criminal court' *Sydney Morning Herald* 29 August 2002). As currently established the ICC has no jurisdiction over the types of criminality and enforcement measures under consideration here for which mutual legal assistance measures exist in lieu of international jurisdiction.

National attitudes to jurisdiction are modelled by Heymann who proposes two models for interpreting international law enforcement co-operation. Where States share a trust in each other's legal systems, a similar outlook on prosecution and are prepared to tolerate limited, non-intrusive self-help by each State within the borders of the other, then this direct, bilateral co-operation constitutes Heymann's *prosecutorial model* (1990:103). This characterises the culture of direct co-operation between investigators of any given agency working at the micro level, sometimes termed the philosophy of 'practical policing'.

Heymann's second model describes a scenario founded upon broad principles such as sovereignty in which detailed rules are provided for dealing with cross-border contact between law enforcement agencies. Strict observance of the sovereignty principle inhibits contact at the micro level that is unsupervised or uncoordinated by an agency at either the meso or macro levels. This he terms the *international law model*. Heymann concluded: "no nation adheres to either [model] in its pure form", (*ibid.*:105).

Brown, reflecting on these two theoretical propositions, considered Europe and found both models applicable. The *ECMA* falls within the international law model considered by some at the time to be "revolutionary" (1998:51). This treaty provides an intergovernmental, legal structure for mutual assistance between European states. Brown contrasts the formality of contact required by the *ECMA* with the *relative* informality provided by the *Schengen Convention 1990* which foreshadows the gradual abolition of internal borders within the EU and enables under certain circumstances, cross-border surveillance (article 40) and cross-border pursuit (article 41) within the territories of contracting parties.

Two contrasting models are apparent in the political approaches to negotiating mutual legal assistance instruments (Harfield 2003 for detailed presentation of the arguments; Harfield 2002 for issues arising from the contrasting approaches). The European and UN approaches can be described as that of *consensus*. Multilateral instruments, such as crime suppression conventions, are negotiated to reflect the basic standards that the signatory parties are prepared to adhere to. Often there is scope within these documents, particularly within those of the EU, for more extensive bilateral instruments to be individually negotiated based on the minimum common standards outlined in the multilateral convention ('UK-Spain: fast-track extradition agreement' *Statewatch* 11(2), pp.8-9, 2001). But the principal beneficial characteristic of multilateral conventions is their acceptability to as many States as possible and thus their establishment of international norms.

The downside of such an approach, so argue many American commentators and professionals (interviews with Lystra Blake, Associate Director, Office of International Affairs, Department of Justice, Washington DC, 16 May 2001; and with Lance Emory, FBI Legal Attaché, U.S. Embassy, London, 22 February 2000), is that such an approach only achieves the lowest common denominator and that a bilateral instrument can be tailored more closely to the needs of the two parties. The bilateral approach is the strong preference of the US administration although President Clinton did note, when commending the multilateral Organisation of American States MLAC to Congress, that one of its advantages was that it saved the expense and effort of negotiating bilateral treaties with each South American nation (*Inter-American Convention on Mutual Assistance in Criminal Matters with Related Optional Protocol*, Treaty Doc. 105-25, 105th Cong., 1st Session (1997); ratified by the USA, May 2001). The attraction of bilateral treaties to the US administrations is that the power relationship in such negotiations is asymmetrical, to the extent that this strategy can be modelled as a *control* model, in which the powerful state can negotiate treaties that suit its own needs and foreign affairs agenda, and does not necessarily best serve the interests of the less powerful party (a point made independently by a number of foreign law enforcement liaison officers posted to Washington DC in interviews conducted May-July 2001, and in Zagaris 1998:1408). Indeed, through the judicious deployment of bilateral instruments between partners of unequal status, the control model can be used to promote what is essentially a disguised form of unilateralism.

Heymann's models and the control and consensus models proposed here are not mutually exclusive. The latter complement and illuminate the former. Heymann illustrates how attitudes to international law enforcement co-operation might be characterised, whilst the control and consensus models suggest how different political considerations influence strategic approaches to the negotiation of MLATs and MLACs. US bilateral relations with

individual EU Member States are complicated by the EU obligations imposed on its Members. Indeed, concern was expressed (interview with Lystra Blake) that EU multilateral arrangements threatened the bilateral relations the US had with certain European States (it does not have bilateral MLATs with all EU Member States). To that extent, the US has been exploring, initially in complete secrecy but post 9/11 at least with some public awareness that talks were taking place, with the EU on a bilateral basis ('E.U.-U.S. secret agreement in the making' *Statewatch* 12(2) pp.1-2, 2002). These talks, in which the competency of the EU to negotiate of its own volition in JHA matters with a Third Party is by no means clear-cut, did not progress as well as the US might have hoped (Home Office Mutual Legal Assistance Forum 6 December 2002) since none of the four goals of the US (three of which concerned extradition issues) have been accepted by the EU. Although an EU-US MLAT has been agreed (*OJ* L 181/34, 19 June 2003), to supplement existing US bilateral treaties with EU Member States, privately British government officials have indicated that it is poorly drafted and as such ineffective in what it seeks to achieve.

Also at the strategic level, the *formal treaty-based procedural approach* to mutual legal assistance (e.g. *ECMA*, *EUCMA*) can be contrasted with the *informal schematic approach* (*Harare*) that promotes suppression within a given framework whilst not necessarily detailing procedures to achieve this (e.g. the *Harare Scheme*, the *UN Drugs Convention* (1998) and *UNTOC* (2000)). In the former, signatory Parties agree defined actions to be undertaken in given circumstances. In the latter, nations agree to criminalise specific behaviours thereby achieving a harmony or synchronisation that eliminates safe havens for criminals. The former, characterised by a greater degree of commitment from the signatory parties, is typical of a jurisdiction philosophy founded upon a written constitution and comprehensive criminal code such as exist in Civil Code countries whilst the informal scheme accords more closely with Common Law traditions.

Parallel to this simple model for government interaction is the five-element model of transnational enforcement identified by Dirkzwager (1999) that incorporates the relationship between supranational and national bodies. He identifies in relation to EU customs laws the contrasting options of *direct* or *indirect* enforcement, which are underpinned by three different types of relationship evident in the EU: *horizontal* (Member State to Member State), *vertical* (EC to Member State) and *diagonal* (enforcement agency in one Member State to judicial authority in a second Member State). This model is helpful for understanding the possibilities now inherent in the increasing influence of EU institutions in criminal law and the operation of the *EUCMA*.

Hebenton and Thomas also consider supranational issues in their three-part model. For them *horizontal integration* means the investigators of one nation being authorised to act

in another country whilst *vertical integration* involves the creation of a supranational enforcement agency. The third alternative is *mutual co-operation* (1995:58-59). All three of these models can exist within a formal, treaty-based context. The *Schengen Acquis* represents horizontal integration in this model whilst the work of the EU's anti-fraud investigative unit – the *Office de lutte antifraude* [OLAF] - represents the early stages of vertical integration. Agency-to-agency mutual assistance, whether ad hoc or on the basis of a *Memorandum of Understanding* [MoU] fits the third tier of the model.

Although now dated, Hebenton and Thomas' 'co-operation or integration' approach is still sound in principle and forms the historical background for the developments of other supra- and international models.

Atop the supranational pyramid is a global solution, the ICC, intended to deal with Gregory's first degree of severity. At the regional supranational level concepts such as a supranational criminal code, the *Corpus Juris*, have been proposed and supranational enforcement mechanisms are being established (see Chapter 3 for further discussion of *Corpus Juris* and OLAF). Schomburg (2000) views supranational responses as the logical development of mutual legal assistance measures in that they present a 'level playing field' for investigators and suspects alike. Joerges & Vos (1999:90) suggest that the EU's supranational constitution, as expressed in the ECJ (Zuleeg 1999), is an appropriate vehicle by which criminal justice norms can be established at this level of interaction. Pedersen *et al.* (1999) have already begun to examine the relationship between EU law and domestic criminal sanctions in those First Pillar areas where EU law and municipal law coincide, the former having primacy.

Moving from models of supranational enforcement to models of international co-operation Vervaele argues that "the future of European integration does not consist in building new supranational European institutions but in consolidating and intensifying integration through multi-level government structures with a strong multi-level interdependence between the various levels of political institutions" (1999a:382). Thus he proposes a *network model* in preference to a truly supranational model. For trans-European enforcement networks to become multi-level agency structures Vervaele looks to the US Federal/State agency hierarchy model as a way to proceed (*op.cit.*383-7).

An alternative way of approaching this same issue is through consideration of the continuum that runs from *harmonisation* of criminal laws to *mutual recognition* of court judgements. At one end of the continuum lies a common criminal code and the means to enforce it; a combination, for instance, of *Corpus Juris* and OLAF. At the other end, rather than subscribe to a common criminal code, different national jurisdictions agree to honour

each other's court orders; hence a search warrant issued in the UK would be valid in continental Europe and *vice versa*. In between these two extremes, lies the approximation or synchronisation of laws such as is envisaged in suppression treaties. Transnational criminality can be addressed by ensuring similar crimes and investigative powers exist among the signatory parties. At trial, although part of the overall criminality may occur outside the jurisdiction, it is nevertheless taken into consideration through judicial recognition of elements such as conspiracy for instance.

Cadoppi notes that the protection of human rights has already led to some harmonisation between different European jurisdictions (1996:6), and the enacting of the *Human Rights Act 1998* in the UK is an example of this. As much as 80% of economic and social legislation and approximately 50% of all other legislation enacted in municipal jurisdictions "now emanates from Brussels, whether via directives or more informal political decisions of the Council which have no legal force as such but which are regarded as binding on governments" (Edwards 1996:143). This, too, is a harmonising development with which national parliaments, including that of the UK, are complicit (Carter 2000:457).

Nevertheless Europe is far from achieving real harmonisation.

> "The reality of the diversity of legal orders and of regulatory styles poses problems for the ambition to harmonize regulatory standards in the EU. They complicate the uniform implementation and enforcement of EU law. The national differences in the styles of rule formulation and in the nature of the rules affect in particular the legal implementation, the transposition of EU regulations and directives in national law. The national differences in penal and administrative sanctions, and the styles of rule enforcement affect the uniform application of the law. And indirectly, the styles of rule formation do as well" (Van Waarden 1999:116).

At the other end of the continuum, mutual recognition is not without its drawbacks.

> "...it hardly seems appropriate to rely upon the principle of mutual recognition as a regulatory instrument to overcome the differences in national legislative provisions ... as a regulatory instrument [mutual recognition] fails where objectives of national legislation diverge ... it has faltered in the face of the member states' unwillingness simply to accept each other's products"(Joerges & Vos 1999:83).

Models, of course, can be used to predict and explain failure as well as success. The supranational approach is predicated upon supranational agencies and laws and requires the commitment of nation States to the greater good of the international community. The international approach, on the other hand, relies on mutual co-operation between States but is characterised by the inherent vulnerability of nations unable to fulfil or meet the mutual obligations and by the absence of enforcing compliance.

So much for strategic level models. Theoretical modellers have explored the tactical and operational levels of law enforcement activity as well.

Anderson (1989:chapter 8) & Sieber (1994) both consider a functional continuum ranging from centralisation to decentralisation. The centralised element of this model is

represented by a national unit or agency, for instance the NCIS, co-ordinating and transmitting all transnational communication from the national law enforcement system to representatives of another national system or an inter-state organisation such as Interpol. At the opposite end of the scale, in a decentralised arrangement, individual law enforcement agencies communicate directly with their foreign counterparts and any national agency operates in a advisory or facilitation capacity. Gallagher identifies intermediary stages on this continuum. "Qualified centralisation refers to a situation where two levels of inter-police agency linking could take place. One would be via a national co-ordinating unit and the other, in special circumstances, via direct police to police contact. Qualified decentralisation allows direct communication between police forces but requires reporting of these communications to a national co-ordinating unit." (1998:82). The latter describes the functioning of the Kent police European Liaison Unit based at the Folkestone end of the Channel Tunnel.

Benyon, considering the overall framework for police co-operation, has identified a three-tier hierarchy (1997:107-108). These correspond to the strategic/tactical/operational hierarchical model used by law enforcement to identify functional chains of command although Benyon has chosen the labels *macro, meso* and *micro* for his hierarchy. The *macro* level comprises the setting of strategic policy expressed in constitutional and international agreements or the harmonisation of laws. The *ECMA* is macro-level instrument. The *meso* level describes structures, practices, procedures and technologies that exist at the tactical level, such as liaison officer networks for instance. The Cross Channel Intelligence Conference [CCIC] operates at this level, as does the Drugs Liaison Officer network (Bigo 2000). The *micro* level describes the operational level at which individual investigations take place; the prevention or detection of specific criminality. It is at this level that the *commission rogatoire* sits for instance.

In his examination of the driving forces behind the growth of cross-Channel police co-operation, Gallagher proposes a *frontier zone model* to describe the interaction dynamics of border policing and the relative levels of influence from local centres (units or force HQ) and national centres (government, national agencies). "Borderlands can be viewed as a network of tensions, creative as well as destructive in their purposes and effects. Public intervention by a sub-central agency such as the police can be interpreted as a form of tension management" the outcome of which "influences attitudes to events, the general characteristics of policy and the planning for activity in or around the frontier" (1998:236). This model is specific to true frontier zones rather than international co-operation as a whole. It offers an explanation for the driving forces that have meant Kent police are relatively advanced in their co-operation mechanisms compared with other UK police forces. In it may also be found the seeds of explanation for the establishment (if any) of local units because national agencies

such as the NCIS, which have as a primary function international liaison, are ill-suited to provide the practical day-to-day functions needed at the frontier.

It remains only to note two contrasting models of legal tradition. The distinction between the Common Law tradition and the Civil Code tradition of administering justice dictates the perception and probative attitudes to different types of evidence. The reliance on oral testimony in Common Law jurisdictions inhibits some of the more obvious means of achieving practical co-operation in adducing evidence from abroad. The reliance in Civil Code jurisdictions on judicial (rather than police) investigation frustrates Common Law enforcement agencies used to autonomous investigation. It is from these two fundamentally different cultural foundations that MLACs and MLATs are negotiated presenting us with an instrumental framework, or statutory models, of mutual legal assistance.

Having looked elsewhere at strategic-level models relating to mutual legal assistance (Harfield 2003), the present research will focus at the operational level, the *micro* level within Benyon's hierarchy of international law enforcement co-operation, by examining cross-border evidence gathering in general as it is experienced by local police forces in England and by examining specific case studies. The objective is not to test the validity of Benyon's model but to test the effectiveness of the model of mutual legal assistance based on UK legislation enacted in 1990 and yet to be fully replaced.

Before this can be considered however, it is necessary to understand how the current mutual legal assistance infrastructure within which English investigators operate, developed. That is the purpose of the next chapter.

Chapter 3

The development of mutual legal assistance mechanisms

Chapter 1 defined mutual legal assistance and Chapter 2 presented various conceptual models that have been used to interpret different aspects of mutual legal assistance and international law enforcement co-operation. The relationship between the present research and the theoretical and statutory models has been identified. The purpose of this chapter is explain how the UK came to adopt the mutual legal assistance statutory regime that it established in 1990 and what the influences were. This will provide the starting point from which consideration of research gaps and methodology can be presented.

Mutual (legal) assistance in criminal matters is largely a phenomenon of the post-WW2 era. Whilst it was not unknown earlier in the twentieth century - Dr Crippen being an early and much publicised example of a transnational arrest secured through new technology (*Daily Mirror*, 1 August 1910, p.1) - when Hinton came to compile an early guide to gathering evidence abroad, arrangements were very much *ad hoc* with a few bilateral agreements in force but no multilateral treaties (1930). [1] In the aftermath of WW2 the Council of Europe commenced work on a number of treaties with the overall purpose of securing lasting peace and security within Europe (Cram 1996:40; Minogue 1995:55-56). These included the *ECMA*, which came into force in 1959. Mutual (legal) assistance in criminal matters has received additional political impetus within western Europe in recent years as the EU has broadened its sphere of interest beyond economic affairs (First Pillar) to Third Pillar issues such as justice and home affairs. The 1997 *ToA* (Title VI) and the Presidency Conclusions arising from the EU Tampere summit amply illustrate this. Transnational criminality is now presented (and presumably perceived) as a major threat to the EU and its Member States (see for instance, Europol 1999; the *UK Threat Assessment* published annually by the NCIS; Europol *Annual Reports*; Foreign & Commonwealth Office 2002:15) and since September 2001 it has been linked with the United States' 'war on terror' (Conclusion and Plan of Action of the Presidency, Extraordinary Informal Meetings of the European Council, Brussels, 21 September 2001; Harfield 2003:234-6). Consequently, international co-operation and mutual assistance in enforcing national criminal laws (in the absence of an international criminal code) is being presented as the way to combat such criminality and the justification for EU interest in this arena.

[1] The UK entered into bilateral agreements with France (1922), Belgium (1922), Czechoslovakia (1924), Germany (1928) and Spain (1929) (Hinton, 1930:14).

This chapter considers whether the motivation or driving force for mutual legal assistance has been practitioner-based (bottom-up) or politically driven (top-down). It does so in order to provide a context within which to consider the key research questions of this thesis outlined below (Chapter 4). Because of the geographical and temporal scope of this thesis, the principal focus will be on the UK and Europe.

Practitioners as a driving force

Those who directly seek and provide mutual legal assistance (investigators) are not those who establish the mechanisms for mutual legal assistance (politicians, administrators). In the view of one experienced UK investigator, inter-governmental negotiations concerning mutual assistance suffer from the lack of practitioner participation (Frank Gallagher, interview 14 November 2000). The fact that administrators withheld from practitioner and public comment the preliminary text of the Council of Europe's proposed cyber crime convention until draft no.22 is an example that supports Gallagher's view. An actor driving for change may not be the same actor who then implements the subsequent changes. In other words, bottom-up drivers may not have definitive influence in establishing mutual legal assistance mechanisms.

As long ago as 1968, the need for mutual assistance mechanisms was felt most keenly amongst UK law enforcement agencies by Kent County Constabulary which had responsibility for the cross-Channel ports of Dover, Folkestone and Ramsgate. The UK had signed but not ratified the *ECMA* and so UK authorities engaged in transnational enquiries had at their disposal only the (pre-*ECMA*) customary practice of international law as identified by Reuter (1958). Requests for assistance were entirely *ad hoc* and formality had to be invented as and when required (for just such an example see a *'commission rogatoire'* drawn up by a Justice of the Peace for the Borough of Margate 18 October 1967, Gallagher 1998:248).

Illegal immigration was a significant problem common to authorities on both sides of the Channel in 1968 and the then Chief Constable of Kent sought to establish the CCIC with his opposite numbers. This initiative was pursued in the absence of any government assistance and, in fact, French participation was constrained by French government resistance to autonomous actions by local police chiefs (Gallagher 1998:140), a position consistent with the hierarchical and judiciary-based investigation system operating in Civil Code France (Vogler 1996). From this innovation, in which the practitioners were the prime movers, there evolved a particular form of mutual assistance based on the frontier zone which had the Channel ferry routes at its epicentre (Gallagher 1998:235-237). Such co-operation and

transnational linkage was essential to the Kent police but given the relative autonomy of UK police forces (particularly at that time), there was no appetite within government for any national policy or initiatives in this area. In the absence of any formal government support, the Chief Constable proceeded with his international relations on the basis of his own authority (Gallagher 1998:234; see also Walker 1993:131).

Clearly this was mutual assistance driven by the practitioners. It was mirrored elsewhere with the "establishment of informal co-operation between chiefs of police in the border region of Belgium, the Netherlands and Germany in 1969" (Mangelaars 1993:72 citing Fijnaut 1992). There are limits even to a Chief Constable's authority and in negotiating international agreements, chief officers are confined to the level of inter-agency Memoranda of Understanding which fall well short of the effects that can be achieved through inter-governmental instruments. Of necessity, Kent police continue to negotiate and update agency-level mutual assistance agreements with their opposite numbers, without the formal participation of government departments (who are nevertheless kept informed of developments out of courtesy: Frank Gallagher interview 14 November 2000).

The contrasting autonomy of police chiefs in England and France during the establishment of the CCIC illustrates the constraints on bottom-up initiatives. In England such an initiative could be established relatively easily but could only achieve a certain level of formalised assistance, whereas in France such an initiative is inhibited by a hierarchical decision-making process which provides very little lee-way for bottom-up driving forces to succeed of their own volition. Thirty years on, Gallagher is still not convinced that administrators in the Home Office fully appreciate front-line mutual assistance needs and this is reflected in their discussions of some of the issues surrounding implementation of the *Schengen Acquis* (Frank Gallagher interview 14 November 2000).

Wanting to get the job done - getting arrests and convictions - may not be the only motivation for practitioners wishing to play a part in promoting and securing international agreements. Whilst domestic politics can constrain State participation in international agreements, "international bargains can be a means of empowering particular domestic actors" (Goldstein 1996:562). In the peace dividend from the Cold War, the UK Secret Intelligence Service has found it expedient to establish closer links with HM Customs & Excise in the furtherance of mutual assistance and plans to combat organised crime before it reaches UK shores. Meanwhile the Security Service has instituted closer links with a number of police agencies. Feathers were ruffled at the NCIS when staff from the National Crime Squad were invited to attend an international conference at Europol in November 2000 to discuss developing approaches to investigating cyber crime. The NCIS identifies itself as the one-stop gateway for international investigation enquiries and consultation both inward to and

outbound from the UK, [2] yet it too, is primarily an intelligence service [3] and so rarely participates in the evidential acts of investigative assistance that fall to police and customs investigators.

To establish a role with a formal international remit may be of value to a domestic agency within a domestic political context regardless of whether the international character or the specific type of role is a primary function of the agency concerned. "The domain of international police co-operation may aptly be depicted as a 'crowded policy space'. Agencies with different mandates, political allegiances, philosophies of police co-operation, projections of social and political developments and vested interests co-exist in relationships which at best amount to *ad hoc* mutual aid and accommodation and at worst descend into open competition over scarce economic and symbolic resources" (Walker 1993:125).

Practitioners doing it for themselves is broadly the rationale behind the establishment of Interpol (www.interpol.int) in 1923, "developed by police agencies as a functional response to a given operational need" (Swallow 1996:110). Interpol - the International Criminal Police Organisation - was reconstituted in 1956 with the aim "to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the 'Universal Declaration of Human Rights'" (*Interpol Constitution*, Article 2(1)). Its fundamental role is the facilitation of communication between different police agencies. Its name and *raison d'être* as articulated in the constitution portray the organisation's non-governmental status. In repeatedly stressing co-operation as the life-blood of the organisation, the Constitution makes clear the inherent relative weakness of Interpol.

> "Members shall do all within their power, in so far as is compatible with their own obligations, to carry out the decisions of the General Assembly" (Art.9).
>
> "In order to further its aims, the Organisation needs the constant and active co-operation of its Members who should do all within their power which is compatible with the legislations of their countries to participate diligently in its activities" (Art 31).

Interpol members are police organisations (Art. 4), not national governments. "The legal basis of an organisation gives an indication of the political importance attributed to it. An international treaty in which signatory states accept obligations to an organisation usually gives it more status than tacit acceptance by governments of co-operative arrangements" (Anderson 1989:57). Nevertheless, Interpol has entered into co-operation agreements with the UN, the Council of Europe, the Universal Postal Union and the World Customs Organisation (to name but a few) whilst a number of international conventions make reference to and use

[2] The national bureaux for both Europol and Interpol are located at NCIS HQ in London.
[3] This argument was the basis for the NCIS exemptions under §23 *Freedom of Information Act 2000.*

of Interpol's transmission role including the *ECMA* and the *EUCMA*. [4] It has a presence on the world stage, a potentially significant role in mutual assistance and a constrained influence in mutual legal assistance. Interpol exists because practitioners needed and still need some mechanism to facilitate communication between them and thus it represents the product of the practitioners' driving force. Interpol promotes communication and co-operation. But it can do little more in practical terms and criticisms voiced at a recent Interpol conference attended by the author suggest that there remains much room for improvement in achieving even these limited aspirations (6 December 2000). With the role of Europol being enhanced in response to the terrorist attacks in New York, 11 September 2001, (hereafter referred to by the colloquial label 9/11: Dubois 2002:328-329), Swallow's prediction that Interpol will become increasingly marginalized seems ever more prescient (1996:126).

Consistent throughout this brief consideration has been the theme of 'so far but no further'. Practitioner-driven initiatives appear to develop in the absence of government intervention. A void is filled, a need met. There appears to be only an indirect connection with formal MLAT activity. There is evidence that practitioners have little or no opportunity to contribute meaningfully to the establishment and drafting of MLATs even though a Home Office discussion paper (1988:2-3) [5] demonstrates that the needs of practitioners provided justification for the policy-makers to enter into MLATs which provide the authoritative framework within which mutual assistance can be legitimately provided in a regulated manner. Conversely there is evidence to suggest that, regardless of criminal justice objectives, finding a role within the MLAT framework can be of organisational benefit to domestic agencies in enhancing status and securing futures; activity which might perhaps be regarded as political, bandwagon support rather than a practitioner, needs-based driving force for such initiatives.

Practitioner-driven initiatives are capable of addressing immediate co-operation issues but appear capable only of informing generally the wider mutual legal assistance debate rather than driving it directly. Which leads the discussion on to the next level in the hierarchy of motivation, (non-practitioner) political agenda.

Political drivers of change

That transnational organised crime and mutual assistance are now firmly on various political agenda is apparent from Gregory's recent summary of the ways in which the criminality of individuals on the global arena is now becoming the concern of governments.

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[4] For full details see www.interpol.int/Public/ICPO/LegalMaterials. (Site visited 21 December 2000)
[5] I am grateful to the Home Office for providing a copy of this unpublished internal discussion paper.

"The list of private criminal actions regarded as of international concern has increased and the organised form of criminality, and the corrupting power of criminal groups, have been recognised as additional causes for concern" both at the level of national governance and within the wider international community. "States, in viewing crime as an element in their new and expanded definition of security, have responded by emphasising the development of well established modes of co-operation such as extradition and mutual legal assistance, supplemented by additional 'suppression' treaties" (2000:128).

The European political imperative initially focused on the desire to enable extradition of criminal fugitives (Council of Europe *Convention on Extradition* 1957) or to facilitate process-service and evidence-gathering abroad (*ECMA* 1959). Unconnected, individual investigations have always been undertaken, particularly in frontier zones, but have not attracted significant political support either within senior police ranks or in government (Soeters *et al.* 1995). Thus as recently as the mid-1980s a front-line detective in England would be left very much to his or her own devices in securing the co-operation of foreign authorities since the UK government had yet to sign the *ECMA* (Frank Gallagher, interview, 14 November 2000).

Attitudes have changed as offending across frontiers has become more systematic and offences more serial in nature. Individual crimes continue to be committed and will continue to necessitate foreign enquiries but developments in licit global trade have been mirrored by a growth in illicit global trade. Transnational organised crime thrives on exploiting the combination of prohibitions and borders. "The power and potential of transnational organised crime is rooted in the vast amounts of illicit capital raised by drug and arms trafficking and other forms of smuggling, as well as penetration of legitimate economic sectors via money laundering. This base is enhanced by the revolution in technologies that permits capital and people to move around the planet with ease", (Lupsa 1996:26).

And whereas individual offences are almost always of little or no political consequence, systematic offending undermines social and economic infrastructures even to the extent of threatening democratic governments and destabilising political infrastructures. "The enormous sums (hundreds of billions of dollars) generated by the illicit drugs traffic trade have concentrated tremendous economic power in the hands of drugs lords who can corrupt whole governments. The drugs lords subvert the criminal justice system, and their nefarious influence corrodes the basic values of society" (UN 1989). "Symbiotic links to government officials protect criminal operations from law-enforcement initiatives" (Godson & Williams 1998:68).

The power and geographical extent of transnational organised crime are phenomena that state structures are not well-placed individually to deal with. Moreover these are phenomena characterised by the capacity for rapid evolution (not a characteristic of either diplomacy or sound law-making): "global organised crime is evolving, embracing new markets and technologies, and moving from traditional hierarchies towards more flexible, network-based forms of organisation" capable collectively of threatening national security resources and undermining State budgets. Tools such as secure digital cell phones and Internet banking are "putting unprecedented power into the hands of a small number of people" (Galeotti 2000:10-11) with a vested interest in manipulating State structures whilst at the same time as far as possible operating entirely outside them.

"States have become almost outmoded organisations: the world is attempting to deal with a twenty-first-century phenomenon using structures, mechanisms and instruments that are still rooted in eighteenth- and nineteenth-century concepts and organisational forms" (Godson & Williams 1998:66). Not only are academics arguing this apocalyptic vision. Politicians deliver the same message, albeit in sound-bite form: "law enforcement is still using nineteenth century mechanisms to fight twenty-first century crime" (Jack Straw, UK Home Secretary, 16 October 1998). [6]

The political imperative that now drives assistance initiatives is one of self-preservation through mutual protection. States can only tackle transnational organised crime effectively by co-operating with each other (European Union 1997:paragraph 5(b)) and by creating the necessary instruments of co-operation. This is the political reason that States need mutual legal assistance.

Potential solutions are complicated by a number of factors. The exact nature of the threat of transnational organised crime is difficult to define (Bruggeman 1998:85-86; House of Commons 1995:x-xi) and almost impossible to quantify (*ibid.*:xii; Europol 1999:80 [7]). The global value of illicit drugs trafficking was estimated in 1997 at $400 billions and the cost of counterfeiting to legitimate trade at $200 billions each year (Godson & Williams 1998:69). Such headline-grabbing calculations demonstrate the need for strategies but assist little in determining tactics for investigating and prosecuting transnational organised crime. Only with a full understanding of the phenomenon and its interaction with legitimate society will effective counter-measures be possible. Understanding the problem requires as much mutual assistance through information exchange, as does gathering evidence.

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[6] Intergovernmental seminar on 'Combating Organised Crime in the European Judicial Space', held at Avignon. I am grateful to the Home Office for supplying a copy of the text of Jack Straw's speech.
[7] It is the conspicuous absence of hard quantitative data from this source that supports the point made here.

The question arises are mutual legal assistance instruments still fit for purpose, given such change in transnational criminality? Instruments that existed prior to 2000 do not make provision for the sorts of investigative techniques that are necessary when attempting to police sophisticated and well-resourced transnational criminality. Here the political aspirations of governments collide with the increasingly aware political expectations of individuals. Pre-dating the European-wide moves in mutual assistance is the *ECHR*. The need for intrusive investigation techniques to tackle serious and organised criminality is recognised and generally accepted by citizens, but it is their expectation that such enforcement activity will be utilised only when necessary and even then under strictly regulated conditions (*ECHR* Article 8). The mutual legal assistance instruments provide specific protection for human rights really only in relation to the coercive power of detention and extradition. Avenues of investigation almost unheard of in the late 1950s are now available to enforcement agencies and there is a political need to ensure that the deployment of such tactics in the international fight against transnational organised crime is executed in a manner consistent with acceptable standards. Mutual legal assistance instruments now need to define those norms.

Thus it can be seen that there are twin political drivers promoting the need for States to participate in mutual legal assistance. The twins are related through the State function of protecting the citizen: firstly from the threat and damaging consequences of transnational organised crime, and secondly from the risk and, arguably, equally damaging consequences from the abuse of State power by its enforcement agents.

From such political considerations, as much as from the legal perspective outlined above, important issues arise that are susceptible to further research. These issues illuminate the characteristics and relationships inherent in mutual (legal) assistance. Through an examination of these issues, a greater understanding of the future role and form of mutual legal assistance should be achieved.

At a general level then, there is a wide-spread interest in combating transnational organised crime. The assortment of political agenda reflects however, the variety of ways in which a single common aim may be achieved.

Unilateralism

As a bench-mark for identifying political motivation and driving forces in this arena, it is helpful to refer to a philosophy that denies, or at least does not highly rate, the value of mutual legal assistance.

Unilateralism contrasts with the positive international law emphasis on the principle of co-operation (Dupuy 2000:22-23) which is echoed in the founding principles of the UN. Law enforcement agencies within the USA demonstrate a history (Nadelmann 1993) [8] and continuing trend (Manning 2000:192) of unilateral action that has appeared to be at odds with prevailing co-operative practices elsewhere in the world. This has been actively presented as a global colonisation of US law enforcement philosophies in order to secure compliance with the wishes of US agencies (Nadelmann 1993 & 1997). Others now question whether the US will reorient from a preference for dominance and deterrence that is the manifestation of unilateralism to the espousal of equity and reassurance (Steinbruner 2000). When US practitioners and agencies have encountered robust resistance to their preferred *modus operandi*, the politicians and diplomats have had no option but to enter into a MLAT. The US became the first Common Law State "actively to explore the benefits to be derived from this form of international co-operation" (Gilmore 1995:xvi; see also xx *ff*). [9] From a patriotic perspective Nadelmann offers a slightly different yet candid spin: "the principal incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by US prosecutors, police agents and courts to unilateral, extraterritorial means of collecting evidence from abroad" (Nadelmann 1993:315).

Here the discussion returns briefly to the question of practitioner-driven changes. Manning argues, citing the evidence of unilateralism presented by Nadelmann (1993), that "transnational agreements for mutual assistance between law enforcement agencies are being ironed out in the wake of police operations both successful and otherwise, that is: police practice sets the frame for legal regulation, rather than vice versa" (2000:193). If Manning is arguing here that mutual legal assistance arrangements are practitioner-driven, then this interpretation does not stand scrutiny. Firstly, as has been demonstrated, law enforcement agencies can negotiate of their own volition nothing more binding than inter-agency MoUs, which have no consequence for inter-government agreements. Agencies certainly cannot negotiate MLATs nor, as has been seen, do those in the UK appear to have much influence in their drafting. Secondly, the series of documents and instruments arising from the Cayman Islands dispute and other unilateral acts are a response to attempted breaches of sovereignty by judicial authorities or investigator mal-practice rather than a regularisation of lawful and

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[8] See Anderson 1995 for a critique of Nadelmann 1993. See Fehérváry 1997 for a discussion of the International Law Enforcement Academy [ILEA] in Budapest established by the US. See Paust *et al.* 2000:479*ff* for detailed jurist discussion of the *Alvarez-Machain* case: an example of unilateralism that flagrantly breaches both national and international law yet which survived challenge in the US Supreme Court. See Gregory 2000:115 & Manning 2000:192 for summary discussions.

[9] In 1973 - before the UK ratified the *ECMA* it had signed in 1959 - the US negotiated a MLAT with Switzerland and in 1986 concluded a MLAT with the UK. In both cases US authorities had tried to use US laws to force foreign banks to violate their own domestic criminal laws regarding the disclosure of information. Nadelmann's Appendix E (1993) details various other MLATs of a similar nature.

internationally acceptable practices. Thus the Cayman Islands dispute, to take one example, is more a catalyst for change than a primary driver to secure a MLAT, the latter in this instance being the diplomats' desire to regularise international relations.

Even in their negotiations on mutual legal assistance the US government appears to prefer unilateralism to reciprocity if this can be achieved. Prior to the 1986 treaty between the US and the UK concerning the Cayman Islands (Gilmore 1995:280-297), the US initially secured a provisional agreement that allowed US authorities unfettered access to Cayman Island documents and records on a non-reciprocal basis and without the discretion to refuse assistance (Gilmore 1995:xxi).

Mutual legal assistance developments in the UK and Europe at the end of the 20th century

Prior to 1990 the UK did not actively engage in mutual legal assistance developments elsewhere in Europe although it had entered into a bilateral MLAT with the USA concerning the Cayman Islands (1986). The government in 1959 saw no possible benefit to the UK in participating in the drafting of the *ECMA* for instance, preferring to rely on the provisions of the 1870 *Extradition Act* which made some small provision for magistrates to "obtain the testimony of a witness" on behalf of foreign authorities if requested (*Report of the Council of Europe Consultative Assembly*, 10th Ordinary Session, 30th Sitting, National Archives:FO371/146282-WUC 1651/6; Foreign Office Minute dated 12 February 1959, National Archives:FO371/146282-WUC 1651/7; §24 *Extradition Act* 1870, as amended 1873).[10]

The unilateralism (arguably characteristic [11]) of the US and the isolationist preference (equally characteristic) of the UK to avoid formality that might bind the unwritten domestic constitution and clash with the adversarial trial system, have both given way to an increasingly conventional framework approach for mutual assistance. The unpublished Home Office internal discussion paper from 1988, which warrants quotation at length (Home Office 1988:2-3), illustrates why this came about in the case of the UK.

> "Until very recently the United Kingdom's policy on formal agreements for mutual assistance in criminal matters was that such arrangements were in general unlikely to be of significant use to us because the insistence of our law on oral testimony left little scope for the admission of witness statements and other documents, which form the bulk of traffic under the European Convention [*ECMA*] ... this position is no longer tenable... significant steps are being

[10] There is no published discussion of UK mutual legal assistance policy prior to 1990. For a detailed consideration of British attitudes both to mutual legal assistance and international law enforcement co-operation between 1950 and 1990, which falls outside the temporal scope of this thesis but which is nevertheless informative, see Appendix A below.

[11] See Reisman 2000, for the robust assertion that 'alleged' US unilateralism is in fact multilateralism writ large.

taken to enable documentary evidence to be admitted in English criminal proceedings, and to make it easier to admit evidence taken overseas....

The United Kingdom is at present seriously hampered in providing mutual assistance, principally because of the limitations of existing legislative provisions. These powers do not provide the breadth of mutual legal assistance which is regularly provided in Western Europe and elsewhere. The United Kingdom's failure to participate in formal mutual legal assistance arrangements has earned us a poor reputation for co-operation, even in the event of entirely reasonable and proper requests. It has also caused serious problems for our own prosecuting authorities as other states may refuse to render assistance because of lack of reciprocity... there would be considerable benefit to the United Kingdom in subscribing to broader mutual assistance arrangements of the kind contained in the Commonwealth [Harare] Scheme and the European Convention."[12]

The tradition of non-co-operation (Harding & Swart 1995:87) then, succumbed to peer pressure within the comity of nations. The passage begs the question: what circumstances created the peer pressure?

The 1988 Home Office discussion paper reveals the higher-level driving force for mutual legal assistance: the political need for the State to secure co-operation from other governments. Within domestic UK politics, law and order became a contested party political issue in the 1979 General Election campaign (Downes & Morgan 1994:184). It has remained so ever since. Inevitably, as crime becomes increasingly international in character, so the law and order debate develops accordingly, albeit with little publicity outside government circles in the first instance. Law and order and the nature of Britain's relationship with the EU individually attract considerable political significance within the UK. In combination such significance ought to be enhanced, yet at the time of writing, media attention (and so public awareness) is focused on whether Britain should enter the single currency or sign the proposed new EU Constitution rather than the nature of transnational law enforcement within the EU. The trend in January 2001 was for numerous newspaper and website opinion polls to invite 'vox pop' yes/no votes on the Euro not the *EUCMA,* the signing of which attracted relatively little UK media attention not least because it took place on a UK Public Holiday (29 May 2000). In May 2004, the media was seised of the promised referendum on the EU Constitution rather than the coming into force of key parts of the *C(IC) Act* 2003, giving domestic effect to most of the *EUCMA*.

Thus top-down political drivers cannot be represented as a response to a popular movement. Elected representatives are relying on their administrators to negotiate arrangements for the general good of the public. The popular mandate is not entirely silent on the issue. The 'paternalist' motives of the politicians are closely monitored by specialist civil liberty lobby organisations such as Statewatch (www.statewatch.org) and Justice (2000). Both these organisations are regularly consulted on such matters by the Parliamentary committee scrutinising Government action in this area (House of Lords European Union Committee, Note by Legal Assistant to Sub-committee E (Law & Institutions) dated 24th October 2000,

E/99-00/E 75.) But the fact remains that in the field of mutual legal assistance within Europe, the agendum is that of the politicians rather than the populace or, for that matter, the police.

In the wider European context, mutual assistance in criminal matters was seen as part of a package of measures worthy of a Council of Europe treaty in the post-war movement for wider co-operation between European nations as a foundation for peace and achieving greater unity (Harding & Swart 1995:88; Cram 1996:40). With the exception of an Additional Protocol drafted in 1978, there were no further significant political developments in mutual assistance within the Council of Europe until the recent negotiations for a Second Protocol.

This thesis is primarily concerned with developments post-1990, the date when the UK at last engaged fully with the European mutual legal assistance movement by ratifying the *ECMA* (*CJ(IC)A* 1990). It is, however, worth briefly noting the foundations laid during the 1970s and 1980s for the developments in European co-operation after 1990. In 1975 Ministers of Home Affairs and Justice in the (then) EEC agreed to regular consultation on matters of internal security in a forum called the Trevi Group (Anderson *et al.* 1995:53-56). [13] Primarily focused on concerted action against international acts of political terrorism prevalent at the time, the Group developed four sub-groups, one of which was established to consider the consequences of abolishing internal borders within the European Community.

The *Single European Act 1986* defined the 'common market' as "a space without internal frontiers in which the free circulation of goods, persons, services and capital is secured" (Article 8A, *SEA 1986*). This political and economic reality was to be achieved by 1993 (Harding & Swart 1995:97) and would bring with it consequential policing issues. These were addressed initially by a separate group of countries that included nations from within and without the European Community who participated first in the *Schengen Agreement 1985* and subsequently the *Schengen Convention 1990*. These agreements provided for mutual assistance between "police authorities":

> "... in compliance with national legislation and within the limits of their responsibilities ... for the purposes of preventing and detecting criminal offences insofar as national law does not stipulate that the request is to be made to the legal authorities and provided the request or the implementation thereof does not involve the application of coercive measures by the requested Contracting Party" (Article 39(1), *Schengen Convention 1990*).

There were provisions for cross-border pursuit and observation operations, controlled deliveries, technical co-operation and liaison officers. The police co-operation chapter "represents a unique attempt to lay down rules with respect to international co-operation [i.e

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[12] I am grateful to the UKCA for supplying me with a copy of this discussion paper.
[13] According to Harding & Swart (1995:96) TREVI is an acronym representing *Terrorisme, Radicalism, Extrémisme et Violence Internationale*; but Frank Gregory reports (pers comm.) an alternative origin based on his conversations with a UK Minister involved in the original meeting, namely that the group is called after the famous fountain in Rome.

mutual assistance] between police authorities" (Harding & Swart 1995:98). The chapters on conventional mutual legal assistance matters were mainly concerned with "achieving equal standards of co-operation" based on already existing MLATs (*ibid.*). With the collection of agreements known as the *Schengen Acquis*, there is the first significant attempt to develop common standards in criminal law enforcement on a regional basis. These were developments with which, at the time, the UK government felt unable to join in because of political resistance to the issue of open borders in an island context (House of Lords 2000).

In broad terms, three general political justifications are presented for increased international police co-operation within Europe and these operate at both national and supranational levels (Walker 1993:114).

- Greater mobility amongst criminals and an increase in international criminal networks.
- The need to compensate for the relaxation of internal border controls in the EU.
- Concerns for the security of the external EU border.

In fact, of course, there are many agenda. Peters highlights the plots and sub-plots at play in EU agenda-setting and how different actors may or may not influence the progress of different issues (1996). Put simply the different perspectives in relation to mutual legal assistance divide into two, those held by the European Commission [EC] in relation to the EU as an institution and those held by individual Member States concerning national priorities.

The Home Office discussion paper (1988) illustrates how the UK government came to acknowledge that its agencies increasingly needed the assistance of their foreign counter-parts and that reciprocity should be the underpinning principle. It was a conclusion reached in the context of the signing of the 1986 *Single European Act* and a vigorous UK debate about the implications for domestic policing of internal freedom of movement for goods and people within the European Community (Gregory 1991). In some areas, such as the interception of communications, the UK felt (and still feels) unable to offer reciprocity although the issue is still vigorously debated (*HL Hansard* 19 June 2000 cols.107-117).[14] Meanwhile, as is clear from the *Treaty of Amsterdam 1997* [*ToA*: entered into force 1 May 1999], the EU has its own priorities.

> "Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and

[14] At issue is the statutory prohibition (s.9 *Interception of Communications Act 1985*, s.16 *Regulation of Investigatory Powers Act 2000*) against the evidential use of communications intercepted by UK authorities. As *R v Aujla* (TLR 24 November 1997) and *R v P and Others* (TLR 19 December 2000) have determined, UK courts are happy to adduce intercept product obtained by foreign authorities. A recent White Paper (Home Office 2004b) now proposes adducing intercept product as evidence at trial in England.

> justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia." (*ToA*, Art.29.)

Because of different hierarchical priorities, mutually acceptable arrangements negotiated between two or more nation States of equal status are not necessarily going to be readily reproduced in circumstances in which member States are subordinate to a supranational institution. At a general strategic level the criminal law enforcement interests of the EU and its Member States are compatible. At the tactical and operational levels of implementation, however, interests may diverge as is reflected in the different national contributions to the *Organised Crime Situation Report* (Europol 1999).

Developments in the EU have been both overt and indirectly consequential. The bold declaration of Article 29 *ToA* is sustained in subsequent Action Plans and Joint Actions.[15] Of particular interest is the enhanced position of Europol within the EU. The 1995 Council Act drawing up the *Europol Convention* (*OJ* C 316/1, 27 November 1995) [16] provided for a relatively limited role. Europol's objective was outlined in Article 2.

> "... to improve, by means of the measures referred to in the Convention, 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 where there are factual indications that an organised criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned."

Article 3(1) specified the tasks that could be undertaken by Europol.

> "To facilitate the exchange of information between the Member States;
>
> to obtain, collate and analyse information and intelligence;
>
> to notify the competent authorities of the Member States without delay via the national units referred to in Article 4 of information concerning them and of any connections identified between criminal offences;
>
> to aid investigation in the Member States by forwarding all relevant information to the national units;
>
> to maintain a computerised system of collected information containing data in accordance with Articles 8,10 & 11."

Articles 29, 30 and 32 *ToA* go further. In particular Article 30(2) states:

> "The Council shall promote co-operation through Europol and shall in particular, within a period of five years after the date of entry into force of the [ToA]:
>
> a) enable Europol to facilitate and support the preparation, and to encourage the co-ordination and carrying out of specific investigative actions by the competent authorities of the

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[15] Relevant EU JHA documents can be accessed at http://europa.eu.int/pol/justice/index_en.htm, (site visited 6 May 2004).
[16] The *Europol Convention* came into force 1 October 1998; Europol went operational on 1 July 1999.

Member States, including the operational actions of joint teams comprising representatives of Europol in a support capacity;

b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and co-ordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;

c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close co-operation with Europol;

d) establish a research, documentation and statistical network on cross-border crime."

Articles 6(4) and 13(12) *EUCMA* respectively give effect to Europol's developing capacity (as outlined in the *ToA*) to initiate requests and provide representatives on joint investigation teams. Mutual assistance measures seem to be acquiring the more formal status of mutual *legal* assistance. On the one hand this can be seen to be bringing the otherwise relatively autonomous actions of law enforcement agencies within a transnational regulatory framework. On the other hand, it might be argued that a supranational institution is assuming for itself measures more properly controlled by national governments.

Alongside the evolution of Europol's position in mutual assistance between police investigators, there is the creation of the European Judicial Network [EJN] established in a Joint Action, 29 June 1998 (*OJ* C197, 12 July 2000; see also http://ue.eu.int/ejn/inten.html). The network is intended to provide intermediary facilitation in judicial co-operation. Working closely with the EJN, particularly to simplify the execution of *commissions rogatoire,* will be Eurojust, a unit to comprise national prosecutors, magistrates or police officers of equivalent competence, seconded from Member States in the same way that police officers are seconded to Europol. Eurojust will "have the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases" (*Tampere Presidency Conclusions*, paragraph 46).

The EU, through intergovernmental mechanisms of co-operation within the Third Pillar, is assuming for itself a participating (rather than third party) role in the mutual legal assistance arena that originally comprised arrangements between individual nation States. Moreover, it is establishing EU bodies that encompass mutual assistance at every level of enforcement (investigators, prosecutors and judiciary) in ways that the *ECMA* and its Protocol are unable to address.

The Council of Europe has not sat idly by and left matters to the EU but nor is it in a position to adopt the supranational status of the EU in respect of the new mutual legal assistance it enacts. A Second Protocol to the *ECMA* has been negotiated. Its text deals with some of the issues addressed by the *EUCMA* (ETS 182, 8 November 2001). Provision is to be

made for hearings by video and telephone conference,[17] the presence of officials from the requesting party at the time the request is enacted, the deployment of cross-border observations, controlled deliveries and undercover agents. It has the advantage over the *EUCMA* that it will be open to all 43 Member States of the Council of Europe, although nothing precludes Third Party States from adopting the provisions of the *EUCMA* (Article 29). Member States of the Council of Europe will be able to choose whether or not to ratify the Protocol and herein lies a weakness inversely proportional to the number of Contracting Parties. The situation with the *EUCMA* is slightly more prescriptive. Article 25 prevents Member States entering reservations to the *EUCMA* other than those expressly provided for in the text. The treaty comes into force 90 days after eight Member States have ratified it and for each additional Member State thereafter, 90 days after it has ratified the treaty. For new Member States however, it comes into force automatically on joining the EU (Art.28). Thus existing Member States, who have a choice whether or not to ratify, are in a rather more flexible position than future Member States.

The mutual legal assistance provisions being established by the EU not only have the potential to assist law enforcement. It can be argued that, together with supranational institutions (Cram 1996:45), they are a vehicle for closer political integration within the EU. The House of Lords Select Committee on European Communities was clear that "the Convention is concerned with improving co-operation across borders in the investigation and enforcement by national authorities of their criminal law. It is not aimed at harmonising national criminal laws and procedures" (HL 1998, paragraph 52). But the complex inter-relationship of the EU's multiple treaties, Directives, Framework Decisions and Joint Actions means that the situation is not quite so simple. The cumulative direct effect of Articles 48 (free movement of persons), 59 (provision of services) and 7 (freedom from discrimination on grounds of nationality) in the 1992 Maastricht *Treaty of the European Union* [TEU], have been argued as creating the obligation on Member States that they must protect from crime citizens from other Member States as they would their own (Dine 1993:251). This argument by logical extension includes undertaking action to combat transnational organised crime. Several JHA Framework Decisions were enacted into UK domestic legislation in the *C(IC) Act* 2003. Framework Decisions have "the purpose of approximation of the laws and regulations of the Member States. Framework Decisions shall be binding upon the Member States as to the result to be achieved, but shall leave to the national authorities the choice of form and method" (Art.34(2) (c) *TEU*, quoted in paragraph 12 of the *Explanatory Notes* accompanying the original *C(IC) Bill*, 19 November 2002). The EU is not only seeking to

[17] A proposal also being enacted in the UK domestic criminal justice system. *Glidewell Implementation Plan for Hampshire and the Isle of Wight*, CPS/Hampshire Constabulary, (2000:9).

promote co-operation mechanisms on transborder crime, but is also trying to ensure a common standard of safety and security across the Community.

In an article intended to be a 'wake-up call' for criminal lawyers, Baker builds on Dine's lead by reviewing influence of EU law on domestic criminal law post-Amsterdam. Written particularly from a defence lawyer's perspective, Baker demonstrates (1998) that the interaction between EU law and domestic laws in Third Pillar issues is far greater than many lawyers currently acknowledge. Sieber had already argued that "all levels of analysis of the present criminal law of the European Communities show the signs of a still feeble, but in a historical perspective, rapidly growing, confederated system of criminal law" (1994:99). Scope for mutual legal assistance between enforcement authorities appears to exist beyond the provisions of MLATs.

The ECJ has no immediate jurisdiction over criminal matters within a Member State.

> "The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" (*ToA*, Art.35(5)).

But the ECJ does have the power "to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under [Title VI *ToA*] and on the validity and interpretation of the measures implementing them" (*ToA* Art.35(1)). This affords the ECJ a more significant role in the application of domestic justice than superficially appears to be the case because the court is in a position to establish justice norms within the EU (Baker 1998:380; Joerges & Vos 1999:90*ff*) and at the same time claim jurisdiction over rights protection (Baker 1998:373*ff*). So whilst the ECJ will not, as currently constituted, hear a criminal trial brought about as a result of an investigation facilitated by mutual legal assistance measures, nor will it act as a court of appeal *per se*, it may be called upon to judge issues arising from the application of such measures.

To some commentators, taken together this is evidence of the EU eroding national sovereignty by stealth (Edwards 1996) and so represents the not-insignificant strengthening of the EU *vis-à-vis* Member States. Others observe that the reform of JHA affairs has been achieved only at the cost of British, Irish and Danish opt-outs which, together with other devices for flexibility, have created the risk of fragmentation in what is supposed to be a unified approach (Monar 1998).

The EU has both the means (its institutions and laws) and the motivation (political integration) to drive developments in mutual legal assistance. It is also acquiring its own means of direct intervention in parallel to mutual legal assistance developments.

Of particular concern in recent years has been the growing amount of fraud committed against the EU (House of Lords 1989; White 1998). Ideas as how best to tackle this problem have included the controversial concept of the *Corpus Juris*, a suggestion proposed by eight academic lawyers intended "to provide a uniform code of criminal offences to deal with fraud on the Community finances" (House of Lords 1999:paragraph 21; see also Dona 1998; for the *Corpus Juris* text see Van den Wyngaert 2002). Although it has attracted much hostile attention in the British media (www.euroscep.dircon.co.uk/corpus1.htm, visited 9 July 1999), the idea remains essentially an academic suggestion and has not been formally adopted as an EC proposal.

More concrete however, has been the evolution of the *Unité de Coordination de la Lutte Anti-Fraude* [UCLAF]. As part of the EC, UCLAF was directly concerned with the preparation of EU legislative proposals and the co-ordination of national enforcement authorities. It did not posses judicial powers of investigation (Vervaele 1999a:372-373) although it did have the power to undertake external inspections independently of Member States (Vervaele 1999b:337). Within EU institutions UCLAF had a number of internal investigative powers: to enter EC premises, demand information, inspect and seize data and to examine witnesses (Vervaele 1999b:340).

In October 1998 the EU Parliament approved by a wide majority a restructuring of UCLAF's role and position. It is now established within the EU institutions as an anti-fraud office [*Office de lutte antifraude* - OLAF]. "All UCLAF competencies have been transferred to OLAF" in a move which represents "a very important step ... towards a fully-fledged European anti-fraud agency" for which far-reaching supervisory and judicial investigative powers in European institutions, Member States and third countries have been suggested (Vervaele 1999b 343; 344). There seems to be little support at present for investing OLAF with full judicial investigative powers and reference is still made to co-operation with national authorities (Vervaele 1999b:344-345).

Customs regulations have also seen developments in mutual administrative assistance (Vervaele 1999a:379; Dirkzwager 1999). Community law in First Pillar issues is directly enforceable through the ECJ but the EC primarily relies upon national agencies to investigate breaches and enforce EU law in these areas. Harmonisation of national laws (Vervaele 1999a:362) and the EU Community Customs Code (Regulation 2913/92 *OJ* L302 1992; Regulation 2454/93 *OJ* L253 1993) have promoted co-operation between the EC and national enforcement agencies although there is not yet a truly supranational enforcement infrastructure (Vervaele 1999a:366).

Regulation 515/97 (*OJ* L82 1997) provides a mutual assistance framework in administrative matters that enables the exchange of enforcement information, hot pursuit, cross-border surveillance and controlled deliveries (Vervaele 199b:377): activities subject to mutual legal assistance in criminal matters (*EUCMA*). This regulation also enhances the role of the EC by enabling the EC to request mutual legal assistance in its own right, a right formerly reserved for Member States (Dirkzwager 1999:261). Similarly within the scope of this regulation, the EC (and so OLAF) can demand an inquiry be carried out, have officials present when the enquiry is executed and acquire access to documents held by administrative authorities in Member States and make copies thereof (*ibid.*:262). Article 135 *ToA* requires that measures be taken in order "to strengthen customs co-operation between Member States and between the latter and the Commission".

It is not the place here to consider, as others have done, whether the legal framework and judicial controls on these administrative developments are adequate (Dirkzwager 1999:266) and whether or not the once distinct lines between First and Third Pillar enforcement measures have become blurred and even circumvented (Vervaele 1999a:380). What has been demonstrated is the political will to improve mutual legal assistance measures within the EU in a variety of spheres. The debate about how this should be done continues but it is clear that the EU, through the enhancing of powers held by EU institutions such as OLAF and through enforceable MLATs such as the *EUCMA*, is now a significant non-national political entity within the developing mutual legal assistance arena. MLAT activity has not ceased with the *EUCMA* or the administrative regulations illustrated above. A supplementary MLAT relating specifically to financial crimes and money laundering has recently been proposed (House of Lords European Union Committee, Note by Legal Assistant to Sub-committee E (Law & Institutions) dated 24 October 2000, E/99-00/E 75.)

The EU has the opportunity through its various institutions and instruments to be more dynamic in promoting mutual legal assistance than either individual nations or the Council of Europe. If full integration is not the long-term EU goal, then standardisation of offences and responses at least seems to be the objective. Prosecutions, of course, will be difficult to standardise given the two fundamentally different models of jurisdiction present within the EU.

In summary, at the European level the Council of Europe is updating mutual legal assistance arrangements first agreed in 1959 to take account of new technologies. Meanwhile the EU is driving changes in mutual legal assistance that have the potential to alter fundamentally the international characteristics of work undertaken by domestic enforcement agencies. No longer will domestic agencies within the EU merely be affording each other mutual assistance in their own investigations. There is increasing scope to have them

enforcing EU regulations and to work to a supranational agenda that has the capacity to request and co-ordinate transnational investigations, regional (rather than national) protection of the citizen being the justification.

Commercial drivers for change

There is one final category of motivation for mutual legal assistance that must be considered, such is its potential influence. In the field of international commercial law there have long been "cogent arguments and strong economic pressure for co-operation and harmonisation" (Harding & Swart 1995:87). Indeed, when compared with civil and commercial matters "progress in mutual assistance in criminal matters can fully be said to be half a century behind" (McClean 1992:124), despite the fact that commentators were remarking upon the ease with which transnational crime could be committed and justice evaded as long ago as 1874 (Clarke 1874:12). In 1896 the *Hague Convention on Civil Procedure* made provision for mutual assistance by way of *commission rogatoire* (Art.6) and so established a multilateral precedent that criminal judicial authorities were eventually to adopt. The reason for the differential progress is simple. There has always been profit to commercial enterprises and States in promoting international trade assistance and its protection but, as has been seen, States have jealously protected their criminal jurisdictional sovereignty.

Multinational commercial organisations, whose national loyalties are nominal, are global customers for law enforcement protection. Their interests no longer coincide with those of the geopolitical state, the traditional and territorially-based supplier of public police protection (Manning 2000:182). On the one hand willing to exploit national regulatory differences to promote profit, they nevertheless have much from which to benefit in uniform standards of protection from criminality wherever their commercial concerns are situated. This is becoming particularly apparent in the nascent area of cyber crime (*The Economist*, 13 January 2001, pp.25-27), a new policing space (Manning 2000) in which law enforcement has only recently formulated a co-ordinated response (*HC Hansard* 13 November 2000 col. 531W).

The Internet and e-commerce have generated their own legal needs that sit outside a territorial framework. The impossibility of effective government regulation of the Internet is seen as one of its most significant attractions in many quarters, particularly for advocates freedom of speech and thought. From a commercial perspective the Internet offers a gateway to new markets that were previously inaccessible. But by the same token these facilities also present new opportunities to commit 'traditional' crimes as well as the means to commit new

types of crime. The ease with which frauds can be perpetrated using the Internet or acts of commercial espionage and sabotage is of particular concern to business interests as well as individual citizens who are usually secondary victims in such acts.[18] Persons whose electronic identities are stolen to effect a fraud risk losing (and never regaining) their credit rating. Workers (and their families) whose employers are put out of business through e-crime have their livelihoods put at risk.

The voice of individual and indirect victims is but a whisper compared with the shouting of libertarian lobbyists and profit-motivated business people who are more successful in securing the ear of government. And as the concerted opposition to the *Regulation of Investigatory Powers Bill* demonstrated, even libertarian lobbyists may need to recruit and co-ordinate diverse business allies (with whom they might not normally find common ground) in order to advance their cause (*HL Hansard* 19 June 2000 cols 97, 129-130). During the pre-legislative preparation of this Bill, Department of Trade and Industry officials were present to monitor consultation between the Home Office and law enforcement and intelligence agencies to ensure (successfully as it transpired) that industry interests did not have to yield to crime-fighting measures.[19] The business lobby has a particularly powerful voice on law enforcement issues that impact upon commercial interests and commentators have noted with irony that, having opposed Internet regulation so vociferously, commercial organisations will be the driving force behind the development of jurisdiction over the World Wide Web (Manning 2000:186); jurisdiction that can only be established on a multinational, multi-agency co-operative basis.

> "What was supposed to be an anarchistic and liberating technology may in fact make the world less democratic, by forcing a huge increase in legal harmonisation. This will mostly be pursued by governments and vested interests banding together to enact multilateral treaties, which are difficult for national parliaments to scrutinise or change." (*The Economist*, 13 January 2001, p.27).

There is also an argument to suggest that increased transnational enforcement resources, including legislative instruments, are more likely to be driven by commercial concerns than by the representations of enforcement practitioners because businesses are now looking to the criminal law to protect trade advantage (such as intellectual property, Manning 2000:182-187) in preference to Civil Code protection (Craig & De Búrca 1998: chapter 24). As business organisations increasingly come to see synchronised or harmonised criminal laws as a commercial benefit, so there is a further motivation, within Europe at least, towards

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[18] Manning suggests that US federal law enforcement agencies (as well as intelligence agencies) are now involved in such espionage as a protective measure for state interests (2000:193).

[19] The author was a member of the Home Office Standing Consultative Group on Part I, RIP Bill and also advised on Parts II & III. Outside this forum DTI officials declined to meet personally with the author and accept official representations on behalf of the National Crime Squad on those elements of the RIP Bill drafted by the DTI.

integration similar to those developments in non-criminal integration that have sought to promote economic growth (Craig & De Búrca 1998: chapter 1).

The counter-terrorist agenda

Since 11th September 2001, the day on which two aircraft were flown into the World Trade Center, New York, and on which the Pentagon also came under attack [20] - attacks attributed to the al-Quaeda political organisation – the international law enforcement co-operation arena has been complicated by the so-called 'war on terrorism', with which combating transnational organised crime is now often associated (*Conclusions and Action Plane of the Presidency*, European Council, 21 September 2001; *Communication on Measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information*, European Commission, COM(2004)221 Final).

In what is indisputably military action, armed forces have invaded Afghanistan and Iraq and overthrown the existing regimes. In conditions that conform neither to the Geneva Convention-based rules of war nor the due process principles of the rule of law and mutual legal assistance, a large number of 'suspects' have been interrogated in what has been presented as both an intelligence operation and a criminal investigation. A small minority, apparently selected on the basis of nationality or ethnic origin, have been dealt with according to established domestic laws ('Britain has a duty to ensure the Geneva Conventions are upheld' *The Independent* 15 January 2002, p.4; 'American Taliban flies back, but not to the cages of Guantanamo Bay, *The Independent* 23 January 2002, p.12; 'Straw wants British suspects to be tried in UK' *The Independent* 25 January 2002 p.13). The fact that all suspects repatriated to British custody from Guantanamo Bay were released within twenty-four hours on the grounds that there was insufficient evidence to charge them with any offences confirms the doubts about the probative value at trial of any 'evidence' obtained from the Guantanamo Bay detention centre ('Another law lord criticises detention at Guantanamo Bay' *The Independent* 28 January 2004 p.4; 'A black and white case of US injustice' *The Independent* 27 April 2004 pp.26-27).

The UK has always treated terrorism as a crime to be dealt with by the domestic regime, not least by insisting that familiar, regular and incontrovertible charges such as murder are tried rather than any attempt being made to legislate for an offence of terrorism which would leave open the possibility of courts being asked to adjudicate on defences of political motivation. Not all States share this approach. As intelligence communities around

[20] Meyssan (2002:chapter 1), using US military photographs and other sources, questions the relationship between the New York and Washington attacks.

the world engage in unprecedented co-operation, and new laws are rushed through legislatures focusing on measures to combat the newly emphasised common evil of terrorism (John MacFarlane, Australia National University, (former Australian Federal Police Officer and former Australian Security & Intelligence Organisation Agent) pers. comm. Canberra, October 2001; for example the US *Patriot Act* 2001 and the UK *Anti-terrorism Crime & Security Act* 2001 [ATCS]), there has been considerable overlap between the activities of law enforcement investigators and intelligence gatherers, nowhere better illustrated than the merging of the G8 Lyon Group (law enforcement) with the G8 Roma Group (counter-terrorism). Intelligence communities have sought to re-establish their roles to incorporate action against transnational organised crime since the end of the Cold War ('Security service turf wars hamper war against crime', *The Independent* 28 August 2001, pp.1 & 4), and the aftermath of the 9/11 attacks have invigorated this pursuit. This is not necessarily to the advantage of law enforcement.

Measures sought by law enforcement to tackle transnational organised crime, and previously subject to concerted political opposition, have now been enacted in the UK by the *ATCS Act* 2001, but only in relation to terrorist acts that threaten national security. An on-going debate with government and communication service providers being patiently progressed by law enforcement, was guillotined by a knee-jerk reaction to a perceived intelligence emergency. Links between terrorism and transnational organised crime have often been argued – and there is an obvious market for gun-runners in supplying weapons to terrorist groups for instance - but the majority of transnational organised crime is not undertaken to fund terrorism. It therefore has to be tackled using conventional criminal and procedural law. Attempts to rush into UK domestic law *EUCMA* mutual legal assistance measures through the unprecedented vehicle of secondary legislation under the ATCS Act Part 11, failed after the House of Lords, recognising the significant constitutional implications of such a move, insisted on a sunset clause for the measures thus setting a timetable for implementation that the Government could not meet. The consequences of this have been numerous. Attempting to meet the deadline meant suspending the on-going mutual legal assistance review instigated in response to the EU peer review exercise (see below Chapter 4). The failure to meet the deadline meant that extra space had to be made in the Parliamentary Session commencing November 2002 to accommodate a special Bill, the *C(IC) Bill*. Because parliamentary time is extremely precious, internal Government negotiations meant that the *C(IC) Bill* could be framed only to enact *EUCMA* measures and *Schengen* measures. A number of other mutual legal assistance issues that need to be addressed and could usefully have been addressed in a comprehensive Bill, will now have to be postponed for at least two parliamentary sessions (Home Office Mutual Legal Assistance Forum, 6 December 2002). In

other words, attempts on the basis of an intelligence community agenda, to rush through alterations to mutual legal assistance measures intended to assist law enforcement, have ultimately led to disruption and delay in reaching possible improvements to the mutual legal assistance and international law enforcement co-operation framework established to counter transnational organised crime.

It is not the purpose of this thesis to explore the multitude of due process issues arising from the investigation of the New York attacks. Nor is this the place to discuss in depth US-EU relations in the international law enforcement co-operation arena. But it is worth noting that the steady progress within the EU towards greater co-operation between the authorities of Member States in JHA initiatives, has been disrupted by the perceived need to work closely with the US authorities to prosecute, initially, the New York attacks, and subsequently a war against Iraq. Co-operation between intelligence communities may well have increased since September 2001, but the fundamental differences between US and European (particularly UK) approaches to mutual legal assistance and international law enforcement co-operation (identified in Harfield 2002 and 2003 for instance) remain, and it is these fundamental differences which are now eroding the co-operative impetus initially witnessed in the autumn of 2001 (Dubois 2002).

Ultimately, it is the intelligence practitioners rather than the law enforcement communities that have most to gain from post 9/11 co-operative activity, legislative enactments and policy directions. The problems that beset law enforcement engaged in investigating transnational (organised) crime on 10 September 2001, still exist today, and the aftermath of the New York attacks has brought no long-term enhancement to daily investigation of 'routine' transnational (organised) crime.

Conclusion

Practitioners drive, and will usually settle for, mutual assistance measures. Politicians and administrators require mutual legal assistance. They have different priorities. Investigators are seeking the quickest and most efficient means of gathering information. The politicians and diplomats are seeking to retain control over actions that would otherwise constitute infringements of sovereignty. The drivers and models discussed above highlight the areas of tension that exist between these differing priorities and the constraints faced by practitioners and policy-makers in pursuing their objectives. Practitioners habitually complain about the burdensome bureaucracy inherent in mutual legal assistance formalities (senior investigating officer interview, 7 February 2001) and the rationale behind the *EUCMA* is to improve *ECMA* provisions (*HL Hansard* 12 June 2000 col.1473). But against the pragmatic

approach of the investigators is set the desire of policy-makers to preserve sovereign authority (Mitsilegas *et al.* 2003:9), often through the vehicle of due process protections. In the arena of IT-facilitated crime the tensions have now reached critical levels because of the speed with which crimes can be committed and the evidence destroyed. Informal practitioner mechanisms such as the G8 24 hour/7 days a week contact database [24/7] or the Interpol equivalent can only achieve so much. The authority invested in international legal instruments is crucial to ensuring successful investigations and the fact that the Council of Europe published more than two dozen sequential public drafts of its *Cyber Crime Convention* before consensus was reached two years behind schedule, does not bode well.

The cyber crime arena magnifies the problems and principles of mutual legal assistance and mutual assistance because of the speed and geographical capability of such criminality. It is also an arena in which there are vastly different levels of investigative capability in terms of technology access, investigator skills and lawful powers. Such heightened sensitivity is distracting for the purposes of this academic study and the whole cyber crime arena is worth research in its own right.

Having thus presented a multi-faceted context in the first three chapters, the thesis now progresses (in Chapters 4 and 5) towards it contribution to original research by posing the primary research questions (about whether mutual legal assistance achieves what is needed); by considering how the effectiveness of mutual legal assistance has been evaluated hitherto; and in the light of the aforementioned, by identifying the research gaps and explaining the methodology for the current research.

Chapter 4

Promoting principles into practice: evaluating the effectiveness of mutual legal assistance

Introduction

The theoretical and legal principles and different political perspectives of mutual legal assistance and international law enforcement co-operation having been discussed, the foundations have been laid for assessing whether these concepts work in practice and how they might be evaluated in order to prepare for the original research that has been conducted as part of this study. At the heart of this research lie two key questions: does mutual legal assistance work, and are the politicians, whose increasing interest in mutual legal assistance has been observed, delivering what practitioners need in order to make mutual legal assistance work?

Does mutual legal assistance work?

So does it work, and if so how do we know? Murray & Harris who, from their perspectives of specialist fraud defence and SFO prosecution lawyers respectively offer a few brief introductory chapters to their compilation of mutual legal assistance instruments applicable to the UK, argue yes. [1] "The aims of the committee of experts were to produce a convention which was simple and flexible enough to be adopted throughout the Member States which agreed to ratify it, while laying down a general principle that mutual assistance should be provided where at all possible in criminal proceedings. The [*ECMA*] has been the corner stone for all European co-operation since 1959, and has proved its worth in achieving its objectives" (Murray & Harris 2000:7). In the rarefied world of multi-million pound business fraud they have between them amassed more experience than most criminal justice professionals in other law enforcement arenas in using the various available instruments.

But this acclaim warrants qualification. As long ago as 1971, the European Committee on Crime Problems reviewed the operation of the *ECMA* and found it wanting. What it wanted particularly at that time was greater take-up amongst the nation States of Europe. Opened for signature in 1959 and entering into force in 1962 when Italy, Greece and Norway

[1] Lorna Harris was Head of the UKCA 1999-2002. Christopher Murray is a partner at Kingsley Napley solicitors, London and a Recorder of the Crown Court.

were the first States to ratify it, by 1971 the *ECMA* had been ratified by ten Member States of the Council of Europe. [2] It had also been acceded to by two non-member States (ECCP 1971:8, 12). [3]

The ECCP *Rapporteurs* struggled to balance the needs of investigators against the needs of national administrations. It was recognised that transmission of requests via diplomatic channels was cumbersome and slow. "Mutual assistance will never achieve the full results of which it is capable, unless its operation is both quick and easy. Speed is imperative if crime is to be fought successfully" (*ibid.*:50-51). Nevertheless they recognised a necessity for governments to be able to scrutinise requests before executing them and argued that transmission of requests through justice ministries (or equivalent departments) would serve to protect national interests and ensure compliance with the domestic laws of the requested State. But preserving individual ways of doing things can impede the process of mutual assistance.

The exchange of information concerning conviction of a national from one State in the jurisdiction of another (Art.22 *ECMA*) is subject to a restriction if the individual concerned is a national of more than one State. It is also subject to several individual national Reservations. Such limitations were regretted by the ECCP in 1971 (*ibid.*:54) and even today such exchange is observed more in the breach (Interpol interview 21.7.98). Proper mutual recognition of court judgements from other States is still seen as potentially a major future contribution to law enforcement co-operation in Europe (Jack Straw, speech, Avignon 16.10.98). It is regarded by the UK as politically more acceptable than full harmonisation of criminal codes (Lorna Harris interview 29 August 2000), although the UK has neither signed nor ratified the Council of Europe *Transfer of Proceedings Convention* (Chase & Leigh 1998:198) which might be regarded as an associated way forward.

The number of Reservations lodged generally by the twelve States up to 1971 to various Articles was subject of criticism by the ECCP: "the unity of the Convention has been fairly considerably impaired" (1971:70). Israel sought more inclusivity by arguing that criminal proceedings under Article 6 should also include police investigations (*ibid.*:87) thus highlighting a practical difficulty for Common Law States which the UK had avoided by not becoming Party to the Convention. Yet on the other hand Israel also reported that it had had to reject certain requests because it would not recognise examining magistrates and prosecutors as judicial authorities and so could not accept ILORs from such persons (*ibid.*:89).

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[2] Denmark, Switzerland, France, Sweden, Austria, the Netherlands and Turkey had joined the first three States.

[3] Israel from outside Europe (1967), and the principality of Liechtenstein (1969). Murray & Harris (*ibid.*6) report 37 signatories as of 31st March 1999, signature not necessarily indicating ratification.

These points illustrate the validity of one *Rapporteur's* conclusion that "despite a number of improvements [mutual legal assistance] bears the marks of its close attachment to the legal systems of various the States, who are still very jealous of their sovereignty" (*ibid.*:56). The ECCP report concluded that "certain rules which some years ago represented the best solution to the problems raised might no longer appear adequate" (*ibid.*:94).

Even the inadequate rules remained too revolutionary for some. Having taken no part in drafting the *ECMA*, the UK argued that it was "unlikely to be of much significant use to us because the insistence of our law on oral testimony left little scope for the admission of witness statements and other documents, which form the bulk of the traffic" (unpublished Home Office Discussion Paper, 1988; see also Brown 1998:51 who cites an earlier draft version of the same document). Despite this opposition, two years later the UK ratified the Convention because of the growing and irreversible need for UK authorities to gather evidence from abroad. Practicalities overcame political reservation.

The gradual accumulation of signatory Parties has overcome one weakness noted by the *Rapporteurs*. The more Parties to the *ECMA*, the more the philosophy of mutual assistance became conventional, international political wisdom. Since 1971 there has been a two-pronged response to the other perceived inadequacies: protocols amending the 1959 convention (one in 1978 and another currently being negotiated) and a separate Convention negotiated amongst EU Member States. The 1978 Protocol reduced the number of grounds for refusing assistance in relation to fiscal offences and extended the provisions for the service of court documents. The draft Second Protocol currently being negotiated is more expansive (an early version of the draft is reproduced in Murray & Harris 2000:Appendix G). Where the 1959 Convention defined policy, the draft second protocol deals in more detail with practicalities. Developments in communication technology have generated articles concerning the delivery of testimony by video conference and telephone. Increased sophistication amongst criminals (within the context of the parallel development of human rights philosophy) has given rise to articles concerning specific investigative tactics such as cross-border observations, controlled delivery of goods and money, the use of undercover agents and the exchange of data.

Such developments within the treaty law of the Council of Europe have been mirrored, elaborated upon and already enacted - and some would argue, unnecessarily duplicated (Schomburg 2000:58) - within the treaty law of the European Union. The *EUCMA* (the text of which is published in *OJ* 2000/C 197/01) "is intended to improve co-operation against serious and organised crime by improving the procedures for mutual assistance" (Lord Bach, *HL*

Hansard, 12 June 2000, col.1473).[4] Signed on 29 May 2000, it will come into force when eight Member States have ratified it (Art.27(3) *EUCMA*). It will be open to new Member States as and when they join the EU (Art.28), and has already been opened to certain non-EU States that have also adopted the *Schengen Acquis* (Art.29).

The 1959 instrument, whilst not perfect, would appear to be regarded by politicians and diplomats as sufficiently sound to warrant adjustment rather than abandonment. It is worth noting that the provisions of the *EUCMA* and the draft Second Protocol to the *ECMA* both focus on specific tactics and techniques. Lord Bach's comments during the House of Lords Committee Stage of the *Regulation of Investigatory Powers Bill* quoted above, indicate that the generality of the *ECMA* in respect of any form of criminality is insufficiently precise when tackling the serious and organised crime that is of particular concern to the EU. Mutual legal assistance is regarded by many to have proved its worth as a prevailing concept and is now evolving to take account of developments in criminality that almost certainly were not envisaged in the late 1950s.

Not everyone would agree with the perceived rate of progress. Schomburg sounds a voice of dissent. "The interim achievement should not be lost sight of: much has undoubtedly been simplified and improved, while important new instruments have and will be created: only the result in Europe seems, given the most varied ingredients of the most varied origin, to be an unpalatable cocktail of legal assistance" (2000:56). As a judge called upon to make sense of the various mutual legal assistance instruments now employed, Schomburg's vision for improvement looks beyond the (in his view, outdated) infrastructure of mutual legal assistance, focused as it is on not offending national sovereignty, to co-operation based upon a uniform EU system of prosecution. Regarding a harmonised body of European substantive criminal law as neither feasible nor desirable, and the forced harmonisation of procedural law among States as impossible, for Schomburg progress will be made when Eurojust [5] assumes the role of legal documentation and clearing house tailored to judicial requirements, just as Europol is structured to suit investigators (*ibid.*:57-59).

His nightmare scenario is a trial in which a number of charges are being prosecuted simultaneously under a variety of mutual legal assistance conventions, with sometimes conflicting rules, some requiring the investigators to observe the laws of the requested State, others the law of the requesting State (*ibid.*:55). Taking a second example, both prosecution

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[4] Besides reproducing the provisions noted in the draft Second Protocol to the *ECMA*, the *EUCMA* also provides for international joint investigations teams and a co-ordinating role for Europol.

[5] A new institution announced in paragraph 46 of the Tampere Presidential Council concluding statement, Eurojust is the prosecutors' equivalent of Europol. It is not clear that Eurojust will assume quite the role Schomburg anticipates.

and defendant have the opportunity to go "forum shopping" (*ibid.*:56): each party utilising the laws and procedures of different States to their own advantage. Transnational criminality might attract better prosecution opportunities in State A than State B. Alternatively, a suspect might be prepared to deal with authorities in State C because the (reduced) risk of conviction carries a lesser sentence than in State D. Schomburg argues, persuasively, that both prosecutors and suspects should face a European-wide level playing field, and that in certain areas there should be not mutual legal assistance between national jurisdictions but a supranational jurisdiction for issues that transcend national interests.

Observing or suggesting improvements upon the provisions of the *ECMA* is one way of assessing whether or not mutual legal assistance works and reveals how its success might be measured in some quarters. But it is not the only way. Conspicuous by its absence is a sustained qualitative or quantitative appraisal of mutual legal assistance, arguably a second means of measuring success.

The findings of the 1971 *Rapporteurs* are delivered anecdotally and do not betray whether or not hard data were gathered during their work. Schomburg's work is theoretical (2000). Murray & Harris (2000) are concerned primarily to explain the workings of the various instruments rather than assess their impact. The political focus on investigative tactics in the new legal instruments recognises that such tactics are necessary to investigate modern very sophisticated higher echelons of criminality and that there is a need to do so in a legitimately sanctioned manner in which human rights are valued and properly balanced and in which national sovereignty is respected. By implication the *ECMA* could not provide all that was required. The phenomenon of transnational criminality is the subject of considerable academic attention (for a flavour of this work see the various volumes of the journal *Transnational Organised Crime*; the thematic issue of the *Howard Journal of Criminal Justice* 37(4) (1998); Martin & Romano (1992); Neapolitan's bibliography and source book (1997); Fiorentini & Peltzman (1997); Reuter & Petrie (1998); and Van Duyne & Ruggiero (2000)). But in this varied abundance of legal, political and criminological academic activity, very little appears to have been written regarding the relationship between mutual legal assistance processes and successful investigation.

The academic perspective

Anderson and others have written authoritative studies on the development of international law enforcement co-operation (as opposed to mutual legal assistance), particularly within the EU (1989; 1995; *et al.* 1995; see also Benyon 1997; Bigo 2000;

Hebenton & Thomas 1995; Wrench 1998). Such descriptive works outlining the development of Interpol, the Trevi Group, the *Schengen Acquis*, Europol and other co-operative *fora* set a trend continued in recent works (see, particularly, papers by Ebbe; Higdon; and Rauchs & Koenig in Koenig & Das 2001 although all the papers in Parts I and II of this anthology fit the trend). They are works that chart the evolution of international law enforcement co-operation during the 1990s. Written as works of contemporary description, in this fast-moving arena they have quickly acquired the status of historical records.

Chatterton takes this a stage further, highlighting the need to move away from description towards analysis. "By concentrating on the framework of laws, protocols and agreements, and so forth that have been set up between countries to help their law enforcement agencies to work together, the literature on police co-operation has tended to ignore the supporting pillars ... We have very limited information about the ways in which police forces in Europe operate in practice and even less about how they actually work together to investigate cross-border crime and prevent crime that has an international dimension" (2001:324). Pointing out that co-operative mechanisms are a means to an end rather than an end in themselves, he queries the extent to which UK police forces avail themselves of the co-operative mechanisms, and whether UK investigators would be better off working on their own rather than "investing heavily in interagency projects" (*ibid*:327).[6]

In considering these and related questions at length, Chatterton appears to make insufficient distinction between issues of policy and procedure and the different types of mutual legal assistance mechanisms now in place. Some co-operative mechanisms – instruments of international law for instance - are indeed ends in themselves: they are the formal, diplomatically-negotiated palliatives to the inhibitions imposed on the natural inclinations of investigators by the laws of sovereignty. The *ECMA* 1959 and the *EUCMA* 2000 provide legal mechanisms to be used by investigators seeking evidence from abroad of relevance to domestic investigations. Having provided practical mechanisms, these instruments have achieved what was intended. They are not instruments of policy, but of procedure. Agencies and authorities will avail themselves of these mechanisms to the extent necessary to progress individual enquiries. They have no other need of these instruments and are not guided by them beyond the extent necessary to ensure evidence is gathered lawfully. Thus when an individual agency seeks evidence from abroad there is a mechanism in place to achieve this.

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[6] Chatterton appears to be talking about interagency projects in terms of Interpol and Europol. From an operational perspective there is another interpretation. Is it more effective for agencies to engage in international, joint or parallel operations such as Case Study 2, Chapter 7, or go it alone, accepting that a given operation will require mutual legal assistance? As will be seen, some senior investigating officers incline away from joint or parallel operations despite the introduction of the Joint Investigation Team concept.

Whether international law has provided legal mechanisms that are fit for the purpose is a separate question within the context of evaluating the effectiveness of the treaty provisions. The Council of Europe Experts Committee on Crime Problems [ECCP] reviewed the *ECMA* in 1970 and found it wanting, not least because signatory parties had yet to fully implement the provisions and ratifications were still relatively few in number (Council of Europe 1971:93 *ff*). Have matters improved? Are investigators able to obtain the evidence they seek using the procedures? Is it being successfully adduced in court? Studies of case-law and practitioner experience will begin to answer these questions.

A second area of interest lies not in the international instruments and the legal provisions thus made available to investigators but in the administrative structures established to facilitate those provisions. Is it still the case, as Soeters *et alia* asserted, that "cross-border collaboration in the Euregion until now is merely a matter of motivated individual police officers in various forces, each developing their own network of liaison persons beyond the borders ... an informal, *ad hoc* activity in which the official procedures play only a marginal role" (1995:9; quoted in Chatterton 2001:330)? The EU has recently completed an evaluation in respect of government mechanisms (Central Authorities) enabling mutual legal assistance (see below p.72*ff*) and it will be advocated here that such an evaluation can be complemented by examining the practical experiences of investigators in using the mechanisms provided to gather evidence.

In a further type of mutual assistance, international police networks, Chatterton widens the debate by detecting tensions between international law enforcement co-operation and UK local policing objectives, arguing that the need to focus finite resources on delivery of core police services to the local community (pursuant to *Police Act 1996*, the *Crime and Disorder Act 1998*, the *Local Government Act 1999* and now the *Police Reform Act 2002*) militates against collaboration and investing in international networks. Local police managers "are likely to view national – and international – initiatives as potential threats to their budget allocations" (2001:339). "Commanders are concerned first and foremost with the performance of their units and how effectively they deal with problems that affect the public living in their areas. There is growing evidence that this is resulting in the development of parochialism" (*ibid.* 340; see also UKCA interview 7 August 1998 discussed in Chapter 1 above, p21). This calls into question the political willingness at all levels to engage in international law enforcement co-operation. Again, it is important not to confuse participation in either formal or informal networks, and the resources required to do so, with the daily investigation of 'core business' crime where evidence may be located in more than one jurisdiction.

The ACPO portfolio-holder for International Affairs accepted that, at face value, international law enforcement co-operation is not a priority for UK chief police officers

because the Government effectively says as much by omitting international law enforcement co-operation from Ministerial Priorities set for the police service (interview 23 July 2002, hereafter 'ACPO (IA) interview'). However, he went on to point out that such a superficial interpretation requires qualification. Whilst not a Ministerial Priority set for local police forces in the UK, part of Home Office Aim 2 is "to reduce organised and international crime" and this is reflected in the National Policing Plan 2002, Appendix B. Local forces are at the end of the transnational organised crime 'food-chain'. The illicit commodities imported by transnational organised crime groups, be they drugs, firearms or human beings, end up on local streets in the UK inevitably fuelling local crime and creating issues of local public concern that do feature in local policing priorities (for instance burglaries committed to fund a drug dependency or public disorder generated as a result of a mass influx of immigrants). It was postulated that UK forces with ports of entry or situated along the national borders might have more need of international law enforcement co-operation than land-locked forces (ACPO (IA) interview), but this view itself is qualified by a Midlands-based Detective Superintendent who pointed out (pers. comm. 7 August 2002) that the dispersal of both legal and illegal immigrants across the UK meant that any force was bound to encounter a need for international law enforcement co-operation in dealing with local crime which incorporated an immigrant factor. This is borne out by the policy considerations facing the Government's Project Reflex: an inter-departmental team tackling organised human trafficking and illegal immigration which includes a multi-agency Immigration Crime Team [ICT].[7] The ICT is currently located in two bases, Heathrow and Gatwick airports. But the volume of enquiries being undertaken by these teams in the Midlands suggests that there is a business case for establishing a third branch of the ICT at the end of the supply chain beyond the nexus of the immediate ports of entry (private information). The point regarding land-locked areas having no lesser need of mutual legal assistance mechanisms was reinforced by a chief Crown prosecutor for a neighbouring area who observed that the issuing of *commissions rogatoire*, not so long ago the rarefied preserve of specialists, is now a daily occurrence for all his staff in his similarly land-locked CPS area (Peter Lewis, presentation to the Oxford Conference, 28 August 2002).

Nor is it necessarily accepted that there is direct competition for resources that prevents participation in international law enforcement co-operation (ACPO (IA) interview). The EU seeks to co-ordinate a number of pan-European road-safety initiatives that are delivered within the context of local force priorities regarding traffic policing. This involves not competition for resources but the incorporation of wider priorities and initiatives within

[7] Human trafficking is defined as comprising exploitation of those trafficked, for instance women and children transported across borders to work in the sex trade. Illegal immigration defines all non-exploitative unlawful immigration. (ACPO (IA) interview).

local policing plans. The terms of reference for the ACPO International Affairs portfolio are "to promote effective policing within the United Kingdom and abroad by co-ordinating the provision of assistance and advice to overseas countries and international organisations" and "to ensure that the United Kingdom's domestic Police Service provides appropriate professional advice to Government Departments when their activities affect policing" (ACPO (IA) interview). Intervention (training and specialist support for foreign agencies) and interdiction (such as the off-shore operational activity now a priority for HM Customs & Excise) are seen as activities that both directly and indirectly contribute to the local policing aim of providing safer communities by reducing levels of transnational criminality that impact on the UK.

Seen from a wider perspective, all UK local forces have a vested interest in international law enforcement co-operation, even if local chief police officers expect the bulk of daily transborder investigative and intelligence activity to be undertaken by the specialist agencies established to do just that; namely the National Crime Squad and the National Criminal Intelligence Service (ACPO (IA) interview). Chatterton correctly identifies a need to ensure that international law enforcement co-operation procedures and mechanisms are operating effectively – this area of law enforcement activity should be as accountable as any other - but places too much emphasis on a perceived tension between local and transnational policing from a UK force perspective. He appears not to take proper account of the continuum of criminality and response along which sit all actors in law enforcement or the distinction between resources invested in international liaison activity (police networks and policy-development) and resources invested in transnational investigation, (which may ultimately be contributing towards meeting a local force performance target if the crime is located in the UK but has transnational elements). This point is important because in evaluating the effectiveness of structures and processes, the issue is not whether resources needed for a transnational enquiry are in competition with resources needed elsewhere. Arguably that is an eternal debate applicable to any area of policing. Invariably, investigators who seek evidence abroad are doing so pursuant to a domestic investigation that is only going to be carried out within the context of the local policing plan or relevant national agency plan. The issue, rather, is whether the international law enforcement co-operation mechanisms in place are stream-lined and effective so that resources deployed on such enquiries are used in a cost-effective manner. Are investigations or prosecutions abandoned, for instance, because it is too difficult to gather and adduce vital evidence from abroad? Michael Kennedy, President of Eurojust, suggests that this is indeed the case and that prosecutors have hitherto often settled for prosecuting such criminality as they can prove entirely within their jurisdiction whilst ignoring behaviour that comprises transnational criminality (Oxford conference, 29 August

2002). An example would be charging a trafficker with possession of drugs rather than distribution because to charge the latter required adducing evidence from abroad at no little expense in time and effort. [8]

Where tensions can exist is in the *quid pro quo*. There is evidence that UK agencies are reluctant to assist foreign authorities seeking evidence located in the UK because such activity diverts resources and contributes nothing to force performance indicators (UKCA interview, August 1998). But this, too, boils down to the proper management of in-coming enquiries. Simply asserting that there are insufficient resources to assist foreign authorities will not reduce the level of demand for such assistance. Further, such a stance will inhibit UK domestic investigations dependent upon mutual legal assistance because the UK will be seen to be reneging on its international treaty obligations and failing to observe the courtesy of international comity. The lack of co-operation from UK authorities in response to assistance requests from foreign authorities, and the animosity thus generated which consequently led to a wide-spread reluctance to assist UK authorities, provided the policy rationale for enacting the *Criminal Justice (International Co-operation) Act 1990*, by which the UK adopted in domestic legislation the provisions of the *ECMA* which had been resisted from its inception, reliance having hitherto been placed on the *Extradition Act 1870* (as amended in 1873) for all matters of mutual legal assistance (Foreign Office Minute briefing UK representatives at the Council of Europe, 2 March 1959, National Archives:FO371/146282:WUC 1651/9; Home Office 1988).

Chatterton has noted an academic lacuna and calls for further research that records and explains outcomes in international law enforcement co-operation by focusing on process evaluation rather than simply describing structures and the circumstances under which they came into being (2001:343). Evaluation of mutual legal assistance mechanisms is not new, as the 1970 ECCP exercise demonstrates, and recent developments in the concept will be outlined below. But nor, as it is currently practised, does it give a complete picture. There are a number of elements within the arena of mutual legal assistance and international law enforcement co-operation that can, and should, be evaluated to assess their effectiveness. The 1970 ECCP programme reviewed the adoption and ratification of a specific international instrument. The effectiveness of international police networks formalised into NGOs such as Interpol and Europol is one area of possible research. The effectiveness, from a government administrator's perspective, of mechanisms established to facilitate co-operation and mutual

[8] A further consequence of ignoring transnational criminality in pursuing easier, 'domestic' charges is that prosecution and conviction rates fail to reflect accurately the level of transnational organised crime, a notoriously difficult phenomenon to measure at the best of times.

legal assistance is another area amenable to assessment. The analysis of investigator experience when using the various mechanisms to further individual investigations is a third.

Financial investigation and the genesis of modern peer evaluation

The idea of mutual legal assistance evaluation through peer review, on both a unilateral and a multilateral basis, has become well-established in financial criminal investigation and preventive action to inhibit money-laundering. US authorities regularly review the legislation and activity of other nations in combating international corruption, bribery and also drugs trafficking. A US Department of Commerce review of the corruption and bribery laws of other States, for instance, has found numerous deficiencies (from the US perspective) in UK legislation and little effective implementation of the OECD anti-bribery convention (2001).[9] The US also reviews anti-drug measures adopted by other States, imposing unilateral economic sanctions if the measures implemented by the other State are deemed by US officials to be inadequate (telephone interview with Jonathan Winer, Washington DC, 1 June 2001; also Winer 1997:59-60).[10]

Given the adverse consequences to the market economy threatened by financial crimes, the G8 group of countries (formerly the G7) have long taken a multilateral interest in law enforcement in this particular sphere. The 1989 G7 Summit, held in Paris, established the Financial Action Task Force [FATF], an intergovernmental policy-making body "whose purpose is the development and promotion of policies, both at national and international levels, to combat money-laundering" (http://interdev.oecd.org/fatf/AboutFATF_en.htm; accessed 8 August 2002). Within a year the FATF had published forty recommendations outlining action necessary to prevent and reduce opportunities for money-laundering the proceeds of crime. The political driver for this initiative was protection of the international economy and global markets.

Multilateral monitoring and peer review are among the tenets upon which the FATF was founded. Every member country, twenty-nine as of August 2002, responds to an annual questionnaire that assesses the extent to which the respondent State is implementing the forty recommendations. The second element of the peer review comes in the mutual evaluation programme during which each FATF Member State is visited in turn by a team of selected

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[9] The review has been conducted annually since 1998 under US Federal law: Section 6, *International Anti-Bribery and Fair Competition Act* 1998. I am grateful to Ms Lorrie Elder, US Congress, for drawing my attention to this source.

[10] Jonathan Winer was the Deputy Assistant Secretary of State for Law Enforcement and Crime, Bureau of International Narcotics and Law Enforcement in the Clinton administration, a counsel to Senator John Kerry 1985-1993 with particular reference to transnational organised crime, and investigated the BCCI affair on behalf of US authorities.

experts appointed by the FATF. [11] Such visits are intended to assess the "extent to which the evaluated country has moved forward in implementing an effective system to counter money laundering and to highlight areas in which further progress may be required" (*ibid.*). Although not binding in international law, failure to implement the forty recommendations renders the State in question liable to counter-measures from compliant FATF members.

Such measures, "which should be gradual, proportionate and flexible regarding their means and taken in concerted action towards a common objective", are also taken against non-FATF States which additionally are subject to unilateral evaluation by FATF Member States against twenty-five criteria defined in the Non-Cooperative Countries and Territories [NCCTs] Review Programme. Fifteen non-FATF states are currently so proscribed (FATF 2002:6; 19). Of these only one, Nauru, is subject to counter-measures (Patrick Moulette, FATF, Oxford conference, 30 August 2002)

The current mandate for the FATF expires in 2004. Given that steady progress in tightening anti-money laundering regimes is being claimed – Hungary, Israel, Lebanon and St Kitts and Nevis were all declassified as NCCTs in 2002 – it is likely that the FATF will be given authority to continue its work, particularly in the context of the current 'war on terrorism' which includes action against terrorist funding. It is argued by the FATF that peer review and external evaluation in this particular arena has produced demonstrable benefits. Both the UK and, following 11 September 2001, the US, have amended their domestic legislation in order to comply more closely with FATF recommendations.

A drawback of this concerted action, based upon defined assessment criteria, is that money-laundering will be displaced to those states and territories lacking robust jurisdictions which are already vulnerable to regime infiltration by transnational criminal organisations [TCOs], in which case such jurisdictions may well find it harder to take the legislative and enforcement action demanded by the co-operative and compliant international community. There is also considerable disquiet among developing and smaller states about the selective use of the evaluation mechanism. In a debate between Patrick Moulette, FATF, and Grace Perez-Navarro, OECD, for the regulators, and David Ballantyne and Geoffrey Rowland, respectively the Attorneys General for Guernsey and the Cayman Islands, for the regulated (Oxford conference, 30 August 2002), it was conceded by the FATF that selection for NCCT review was at the whim of FATF Member States based on their experience of dealing with a given jurisdiction rather than against defined selection criteria or strategic threat assessment. Thus Guernsey, whose evaluation against the FATF forty recommendations proved a greater

[11] The UK and the US were assessed against only twenty-eight of the forty recommendations (Geoffrey Rowland QC, Oxford conference, 30 August 2002). The UK was found to be compliant with twenty-four criteria and the US compliant with seventeen. Both states have since taken remedial action to improve their compliance.

adherence than could be demonstrated by either the US, the UK, Luxembourg or Switzerland (all FATF Member States), was nevertheless further selected for a NCCT review at the cost of lost business to the economy until the additional compliance was also proved. Likewise the Cayman Islands, recognised by the FATF as leading the way in the global fight against financial crime, was designated as a NCCT whereas the tax havens of Luxembourg, Switzerland and Delaware (USA), all much used by TCOs, have not been. [12]

It was further conceded that the FATF had conducted no studies of money-laundering before or after the review and listing process to ascertain whether evaluation really did result in a reduction of money laundering. The reviews were paper-based, looking at laws and policies rather than outcome-focused based on the level of money laundering activity (Patrick Moulette, FATF, in response to questions from the audience, Oxford conference, 30 August 2002).

What the FATF has achieved is a voluntary blue-print for tackling money-laundering and an evaluation process by which success in implementing the mechanisms to sustain that blue-print can be measured. Within this model, co-operation is manifest in common action, rather than in the direct actions of one jurisdiction fulfilling the assistance request of another. The case for the benefit of evaluation and peer review is made out, albeit that application of this model is vulnerable in certain circumstances to criticisms of being self-serving and of being used as a political weapon against economic competitors in the financial services sector.

More recently, the Council of Europe has commenced its own evaluation programme in connection with measures to combat money-laundering and related crimes with an *Agreement establishing the Group of States against Corruption – GRECO* (adopted by the Council of Europe Committee of Ministers 5 May 1998 at its 102nd Session).[13] The programme has highlighted another potential weakness in evaluation as a concept.

The UK was the eleventh GRECO member to be examined in the first evaluation round which ran throughout 2001 (GRECO 2001). UK authorities responded to a comprehensive questionnaire prior to the visit of the evaluation team, 26-30 March 2001. The evaluation team comprised a law enforcement expert (a FBI Assistant Director),[14] a criminal justice expert (a Hungarian public prosecutor) and a general policy expert (the Director of Audit for the Auditor General, Eire). Those they met included MPs, officials from the Home Office, the Lord Chancellor's Department, the Northern Ireland Office, the Scottish

[12] David Ballantyne, Attorney-General of the Cayman Islands, was moved to quip that no self-appointed regulators' list would have been credible had it not included the Cayman Islands (Oxford conference, 30 August 2002).
[13] The acronym is derived from the French translation of the group's title. The UK was not among the original seventeen CoE Member States that formed the group but had joined by 2001.
[14] The US is not otherwise involved in GRECO.

Executive, the Crown Office (Scotland), the Department of Environment, Transport and the Regions, the Office of Government Commerce, the National Audit Office, the Foreign Office and the Cabinet Office. Regulatory and enforcement agencies represented were HMCE, the Inland Revenue, the Serious Fraud Office, NCIS, the National Crime Squad, the Metropolitan Police Service, Strathclyde Police (Scotland), HM Inspectorate of Constabulary and the Police Complaints Authority (*ibid.* paragraph 2).

A positive interpretation was placed on the relative paucity of data demonstrating corruption in the UK: "while the UK authorities recognise corruption is insidious and difficult to measure, it is not generally perceived as a major problem in the United Kingdom ... according to the latest crime-statistics figures [*sic*] for England, Wales and Northern Ireland, in the period between 1993 and 1999 the number of convictions for corruption in these jurisdictions remained constantly low," (*ibid.*: paragraph 8). In 1999, for instance, fifteen prosecutions under corruption statutes resulted in ten convictions. But absence of evidence is not necessarily evidence of absence. Alistair Brown, representing the Crown Office, who met with the evaluation team has observed publicly that a lack of prosecutions is as much evidence of indifference to the issue as evidence of there being no real problem (Oxford Conference, 27 August 2002). The success of evaluation is dependent upon a willingness to be evaluated. From his own experience and on the basis of UK responses to the questionnaire, Brown concluded that UK authorities prefer not to investigate the possibility of corruption within the UK too closely. He contrasts this "head in the sand" approach with the outright obstruction encountered elsewhere. Brown was due to have been a member of the evaluation team to be sent to Moldova but for two years the Moldovan authorities procrastinated, not least by refusing to appoint someone in Moldova to correspond with the GRECO administration and so facilitate the visit. With the appointed evaluation team just awaiting a date and permission to travel, Moldova subsequently requested a French-speaking evaluation team rather than an English-speaking team: the process of team selection and date-setting has commenced all over again with no more notable progress than over the past two years.

For Brown the simple truth is that in the UK there is no way of knowing or assessing how much corruption is taking place, therefore GRECO could do little more than conclude that "the arrangements for the fight against [corruption] and the impact thereon of existing immunities are not easy to analyse ... This state of affairs necessarily dictates caution in arriving at any generalised conclusions." (GRECO 2001: paragraph 99). Such serious corruption as was conceded was identified as existing within the UK police service: it was also recognised that this was the only public service in which there was any serious attempt to combat internal corruption (*ibid.*: paragraph 100).

In a report that was generally supportive in conclusion but critical in detail, the team that evaluated the UK made comment on mutual legal assistance arrangements within the jurisdiction noting that "improving the legislation for the seizure of corruption-related assets will be an exercise in futility if the authorities that are charged with providing international legal assistance do not have enough resources to deal with the corresponding requests expeditiously." This was supported with a recommendation that permanent, rather than temporary, extra resources should be allocated to the UKCA to manage requests for mutual legal assistance (*ibid.*: paragraph 79, see also 28 and 102 (ii)). For Brown, the real lessons learnt were that political will could not be legislated for, and without the political will to enforce laws, no amount of legislation is going to make a difference, even if on paper it appears the necessary instruments and mechanisms are in place.

The FATF and GRECO evaluations have demonstrated that, although evaluation to ensure implementation is surely necessary, it is possible to manipulate or evade review procedures thereby deriving incomplete or misleading evidence upon which to base conclusions. These are lessons that future programmes would do well to recognise.

Money-laundering is not the only area in which evaluation of co-operative mechanisms has been instigated by the G8 nations. In 1996 the G8 issued its own list of forty recommendations to tackle transnational organised crime following its Lyon Summit (which have subsequently been revised and re-issued as sixty-three recommendations, May 2002). This led to the establishment of the Lyon Group of law enforcement experts that advises G8 ministers. The Lyon Group itself has three sub-groups looking at international law enforcement special projects, judicial co-operation and the specialist arena of hi-tech crime.[15] In 1997, following their Summit at Washington, the G8 ministers issued a communiqué (9-11 December 1997) outlining, *inter alia*, progress to be made in tackling hi-tech crime (given that so much global economic activity is computer-based). Ten guiding principles and a ten-point Action Plan were appended to the communiqué.

Amongst the ten actions was the desire to establish emergency single points of contact in each State on a twenty-four hour/seven-days-a-week basis, so that hi-tech crime investigators needing assistance in gathering transborder evidence could contact an expert in another jurisdiction who could take the necessary steps, subject to domestic law, to preserve the digital evidence. The particular need in the case of digital data is to preserve the data pending formal evidential requests being made through mutual legal assistance channels. The volatility of digital data is such that it will probably have succumbed to either malicious deletion or deletion through routine business practice before a formal mutual legal assistance

[15] The Hi-Tech Crime Sub-Group, hereafter HTCSG.

request can be executed. The primary function of the 24/7 network, as it is termed and which is voluntary (all G8 business being conducted on the basis of consensus), is to ensure that the evidence is preserved in order for it to be formally requested.

In the aftermath of the terrorist attacks against the United States in September 2001, concerted efforts have been made to expand the network beyond the G8 Member States. As of May 2002 twenty-five nations had agreed to participate and it is a concept already supported by the European Union (9193/01 CRIMORG 61, 18 June 2001) and now given international legal effect in the Council of Europe *Cyber Crime Convention* 2001 (Article 35). The network exists but does it function as intended? Is it of use? To find out the UK delegation to the HTCSG, comprising an official from the Home Office Hi-Tech Crime Policy Unit and the present author representing UK law enforcement, formally proposed at the May 2002 meeting of the Lyon Group that the effectiveness of the 24/7 network be assessed through peer review. The proposal was adopted and a number of pilot evaluation exercises were conducted with a view to reporting back at the next HTCSG meeting in October 2003 on the most appropriate form of on-going peer review and areas for improvement. Historical, anecdotal data regarding the operation of the network was collated. The operation of the network was systematically monitored between July 2002 and September 2002, a global 'table-top' exercise tested the network in June 2003, and random 'ping' tests were carried out to ensure that the relevant expert points of contact are indeed contactable. The evaluation pilot was restricted to the G8 Member States. The 'table-top' exercise, which the present author helped to devise and co-ordinate, highlighted a number of disparities between promise and performance.[16]

The 24/7 network represents a form of pre-cursor mutual legal assistance. Its effectiveness, in part, is constrained by the domestic legislation of the requested State. A US federal agent can issue a Preservation Notice requiring a Communication Service Provider [CSP] to preserve specified data for ninety days (usually long enough to instigate a mutual legal assistance request). A UK police officer currently can do no more than invite the CSP voluntarily to co-operate in preservation pending a court order.[17] The purpose of the evaluation exercise was not to overcome these discrepancies in domestic legislation (the fundamentally divergent attitudes to data protection either side of the Atlantic currently

[16] The detailed results of the test are confidential and by consensus the issues raised were presented in a sanitised report to the HTCSG to avoid embarrassing any national delegation at the meeting.

[17] The *Anti-Terrorism, Crime & Security Act* 2001, enacted in response to the events of 11 September 2001, makes limited provision for communications data preservation orders in circumstances in which national security is threatened (*ATCS* Act Part 11), and even then compliance is voluntary and subject to a Code of Practice which has yet to be drafted, let alone put out for consultation and Parliamentary scrutiny. This provision would not appear to satisfy UK obligations under the CoE *Cyber Crime Convention* to legislate for US-style preservation notices. How this is to be achieved, given considerable industry opposition to such an instrument following the partial coming into force of the *RIP Act* 2000, remains problematic.

prohibit any such statutory synchronisation) but to ensure that lines of communication work properly and that the right individuals are identified as the appropriate 24/7 contact. (Interpol operates its own national hi-tech crime contacts list, on which nearly 70 States are represented, but accepts that the designated contact may be a government official rather than an investigator and may not be available on a full-time, call-out basis.)

In making the proposal, the UK delegation prayed in aid the EU peer review programme for mutual legal assistance mechanisms at government level. [18] Like the FATF programme to ensure appropriate global anti-money laundering laws, the EU mutual legal assistance evaluation programme has now established its pedigree and can point to specific improvements derived directly from peer review and evaluation. Unlike the FATF programme, it is not applied outside the Member States.

The EU mutual legal assistance evaluation programme

Pursuant to its Action Plan of 28 April 1997 to combat organised crime (OJ 97/C 251/01 15 August 1997), the EU undertook research, including peer evaluation, into existing mutual legal assistance practices among Member States with the aim of identifying areas for improvement in order to enhance mutual legal assistance in criminal matters within the EU. The research and evaluation programme started "from the assertion that judicial co-operation needs to be brought up to a comparable level to police co-operation" (EU 2001a, Multidisciplinary Group on Organised Crime [MDG], *Final report on the first evaluation exercise – mutual legal assistance in criminal matters*, 8648/01 CRIMORG 55, 10 May 2001:6 [hereafter *Final Report*]).[19]

The evaluation programme was conducted over three years 1999 to 2001 with five Member States being evaluated each year. Individual reports on each member state were produced in addition to annual reports during the period of the exercise and a final report. This programme is envisaged to be on-going and the first three-year round focused on "delays in the operation of the system for mutual legal assistance and urgent requests for the seizure of assets, having particular regard to cases which involved organised crime" (EU 1999, Multidisciplinary Group on Organised Crime [MDG], *Joint Action on Mutual Evaluation*, 10972/1/99 CRIMORG 131, 6 October 1999:1 [hereafter *First Report*]).

The procedure for the evaluations is detailed in the First Report (EU 1999:4-8). It is modelled on the procedure for FATF evaluations: the FATF Secretariat provided assistance to

[18] The European Commission is represented at G8.
[19] Michael Kennedy, President of Eurojust, observed that this motivation also under-pinned the creation of Eurojust (Oxford Conference, 28 August 2002).

the EU in launching its three-year programme. Each Member State was asked to nominate three experts with substantial experience who would be prepared to participate in one evaluation exercise. From this list of names submitted to the General Secretariat of the Council, the Presidency designated teams, each of three experts, to evaluate each Member State. No expert was designated to a team evaluating his or her own jurisdiction. A questionnaire was drawn up by the Presidency, with the assistance of the General Secretariat of the Council, and approved by the MDG. The questionnaire was sent out to the Member States to be evaluated, allowing time for completion (and in some cases translation) before the evaluation team visited the jurisdiction. The answers to the questionnaire were considered in depth and supplementary questions drafted as appropriate. Member States drew up draft programmes of visits for the evaluation team to meet relevant experts including political, administrative, police, customs and judicial authorities. The evaluation teams had the opportunity to request additional visits or meetings having considered the draft programme. Each visit normally lasted four days.

Within one month of completing the visit, each evaluation team prepared a draft report upon which the evaluated Member State was invited to comment. If the evaluation team accepted the responses, the draft report is amended accordingly. Where there was disagreement, an appendix to the evaluation teams' report, noting the Member State's comments, was drawn up. The aim was to achieve amicable consensus for a programme of improvement in conjunction between the Member State and the MDG. To that end, prior to the next scheduled MDG meeting, the evaluation team met with officials from the Member State that had been evaluated "to try to resolve any remaining differences between the experts and the Member State as contained in the Annex to the draft report" (*ibid.*:7). The report was then discussed within the MDG. Occasionally with minor amendments, the report's conclusions and recommendations were then adopted by the MDG.

The whole programme generated fifteen individual reports, three annual reports and a final report. In sum this portfolio is effectively a manual on mutual legal assistance as practised within the EU together with recommendations on what needs to be done to enhance co-operation between the Member States. The work pre-dates post 9-11 initiatives and reactions.

The *Final Report* on the three-year exercise noted six findings. The first was one of reassurance. "While mutual assistance does not have the level of perfection and reliability expected by many practitioners, it does not operate as badly as some claim" (*Final Report*:6). The habitual criticism that the mutual legal assistance process is "slow, inefficient and powerless" (*ibid.*: 3) was held to be outdated. Certainly central authorities in the member states have worked hard to reduce the amount of delay. In the UKCA, the appointment of

additional staff helped reduce the back-log of many months achieving a target turnaround of less than ten working days for outgoing requests in 95% cases and actioning incoming requests within twenty working days in 92% cases (UKCA 2001:2, 2002:1). This means that requests are being processed more speedily for onward transmission to the executing authorities. It does not necessarily mean that investigators are themselves acting expeditiously upon receipt. Ten other national reports commented upon some aspect of delay inherent in mutual legal assistance mechanisms that could and should be improved.

The second finding was that, despite statistics that "are not totally reliable", it was evident that in any given Member State, between 75% and 95% of all mutual legal assistance transactions are with another EU Member State, with much of the remainder being made up by transactions with candidate States seeking admission to the EU (*Final Report*:7). Due to inconsistent statistical practices, the lack of common data sets precludes analysis of request-types across the EU. For the period 1997-99, 80.8% of requests received by the UK were from EU Member States (UKCA 2000a:4). For the same period, 65.6% of outgoing UK requests were transmitted to EU Member States (UKCA 2000b:4).

The Achilles heel of international co-operation in criminal matters was evident in the third finding: "forty years after adoption, the reference Convention – [the *ECMA* 1959] – is not applied in a uniform manner either between the Member States or within a Member State (*Final Report*:7). The problem is not unique to the EU. Only 25% of Commonwealth countries have implemented the *Harare Scheme* for mutual legal assistance. Thus 75% of Commonwealth countries have no power to extradite suspects for offences of major concern to the world today (Kimberley Prost; Dianne Stafford; both Commonwealth Secretariat, Oxford Conference 29 and 27 August 2002 respectively). Of sixty-one Member States (out of 169) that responded to a UN survey on mutual legal assistance, 77% had adopted mutual legal assistance legislation: by definition, therefore, 23% had not (Andrew Wells, UNDCP, Oxford Conference, 29 August 2001).

The fourth general finding was that outdated practices, administrative routines and bureaucratic hierarchies added unnecessary complexity to legal problems arising from mutual legal assistance (*Final Report*:7).

The fifth finding was that ignorance of languages significantly impaired communication between requesting and requested authorities, to which the only solution was improved language skills amongst mutual legal assistance practitioners. (*Final Report*:8).

And finally, the report noted that in this arena "there is one certainty: the upward trend in requests for mutual legal assistance" (*ibid.*). The first quarter of 2002 demonstrated a

4.7% increase (over the previous year) on the number of requests being handled by the UKCA (UKCA 2002:1).

A number of noteworthy facts were recognised during the course of the general discussion. Indeed, certain identified deficiencies justified the drafting of protocols to existing conventions to address the issues raised, thus demonstrating the added value of the evaluation exercise (interview, Yolanda Galigo-Casilda, 14 May 2003, European Commission, Brussels). Mutual legal assistance is now developing within the context of an increasingly judicial framework. Direct communication between judicial authorities is provided for both in the *Schengen Convention* 1990 and the *EUCMA* 2000. The European Judicial Network [EJN] exists to facilitate that communication (*Final Report*:10). Increased judicial involvement provides protection against abuses. Arguably this protection hitherto has been partially founded upon "cumbersome bureaucratic channels" through which domestic control of mutual legal assistance has been exercised (*Final Report*:16; see also 23). Such bureaucracy appears to have been concerned more with protecting sovereignty issues than suspect rights and did little to manage properly or indeed facilitate the efficient execution of requests. Nor did cumbersome bureaucracy prevent the development in some cases of diverse practices within a single jurisdiction. Such internal differences of interpretation (found in the UK amongst other Member States) cause confusion to requesting States and make proper evaluation difficult (*Final Report*:21). Direct transmission, where it is already practised, has already meant that "a majority of requests are by-passing the central authority" (Final Report:22). Direct transmission calls into question one of the key roles of the central authorities, their clearing house function. At the same time, central authorities are the obvious location in which to site the management and co-ordination functions recognised as necessary to enhance mutual legal assistance performance. The evaluation programme has demonstrated the need to review the role of central authorities (*ibid.*).

It was further recognised that the context within which mutual legal assistance operates has changed significantly over recent years. No longer a tool of relatively specialist and minimal use, "greater mobility and the extension of the economic field" has led to an increase in offending and a consequent increase in need for mutual legal assistance; an increase in demand that has not been met with a corresponding increase in investment in mutual legal assistance infrastructure and personnel (*Final Report*:25). One consistent finding in all Member States was that investigators visiting the requested State "contributed to the speed and relevance in executing requests, particularly where searching or interviewing a witness was involved" (*Final Report*:26; a finding which echoed that of police practitioners in

the UK in 1996, see below p.23*ff*).[20] It was also recognised that increased mutual legal assistance traffic was placing increased demands on courts of first instance and magistrates, for whom basic training in mutual legal assistance was now considered essential so that these officials would be "in a position to practise mutual assistance in accordance with the international and national instruments in force. Otherwise, the international instruments negotiated and the new laws adopted by the Member States will remain largely a dead letter" (Final Report:26)

Thirteen areas for improvement were identified (*Final Report*:3-4) leading to twenty-two recommendations (*Final Report*:9-30; the recommendations are listed Appendix B). The areas for improvement were as follows:

- "Staff and material and budgetary resources are insufficient to meet requirements and should be more in line with the needs of today;
- insufficient language knowledge remains an obstacle to improving mutual assistance and to direct communication between judicial authorities; there is considerable need for training in this area;
- there is also a considerable burden of outdated practice and pointless red tape and hierarchical complexity; the result is to slow down the transmission and execution of international requests; the solution would be to simplify the channels and streamline the procedures;
- it is imperative to train specialists in mutual assistance;
- a legal complexity arises from the accumulation of international and national rules to be applied in the same case; basic training in this matter for those involved in mutual legal assistance is essential;
- there are major discrepancies between the Member States as to the application of Conventions; a better policy of guidelines (whatever the method of establishing them and whatever their legal status) should be put in place;
- requests for mutual assistance based on offences which may be categorised as tax offences give rise to problems; it is desirable to remedy this for the future;

[20] It is interesting to note that such visits, intended to facilitate the execution of requests are not always welcome. US authorities formally queried whether visits to the US by UK officers seeking to further their investigations were really necessary, feeling that US agencies could execute many requests without a UK officer being present (UKCA 2001:1).

- conventions sometimes take longer to ratify than is justified on purely technical grounds; speedier ratification is indispensable;
- double criminality remains a potential ground for rejecting requests when the measure requested is coercive; the European Union should continue to discuss this matter;
- the exercise of rights of appeal should not be able to be used for delaying purposes;
- use of good practice should be implemented carefully in the Member States and should be monitored by the European Judicial Network;
- statutes of limitations under the law of the requested State should no longer be an obstacle to the execution of requests;
- and finally, as a general lesson to be drawn, the high concentration of mutual assistance within the European Union itself should encourage further use of a specific approach to mutual assistance between the Member States in the area of freedom, security and justice, in particular as it is likely that this aspect might become of growing importance with the enlargement of the European Union." (*Final Report*: 3-4)

The latter proposition is of particular interest given that it coincides with the concept of mutual recognition that renders many aspects of mutual legal assistance, as currently structured, redundant (*Programme of measures to implement mutual recognition OJ* 2001/C 12/02). The European Arrest Warrant [EAW] is an example of mutual recognition being implemented (EU 2001b). The bulk and proportion of mutual legal assistance traffic between EU Member States clearly supports arguments in favour of an EU-specific approach but this is not without significant consequences. Mutual legal assistance relationships between EU Member States and Third Parties may be complicated by the establishment of an EU-specific regime. Third Parties have been successfully incorporated into EU arrangements as the accession of Iceland and Norway to the *Schengen Convention* demonstrates but such accommodation will not always be possible, or even desirable.

During foreign research conducted as a Fulbright Fellow in 2001, the present author interviewed a number of US law enforcement and government officials in Washington DC who demonstrated a frustrated ambivalence towards Europe. On the one hand US authorities bemoaned regional consensus and EU common positions that interfered with the US strong preference to establish a framework of bilateral MLATs with European States (which, depending on relative political and economic relationships, can be individually-tailored to US

advantage). On the other hand, the same authorities were equally keen to be admitted to the privileged and stream-lined arrangements proposed within the EU, such as the EAW, at least as far as securing suspects wanted for trial in the US was concerned.[21]

Talks regarding mutual legal assistance between the EU and the US were being conducted secretly prior to the terrorist attacks against the mainland USA, 11 September 2001. Since then the fact that such negotiations have been taking place is more widely known although the details remain, at US insistence, largely undisclosed (Statewatch 12(2), *EU-US secret agreement in the making,* March-April, 2002:1-2.). In addition to these talks, US authorities and Europol have signed an agreement to work more closely together operationally, which in effect means more sharing of information since Europol strictly-speaking undertakes no operational function (Europol press release 13/02, 20 December 2002). Discussion in depth about these issues is beyond the scope of the present paper, suffice it to make two points: whatever enhanced mutual legal assistance arrangements are arrived at within the EU, there will remain a need to conduct mutual legal assistance with Third Parties and so new improved mechanisms within the EU may have to co-exist alongside traditional mutual legal assistance mechanisms (thus creating, *de facto*, a two-tier mutual legal assistance environment). And secondly, post 11 September 2001, there has been an added impetus to addressing the issues raised by the EU internal evaluation process, although as Dubois has noted (2002), fundamental differences between European jurisdictions and the US regime in philosophy and approach mean that meaningful and significant co-operation and co-ordination remains elusive (see also Harfield 2003).

Added impetus has, nevertheless, been manifest in the UK reaction to its own assessment. The report on the UK runs to eighty-six pages (EU 2001c, [hereafter the *UK Report*]). The UK was the final Member State to be evaluated. The evaluation team met with thirty-seven UK experts including civil servants, politicians, customs and SFO officials, departmental lawyers and solicitors in private practice and four police officers: two representing the Interpol and Europol bureaux at NCIS, one from the mutual legal assistance section of the Metropolitan Police Service Fraud Department and his opposite number from the City of London Police Fraud Department (*UK Report*:61-62). The UK expertise made available to the EU evaluation team was primarily administrative and legal in character. The relative lack and limited scope of investigative expertise meant that key users of mutual legal assistance did not participate in the evaluation. The decision about which practitioners met the

[21] In a touching display of confidence that perhaps over-estimated the status and influence of his interviewer, one lawyer from the Office of International Affairs, Dept of Justice, Washington DC, requested the present author to intercede with the British Prime Minister on behalf of the US authorities on this matter.

evaluation team was a matter for the Member States, not the EC (interview, Yolanda Galigo-Casilda, 14 May 2003, EC, Brussels).

The evaluation team made eleven UK-specific recommendations, three of which had twenty-one sub-clauses between them (*UK Report*:58-60). Arising from the UK review, the evaluation team also made five recommendations of EU-wide relevance.

In summary, *inter alia*, the UK was invited to implement fully all its treaty obligations in relation to mutual legal assistance; to make various legislative changes to overcome existing obstacles to full co-operation; to consider direct transmission of evidence between judicial authorities; enhance the role of the UKCA as co-ordinator of all aspects of the mutual legal assistance process (seven separate recommendations); to provide increased resources to the UKCA and all agencies in order to facilitate the execution of requests; to make better use of the European Judicial Network; and to standardise approaches to the interpretation of urgent requests, application of the *CJ(IC) Act* 1990 on this issue having been found to be inconsistent across England and Wales (*ibid.*:40 and 60; the recommendations are listed in Appendix B).

The publication of the UK report in March 2001, together with the UK application to accede to parts of the *Schengen Convention*, the signing of the *EUCMA* 2000, and the *Second Additional Protocol* to the *ECMA* 1959, prompted two internal consultation exercises seeking expert and practitioner views on UK mutual legal assistance legislation and the role of the UKCA in August 2001. The results of these consultations have been circulated privately by the UKCA.[22] On the basis of replies quoted, consultation with the police service appears to have been confined to the Metropolitan Police Service, the City of London Police and the NCIS in relation to mutual legal assistance legislation (possibly the same representatives that met with the evaluation team), and extended to include Kent County Constabulary for the consultation in relation to the UKCA. There is no indication that ACPO had been consulted. HMCE had, in a number of instances, provided confidential replies for UKCA eyes only; the only responding agency to insist on this (which begs questions that cannot be answered here about the motivation for such a stipulation).

There were clearly differences of opinion within this UK mutual legal assistance community. HMCE, for instance, voiced strong reservations about the implementation of Joint Investigation Teams, arguing that primary legislation would be required to allow foreign

[22] I am grateful to the UKCA for supplying me with copies of the two questionnaires upon which the consultations were based and the tabulated responses.

investigators to participate in investigations within the UK.[23] It is difficult not to conclude that agency political agenda informed some of the responses; a fact that makes the unrepresentative nature of the police service consultation all the more concerning. At the six-monthly mutual legal assistance forum hosted by the UKCA, only the afore-mentioned police agencies and the National Hi-Tech Crime Unit are represented, not ACPO. Communication between the UKCA and police forces outside London is via the International Liaison Officer [ILO] for each force, a role usually found in the Force Intelligence Bureau (or equivalent) that provides a contact point to which the UKCA can forward incoming requests. At least one Detective Inspector in one force has been undertaking the functions without realising that he was fulfilling a specific and designated role, and was theoretically part of a nationwide network of ILOs (pers. comm., September 2002, Detective Superintendent from a Midlands force). The Interpol NCB at NCIS holds an annual training conference for ILOs but this is not a network through which the UKCA has sought to consult the wider police service on the operation of mutual legal assistance.

A month after the Home Office consultation exercise commenced, the terrorist attacks against the US took place. Consequently extra impetus was injected into the mutual legal assistance debate within the UK, which had already been galvanised by the evaluation programme. The impetus however, was not sustained. Section 111 of the *Anti-Terrorism, Crime & Security Act* 2001 made provision for an authorised Minister by regulation (therefore secondary rather than primary legislation) to implement certain JHA instruments including the *EUCMA*. This, in the context of UK legislation, revolutionary statutory device was constrained by a dead-line of July 2002 which was not met. The provision lapsed and UK commitments under *EUCMA* will once again have to be given domestic effect through primary legislation. There is little opportunity for this given the current government's legislative ambitions. Because the EU was committed to having the *EUCMA* fully in force by December 2002, time was made in the Parliamentary Session commencing November 2002 for the *Crime (International Co-operation) Bill* to be tabled (19 November 2002, House of Lords). Even so, this Bill did not become law before the EU deadline. Furthermore, pressure on Parliamentary time means that this Bill will implement only UK obligations regarding the *EUCMA* and will not overhaul other issues raised during the evaluation exercise and subsequent consultation. The domestic review of the UK mutual legal assistance infrastructure, which commenced with the two questionnaires circulated in response to the evaluation report, ironically, was suspended in order for the UKCA staff to focus on legislative preparation and support Ministers during the Parliamentary passage of the Bill

[23] Although this was perceived as a problem by HMCE, it was not so perceived by the Home Office. Just such a measure was enacted in the *Police Reform Act* 2002 (§103) a year in advance of other *EUCMA* provisions that were enacted in the *C(IC) Act* 2003.

(UKCA, Mutual Legal Assistance Forum 3 July 2002, and 6 December 2002, record of meeting). The review re-commenced in January 2004.

The EU mutual legal assistance evaluation programme has high-lighted a number of issues, particularly within the UK. It partially addresses Chatterton's concern discussed above that institutions and mechanisms are created without their effectiveness ever being assessed. Clearly the EU is taking steps to ensure that mutual legal assistance mechanisms in place are fit for their purpose. But in focusing on the government administrators, rather than the investigators who seek and provide the actual mutual legal assistance, the EU programme still does not address the outcome of mutual legal assistance: do current mechanisms deliver evidence, prosecutions and convictions? The evaluation of the UK structures and the responses to the evaluation, have also shown that the Home Office is content to rely on very specialist views from the police service when seeking a practitioner perspective from investigators. The Interpol and Europol bureaux at NCIS do not carry out investigative casework leading to prosecution, being rather conduits through which mutual legal assistance may be facilitated.[24] And neither the Metropolitan Police Service, 27,000 officers serving a resident population of seven million, nor the City of London Police, just under 800 officers serving a resident population of 3,000, can be considered typical of UK policing. Both have specialist fraud investigative functions consequent upon serving the business communities in London, which no other force replicates. Indeed, fraud investigation is not currently a policing priority set for other forces by the Home Secretary. The mutual legal assistance experience in the London-based fraud squads is extensive, but very specialised. Neither can be regarded as legitimately representative of policing in England and Wales however informed their responses to Home Office consultation might be.

There thus is value to be gained in researching the experiences of other police forces in relation to mutual legal assistance in order to respond completely to the challenge set by Chatterton. Herein there is considerable scope for original research: this area has hitherto attracted very little research interest. That work which has been undertaken has been limited in ambition and is now due for review and comparative study.

[24] Police staff at the Interpol NCB, NCIS, can carry out some basic enquiries on behalf of foreign authorities (such as interrogation of the Police National Computer or the checking of commercial organisation against the Companies House register for instance) but nothing that requires coercive powers or the taking of a witness statement (per. comm., Interpol NCB, NCIS, 26 July 2002).

Chapter 5

Understanding police perspectives on the effectiveness of mutual legal assistance

Introduction

The experiences of police forces having been identified as a fruitful area of research into mutual legal assistance, this chapter outlines such limited work as has been completed in this arena and identifies how the present research complements and supplements previous work. It also outlines how the present research has been undertaken.

Previous UK evaluation of mutual legal assistance processes

In 1996 Nicholson and Harrison, then serving officers with the Devon and Cornwall Constabulary, undertook a study of international evidence gathering by British police forces. The study was sponsored by the Police Research Award Scheme and published by the Home Office (Nicholson & Harrison, 1996). Interestingly, the UKCA "felt unable to participate in this research" (*ibid.*:46), which fact undoubtedly informed the critical stance taken by the authors on the work and value of the UKCA.

The principal findings of the 1996 study were as follows:

- Advanced fee fraud, at the time, was the most common type of offence category requiring collection of evidence from abroad;
- Experienced investigators obtained evidence from abroad more quickly than those unfamiliar with the process;
- From 1990 to 1996, US authorities provided the quickest average response to UK requests, Spain the slowest;
- Only one defendant had been acquitted as a result of time delays associated with obtaining evidence from abroad; however, sixty-nine investigations or prosecutions had been abandoned as a result of such problems;

- Obtaining original documentation for use at trial (in accordance with the 'best evidence rule'[1]) was the most problematic aspect of securing evidence from abroad;
- 50% respondents felt Interpol needed to improve both its performance and its image;
- There were a number of minor abuses to the formal system reported but none of these was commented on or tested in the courts;
- Between 1990 and 1996 the requirement for UK officers to travel abroad had increased by 700%;
- The vast majority of respondents involved in gathering evidence from abroad found it both bureaucratic and time-consuming;
- Few forces had guidelines or instructions on international evidence gathering;
- Few forces consider alternative means or consider the effects of international evidence gathering in their case acceptance criteria;
- There was a universal desire for a centralised database of information about mutual legal assistance procedures and contacts.

(*ibid.*:Executive Summary)

The authors identified sixteen key points and made two multi-element recommendations (listed in Appendix C). Amongst their conclusions they promote the concept of a one-stop shop for mutual legal assistance. On the basis of their discussion supporting this idea, they appear to have laboured under a fundamental misunderstanding of the differences in constitutional role and functions between the UKCA and the Interpol NCB which they found to be largely duplicitous (*ibid.*:37). It may well be that the UKCA, in not participating in the research, contributed to this misunderstanding. It is, nevertheless, worth noting that on the basis of different logic, the EU evaluation exercise has drawn similar conclusions about the need better to co-ordinate mutual legal assistance effort within Member States. This is reflected in the Council's general suggestions that the role of the central authorities within each Member State be reviewed and that domestic bureaucracy be pruned wherever feasible. In promoting the EJN, the EU is focusing efforts on a Union-wide co-ordination and facilitation body, a tier in the infrastructure that Nicholson and Harrison had little reason to envisage when writing their own report.

[1] "A party must produce the best evidence that the nature of the case would allow." Hardwicke LC, Omychund v Barker [1745] 1 Atk 21, 49 (26 ER 15).

A practitioner's review rather than a formal academic research project, the methodology adopted by Nicholson and Harrison nevertheless was guided by academic advice (1996:9) and employed a two-part, self-completion questionnaire. The first element was directed at police managers with responsibility for managing staff who gathered evidence from abroad; the second element was directed at those staff. The survey was piloted through a telephone study of intended respondents that identified two areas of concern for potential respondents. Firstly, the large size of the questionnaire and the time it would take to complete was considered problematic. Secondly, there was concern that the questionnaire was seeking management information for the years 1990-1995 in relation to gathering evidence abroad, and many pilot respondents thought that such information would not be available.

The concerns were noted by the researchers but after due consideration, they proceeded as planned trusting upon the good will of police colleagues to complete the questionnaires, and accepting that an absence of management information about this particular form of investigative activity would, of itself, highlight issues in the management of mutual legal assistance (*ibid.*:10).

The 1996 study was targeted primarily at Fraud Squads, ILOs and the [then] Regional Crime Squads and sent to "fifty-six police forces in Great Britain and the Channel Islands" (*ibid.*). These were not identified in the study and it is therefore difficult to be certain exactly which forces participated. For at least some of the data sets accumulated as part of the 1996 research, the Metropolitan Police Service and the West Midlands Police were deliberately excluded because it was felt the likely large responses from these forces would skew the sample (*ibid.*:12). It is not apparent from the report of the study whether these two forces were in fact excluded altogether. There are forty-three forces in England and Wales,[2] eight in Scotland (thus fifty-one in Great Britain), one in Northern Ireland (thus fifty-two in the United Kingdom of Great Britain and Northern Ireland), two in the Channel Islands and one on the Isle of Man, all of which total fifty-five. There were initially nine Regional Crime Squads reducing in number during the period of the study to six. The arithmetic does not equate and so it is not clear exactly how the research population was constituted. The authors assert that "three United Kingdom forces chose not to respond" (*ibid.*:11)[3] but that the 169 responses received comprised an overall response rate of 95%.

[2] The forty-three are the 'Home Office' forces delivering local policing, maintained under §1,2 & Schedule 1 *Police Act* 1996. Private police forces with limited jurisdiction (e.g. British Transport Police, MoD Police, British Atomic Energy Authority Police) are excluded.
[3] The terms Great Britain and United Kingdom appear to have been used synonymously in the 1996 study.

In general terms the authors were highly critical of the UKCA and saw an enhanced role for both the CPS and Interpol in mutual legal assistance. They also envisaged an exponential rise in the need to acquire evidence from abroad.

It is worth rehearsing what, of significance, has changed since 1996 in this arena. Nicholson and Harrison appear to have encountered reluctance bordering upon obstruction from the UKCA. For the purposes of both LLM research (concluded in 1999) and this present research, this author has enjoyed nothing less than full co-operation from various members of staff at the UKCA who have given freely of their time and facilitated the acquisition of documents that might otherwise have proved elusive, notwithstanding their status as being publicly accessible. In 1996 the UKCA protested that there was no simple way of answering the management information questions posed by Nicholson and Harrison. Since that time a new computer database has been established at UKCA and staff there were confident that any specific research queries presented by this author would be amenable to scrutiny, subject to the search parameters of the software. Secondly, the Interpol NCB is no longer located within New Scotland Yard, but forms part of the International Division within NCIS, which was created as a stand-alone institution in 1998. NCIS has published a guide on obtaining evidence from abroad. Thirdly, transnational crime now enjoys a higher political profile than it did in 1996. All current EU JHA initiatives can effectively be traced back to the meeting of a EU High Level Group of experts on transnational organised crime held at Dublin in 1996 that gave rise to the EU 1997 *Action Plan to Combat Organised Crime* (*OJ* 97/C 251/01 15 August 1997). Consequently there is more political support for efforts to combat such criminality. Pursuant to this higher political profile is the fourth significant difference since the 1996 study: the *corpus* of international law on mutual legal assistance has increased significantly. More legislative tools are being made available to investigators. The *EUCMA* and *Second Additional Protocol to the ECMA* are examples of this, as are the mutual legal assistance provisions in the Council of Europe *Cyber Crime Convention* 2001and the *UNTOC* 2000. Within the EU, there is a growing tendency to establish co-operative mechanisms through the implementation of Framework Decisions which, for all intents and purposes, are binding on Member States.

Peer evaluation is another significant development since Nicholson and Harrison undertook their own study. Their study, although focusing on a different perspective in the mutual legal assistance panorama, can in some respects be considered to have anticipated the overall aim of the EU three-year programme: a desire to ensure that mutual legal assistance is as effective as possible. EU efforts continue. At the 2385th Council Meeting on 16 November 2001 discussing Justice Home Affairs and Civil Protection, following on from both the completion of the evaluation programme and the events of 9-11, the effectiveness of mutual

legal assistance instruments and institutions was recognised as a prevailing key issue for the EU (13758/01 Presse 409). Planning for future initiative now includes provision for evaluating implementation (minutes of the MDG meeting held 9-10 January 2002, item concerning implementation of the EAW: held on file with the author). The commitment to evaluation within the EU has been established.

Indeed the enthusiasm for evaluation and review is evident elsewhere within Third Pillar programmes. Alongside the three-year mutual legal assistance evaluation programme at the administrative level, at the strategic level the EU has evaluated progress in implementing its 1997 Action Plan on Organised Crime concluding that the setting of priorities and timescales under the Action Plan had proved "extremely positive and successful" (EU 1999b:10; the 1997 Action Plan is published at *OJ* 97/C 251/01, 15 August 1997). At the Laeken European Council, 14-15 December 2001, the European Council reaffirmed its commitment to the JHA policy guidelines and objectives defined at the Tampere European Council, 15-16 October 1999, noting that whilst some progress had been made much remained to be done to implement all the Tampere aspirations. The need for a renewed - and sustained - impetus was noted (*Presidency Conclusions on Justice and Home Affairs*, Laeken European Council, paragraph 37). Progress at the strategic level really can only be measured in terms of setting up new institutions and drafting new instruments; the establishment of Eurojust is a case in point (*ibid.*: paragraphs 43 & 45). It is at the level of operational implementation and utilisation of the instruments and mechanisms that the initiatives can best be judged, hence evaluation of strategic level programmes will be mentioned only in passing during the course of this research. It will not form a major element of the original work here proposed.

Other aspects of the mutual legal assistance arena have demonstrated a notable consistency since 1996: Nicholson and Harrison remark upon the lack of academic comment about mutual legal assistance (*ibid.*:6). Their observation was corroborated by Chatterton (2001:343) and as recently as March 2004 the Home Office called for information about barriers and inhibitors experienced by practitioners in seeking and executing mutual legal assistance (Home Office 2004b: 20 but see also 16-19). This lacuna prevails.

Scope and methodology for further research

This lacuna, by any other definition, is a research opportunity. Notwithstanding the difficulties that would be experienced in trying to mirror Nicholson and Harrison's study exactly, it is worthwhile revisiting some of their research questions in a structured study to

identify comparative trends. To this end, permission was obtained from the Home Office Policing and Reducing Crime Unit (successors to the Police Research Group that sponsored the 1996 study) to re-use some of the questions from the 1996 questionnaires.

This present research has two main objectives. Firstly there was a desire to make such comparisons as were feasible with the general awareness research published in 1996. Assessing the level of general awareness within police forces about mutual legal assistance and international law enforcement co-operation mechanisms and procedures is a valid means of evaluating how well such mechanisms are understood. It is reasonable to hypothesise that if Nicholson and Harrison's predictions about increased frequency of evidence-gathering abroad are correct, then (through experiential learning if no other mechanism) such increased frequency should have led to increased familiarity with and awareness of procedures. The better and more widely understood they are, the more effective such measures are likely to be.

The second objective was to examine individual case studies, with a view to understanding mutual legal assistance and international law enforcement co-operation issues as experienced by investigators. Increasingly, in combating transnational organised crime, investigators are adopting proactive strategies and tactics. Investigating continuous, inchoate transnational organised criminality up to the point when appropriate charges can be laid is rather different in character from investigating a single, historic and discrete crime, evidence of which just happens to be located in a foreign jurisdiction. The *ECMA* 1959 was geared to providing assistance for the latter circumstance. At the outset of the twenty-first century, what is needed are mechanisms that facilitate the former type of policing since it is now on-going transnational organised crime that is of so much political, social and economic concern. SIO interviews should demonstrate this, and therefore the inadequacies of the *ECMA* in the modern era, as well as enabling some advanced assessments to be made about how successful new measures introduced in the *EUCMA* and the *Second Protocol* to the *ECMA* are likely to be. Such case-study interviews with SIOs do not appear to have been undertaken before and this therefore represents a new source of data to be explored.

The research methodology chosen was informed by these two principal objectives.

A third, subsidiary, objective was to identify issues of concern to a variety of practitioners engaged in different aspects of mutual legal assistance and international law enforcement co-operation, in order to provide an up-to-date context in which to consider the findings from the first two objectives. Personal interviews were considered to be the most appropriate means of obtaining this contextual opinion and data.

Accordingly, a self-completion questionnaire was chosen for measuring awareness at force level of mutual legal assistance issues pursuant to the first objective. The utility of such

an approach and guidance for its successful undertaking are well-documented (Hibbard & Bennett, 1990; Blaxter *et al.*, 1996). A questionnaire, taking into account the lessons learnt by Nicholson and Harrison was drafted and piloted (for ease of comprehension) by means of review by independent observers who would play no part in the actual survey. Once refined, the final version was deployed with the support of ACPO (which is gratefully acknowledged), directly to chief officers electronically via the private ACPO extranet. It was suggested in the accompanying correspondence that force ILOs might be best placed to respond on behalf of the chief officer but identifying individual force respondents was left to the discretion of chief officers. Respondents were invited to reply either electronically or in hard copy. This method was chosen because it represented the most cost-effective and time-efficient means by which a single part-time researcher, researching alone whilst in full-time employment, could reach the target audience. Personal interviews conducted in 43 police forces across England and Wales were considered not to be feasible simply for assessing awareness. It was recognised that self-completion questionnaires do not always enjoy a significant response rate and that such responses as are received can be difficult to interpret (Blaxter *et al.*, 1996:160) but for the purposes of measuring how general awareness at force level had progressed, if at all, since 1996, the advantages in contacting a wider audience through such an approach were considered to outweigh the inherent data disadvantages.

The chief advantage that personal interviews have over self-completion questionnaires is that the interviewer has the opportunity to explore responses in greater depth, thus producing qualitative data that can be set alongside the largely quantitative data secured through self-completion questionnaires and through statistics supplied by the UKCA. The relative disadvantage of interviews, given the circumstances of the researcher in this study, lies in the fact that far fewer interviews can be conducted than self-completion questionnaires distributed. Interviews were considered more appropriate in achieving the second general research objective; detailed case studies of how mutual legal assistance and international law enforcement co-operation work in practice from the perspective of individual investigations. For this research, semi-structured interviews were conducted with Senior Investigating Officers [SIO] from a variety of police agencies on a case-study basis to identify particular issues concerning international law enforcement co-operation and mutual legal assistance that arose in specific investigations.

Six case-study interviews were conducted and tape-recorded, each typically taking two hours to complete. Anonymity and confidentiality were requested in some cases and for the sake of consistency this regime has been applied to all. This arrangement was negotiated in advance with university authorities and a sanitised interview log has been produced, available on request to the examiners only, in order to protect issues of operational sensitivity.

Summarised discussions of the issues raised will be presented here, together with one published case study so as to make available comparative material that is in the public domain.

Semi-structured interviews were also employed when conducting the strategic and policy interviews with policy-makers and ACPO officers.

All interviewees were offered the opportunity to review the sanitised interview logs although only three availed themselves of this opportunity, none making amendments to the log as drafted. It is acknowledged that the researcher's status as a Detective Inspector then serving in the National Crime Squad (and security-vetted to DV level) positively influenced some interviewees in their decision to participate in the research. A researcher with a non-police background may not have been afforded the level of access enjoyed by this researcher and it is certain that a number of issues discussed as contextual background would not have been mentioned to other researchers. None of the sensitive material provided by way of context is discussed below but the data that is discussed is presented from a position of informed authority that might not otherwise have been the case. For this privileged access, the author is grateful.

It was anticipated that these data would allow an evaluation of the effectiveness of mutual legal assistance mechanisms from the perspective of the investigator whose tools they are. Such research supplements the findings at inter-governmental and administrative levels derived from the EU evaluation programme. It will enable some initial conclusions to be drawn about the outcome of mutual legal assistance, rather than just the outputs. It will contribute towards filling the knowledge gap identified by Chatterton (2001).

Conclusion

Methodology has been determined by the two principal research objectives: measuring current awareness at force level of mutual legal assistance and international law enforcement co-operation structures, and identifying specific issues that have confronted senior investigators. In addition, contextual interviews have been conducted with key practitioners as a means of supplementing the literature review in an area of study that hitherto has not enjoyed extensive academic scrutiny.

The findings of the questionnaire research and the case-study interviews are presented in the following chapters.

Chapter 6

Mutual legal assistance in practice: current force perspectives

The original research data presented in this thesis fall into three categories: questionnaire responses from officers in local police forces in England and Wales that have undertaken routine enquiries conducted overseas; interview-based case study material from senior investigating officers [SIOs] and prosecutors who have worked on major criminal investigations of a transnational nature; and interview material from policy-makers such as European Commission officials and ACPO officers who participate in international strategic and policy *fora* in relation to international law enforcement co-operation within the EU. In this chapter, the results of the self-completion questionnaire are discussed following a general discussion of the survey methodologies adopted.

The questionnaire study: dissemination and response

In the autumn of 2002, a self-completion questionnaire was circulated to the forty-three local police forces in England and Wales (as defined in §1 and Schedule 1 *Police Act 1996*: the questionnaire is reproduced in Appendix D). As has been noted above (Chapter 5), this drew upon a previous study for some of its elements whilst at the same time introduced new questions relevant to the prevailing circumstances. The present questionnaire was piloted with UK police officers, non-police law enforcement professionals also engaged in transnational investigations, and with academics. As a result of this pilot, minor revisions to phrasing to ensure clarity were made prior to the formal circulation.

The survey not only had the permission of the Home Office to re-use questions and ideas from the 1996 study, but also had the support of ACPO and with the authority of Chief Constable Paul Kernaghan (Chair, ACPO International Affairs), together with an accompanying letter of support from Kernaghan and a letter of explanation from the present author, was circulated electronically via the secure ACPO extranet. As a matter of protocol the questionnaire was addressed to Chief Constables with the request that the matter be referred to an appropriate staff member for completion. At this stage of the research it was not known whether or not there would be a dedicated role within each force from which the information sought could be easily obtained.

Respondents were invited to respond either electronically or in hard copy. The method of dissemination determined that it was not possible to send stamped/addressed

envelopes with the questionnaires for respondents to use when replying, as would normally be expected with a self-completion questionnaire (Hagan 1993:128-54; Hibberd & Bennett 1990). It was anticipated that respondents would prefer to respond electronically. In the event, only a third of the initial respondents chose to do so, the remainder responding in hard copy. Of the forty-three English and Welsh forces to which the questionnaire was circulated, responses were received from twenty-three, a response rate of 53%.

Whilst these initial responses were being returned the author, through a combination of on-going research and professional contacts, became aware of the network of UK police force international liaison officers [ILO] established in conjunction with Interpol NCB in London. This is a network of single points of contact for correspondence between Interpol NCB in London and UK local forces. The ILOs are also the formal recipients for correspondence from the UKCA. The present author was a guest presenter at a closed training session for UK ILOs held by NCIS/Interpol, November 2002. As a result of this contact, the author was able to identify named contact points (the ILOs) within each of the twenty-one non-respondent forces. At the conference a show of hands revealed that eight ILOs had received the initial transmission of the survey.

It was determined using this information, that a targeted follow-up strategy would be effected to encourage participation from the non-respondent forces and so enhance the data sample. This was considered appropriate as the composition and characteristics of the respondent sample and the response rate were not in and of themselves significant variables within the context of the survey. Any additional responses achieved through this follow-up strategy would increase the overall data sample without compromising its integrity. This was not a survey in which the response rate itself was a variable under study. Accordingly, the SCQ was mailed in hard copy to each ILO from a non-respondent force, together with a stamped addressed envelope. This method of transmission was adopted because not all ILOs had recorded an email address within their contact particulars.

As a result of this follow-up strategy a further nine completed questionnaires were received. Thus the total respondent sample represents thirty-two forces from the forty-three serving England and Wales, a response rate of 74%. [1]

Nicholson and Harrison reported a response rate of 95% for all UK forces with only three forces choosing not to respond (1996:11). Inconsistencies with their data sample have already been highlighted (see above, Chapter 5).

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[1] Although respondents were asked to identify themselves, one force from the follow-up group returned an anonymous response. There was a tenth respondent, the Metropolitan Police Service, bringing the response rate to 76%, but for reasons discussed below, no questionnaire was completed by this force.

The forces that responded to the present survey are listed in Appendix E. The sample is considered sufficient in size within the context of the total survey population to be indicative of trends and general understanding about mutual legal assistance within local police forces. The geographical spread of responding forces ranged across England and Wales from north to south, and from east to west encompassing both urban and rural forces and both large and small forces. This reinforces the representative nature of the sample.

The issue that particularly concerned Nicholson and Harrison, that inclusion of the two largest forces, the Metropolitan Police Service [MPS] and the West Midlands Police, would skew the sample, did not arise in this survey. The West Midlands Police did not respond, and the MPS, although a response was received, did not participate.

In the latter instance, there are numerous specialist units and departments which work with a level of autonomy neither feasible nor necessary in small- to medium-sized forces. Consequently, there are a number of different units within the force that might have responded in the absence of a single point through which to channel all incoming and outgoing enquires. Although the MPS has a unit assigned solely to extradition and mutual legal assistance enquiries, it handles incoming requests only. The various specialist units within the MPS, such as the fraud squad, or murder teams, or the child protection teams, that would be likely to initiate out-going requests as a result of the nature of their work, make such requests of their own volition and by their own arrangements. In the absence of any centrally collected management data in respect of mutual legal assistance requests, it would be very difficult to obtain any coherent response and any response based on the work of just one unit or department would be unrepresentative of that organisation.

In one instance it is clear that a single specialist unit has responded in lieu of a force response. The respondent for the City of London Police,[2] the Detective Superintendent in charge of the fraud squad, made the point that he was responding because his department dealt with the vast majority of the force's out-going and in-coming requests for mutual legal assistance. The minimal number of requests involving other investigating units within the City of London Police was considered to be statistically insignificant for the purposes of this trend analysis.

[2] With an establishment numbering only 777 (*HC Hansard*, 31 March 2003, col. 581W; 0.6% of the total local force establishment in England & Wales) and a police area of approximately a square mile, in September 2002 the City of London Police was the smallest of the Home Office forces, but one with a unique victim/offending profile given the nature of the community it serves: relatively few domestic residents and a very high proportion of commercial – mainly international financial sector – organisations based within its force area. Its fraud squad deals with a disproportionately high number of cases involving mutual legal assistance.

As described in the previous chapter, the 1996 survey contacted more than one respondent per force. Such a strategy was not adopted for this study because part of its purpose was to explore where such a request for research data would be delegated within a force rather than target specific individuals or departments as the 1996 survey had done. Thus only one response per force was expected.

The hypothesis being tested in this instance was that a research request for mutual legal assistance data would follow the same internal contact paths initially as a formal request for mutual legal assistance itself. The purpose of this was to discover to which role would be delegated responding on behalf of the force.

Respondents were asked to identify themselves and provide contact details in the event that any follow up clarification was necessary. This data identified that sixteen respondents (50% of respondents) worked in their force intelligence bureau, two in a fraud squad, one in a crime operations unit and one in a crime support unit (these latter two labels may well be local terminology that in fact incorporates the functionality of what elsewhere is termed a force intelligence bureau). One was located in the force's European Liaison Unit. It was not apparent where the remaining respondents were located within their respective organisations. Three respondents cited no designation. The remainder were all police officers (three Detective Constables, eight Detective Sergeants, nine Detective Inspectors, four Detective Chief Inspectors and one Detective Superintendent). *Question 3* of the survey sought to identify if there was a designated single point of contact within the force for incoming mutual legal assistance requests. Of the thirty-one positive responses to this question, twenty-three were located in the force intelligence bureau, four were specifically described as the ILO, additionally one respondent identified the single point as the ILO in the force intelligence bureau, and one respondent identified the force single point of contact for incoming mutual legal assistance requests as being the fraud squad.

Thus there is a general consistency of approach adopted by most forces in the organisational positioning of the staff responsible for handling or managing mutual legal assistance requests channelled to or from the force. Twenty-three of the responding forces stated they had no dedicated unit either for obtaining evidence from abroad or for obtaining evidence locally in response to an in-coming request. Eight had assigned the function of obtaining foreign evidence to designated roles but only two had similar arrangements for the handling of incoming requests.[3] Thames Valley Police reported that both these roles were undertaken within the force intelligence bureau whilst West Mercia reported that obtaining foreign evidence was the preserve of the force intelligence bureau and the economic crimes

[3] In addition to these, there is the Extradition and Mutual Legal Assistance unit of the MPS

unit but that there was no specialist unit for executing requests received from foreign agencies. The large majority of forces in England and Wales, no doubt with a view to managing heavy demands upon scarce resources, prefer to manage process requests and assign evidential tasks individually as required rather than maintain a specialist unit for such purposes. One chief constable with personal knowledge of a dedicated international enquiry team maintained by a Home Office force, stated that such were the demands for staff to deliver local policing objectives, the future of the international enquiry team was effectively under review and its disbandment a real possibility (ACPO (IA) interview 23 July 2002).

The questionnaires do appear to have been delegated for completion by staff who would also facilitate mutual legal assistance requests. This affords some confidence in the authority of the data supplied as a result of the self-completion questionnaire.

Data available within forces regarding mutual legal assistance requests

Twenty-four respondents reported that the force recorded out-going requests (75% of respondents). Twenty-eight reported that the force recorded incoming requests (87% of respondents) (*Questions 1 & 2*). But a number of respondents contacted the researcher in connection with these questions to explain that their records were effectively correspondence registers; a means of monitoring processes rather than collating management data. Nevertheless, all thirty-two respondents responded to *Questions 9* and *10* which sought to measure frequency trends over time and some of the respondents were able to provide detailed statistics in response to these questions (see below Tables 3 & 4). It is apparent, though, that there is little in the way of comprehensive management data held within forces about the resource implications of mutual legal assistance requests, both incoming and outgoing. Complementary data from interviews also highlights a variable not immediately apparent from raw statistics but significant nonetheless. Sometimes an ILOR is issued for each individual item of evidence sought, and sometimes any given ILOR will incorporate any number of different individual requests. Which course of action is preferred depends often on the personal preference of the SIO concerned, but is also heavily influenced by the working relationships established with the requested authorities. Thus a simple record of the fact that a letter of request was received or issued does not of itself necessarily indicate how many requests were made or received or what the resource implications were, although it will provide at least a minimum indication of the number of requests made. [4]

[4] The number of requests does not necessarily correlate with the number of cases in which mutual legal assistance was requested because any given investigation may generate more than one ILOR.

Information available to investigators needing to make a mutual legal assistance request

Out of the 1996 survey arose recommendations that there should be a one-stop shop approach to mutual legal assistance, that there should be a central database of information, contacts, laws and relevant working practices available to investigators seeking to make a mutual legal assistance request, and that the Interpol manual on obtaining evidence from abroad should be incorporated within force procedures (Nicholson & Harrison, 1996:41-43). It was discovered that "to the vast majority of police officers the prospect of obtaining evidence from abroad is a daunting one and whilst each force has its own Interpol Liaison Officer and can call upon the expertise of specialist personnel very few forces have laid down procedures or guidelines" (*ibid*. 4).

In terms of guidelines and procedures the situation seems a little improved in 2002 (*Questions 6 & 7*). Of the thirty-two responding forces fourteen had documented guidelines for making a request (43%), and of these, eleven also had similar guidelines for handling incoming requests (34%). So whilst the majority of officers appear to have no force guidance to assist them, that majority can no longer be described as vast. Where else do investigators go to seek assistance in this matter? (*Question 8; Table 2*. All respondents answered this question).

Table 2: Sources of advice accessed by responding forces

Source of advice	Interpol NCB (located at NCIS)	Other NCIS department	Crown Prosecution Service [CPS]	UKCA	Other
Number of respondents using each source	**29**	**10**	**26**	**15**	**8**

The principal sources for advice are reported to be the Interpol NCB located at NCIS and the Crown Prosecution Service [CPS]. In twenty-five instances the respondent cited both, and in nine cases the respondent included other NCIS departments as possible sources of information together with the NCB and the CPS. All those who cited the UKCA as a source of guidance also cited Interpol NCB. Given that evidential requests must be transmitted via the UKCA, it might seem surprising that more respondents did not identify the Central Authority in this category. But its relative standing is consistent with both its position within the overall process-chain and its primary function. By the time a request is ready to be transmitted, the investigation will have identified that evidence exists, in which activity Interpol can play a useful facilitation role, and the ILOR will have been drafted to request production of the identified evidence, in which activity the CPS might well offer advice before formally presenting the ILOR as a designated judicial authority competent to issue

such requests. Investigators will therefore be far more likely to engage with the Interpol NCB and their local CPS offices than with the UKCA.

Three of the respondents who reported 'Other' sources, cited the Judicial Co-operation Unit at the Home Office and may well be referring to the UKCA although they have named the department within which the UKCA is located. Drugs Liaison Officers, foreign embassies, the Home Office (again possibly meaning the UKCA), HMCE, the Serious Fraud Office and the Foreign & Commonwealth Office were also cited. The Kent European Liaison Unit, noted for its very close links with judicial authorities in France, Belgium and Holland, cited direct contact with foreign authorities as an additional source of guidance. The only other source reported by Kent was NCIS (Other), perhaps reflecting that the accumulation of expertise within this specialist unit negates any need to contact the Interpol NCB or CPS for advice.

Neither the European Judicial Network nor Eurojust were cited as sources of guidance but this is unremarkable for two reasons. Firstly they were both in relative infancy as institutions at the time of the survey and so were not yet well known, and secondly their principal clientele are intended to be government officials, judges and prosecutors rather than investigators.

Level of request activity

Questions 9 and *10* sought to measure the level of request activity as far as existing force management data would permit, with a view to identifying trends at least. All thirty-two respondents replied to each question, and nine were able to provide exact figures for some years. The timing of the first circulation of the survey meant that figures were likely to be available only for the years 1997-2001. The timing of the second circulation meant that some forces were able to include figures for 2002 as well. The scaling used is reproduced from the 1996 survey.

Table 3: Force enquiries necessitating the gathering of evidence outside the UK

No. of requests	1997	1998	1999	2000	2001	*2002*
0 – 5	6	7	6	4	5	-
6 – 10	1	2	2	6	6	-
11 – 20	1	3	2	3	4	-
21+	6	7	10	9	13	-
Don't know	13	10	9	8	4	-
Avon & Somerset	-	-	-	-	73	*88*
Cheshire	-	6	14	20	27	-
Devon & Cornwall	-	11	24	7	15	-
Dorset	-	-	-	-	25	-
Gloucestershire	38	18	21	32	30	-
Humberside	-	44	47	45	64	-
Thames Valley	120	106	69	92	102	-
West Mercia	65	80	64	60	63	-
Unidentified	-	1	0	9	6	-

These figures are not directly comparable to the data discovered by Nicholson and Harrison (1996:15, Table 3) because their data for this question was based on sixty-one departmental responses whereas the data for this present survey is based on thirty-two force responses. Nevertheless some changes and similarities in trends are worth pointing out. For the years 1990-1995, Nicholson and Harrison discovered that "the vast majority of departments who deal with cases necessitating international evidence gathering do so on a yearly basis on less than five occasions", (*ibid.*). Indeed, for each of those years more than 50% of their respondents had five or fewer international evidential enquiries, with between 20-40% of respondents between 1990 and 1993 reporting that they had no data with which to answer the question. Thus respondents on the minimum frequency band outweighed all the respondents in the other frequency bands and the "don't knows".

Table 4: Evidence gathered in the UK on behalf of foreign forces

No. of requests	1997	1998	1999	2000	2001	*2002*
0 – 5	8	8	4	4	6	-
6 – 10	2	2	3	4	4	-
11 – 20	1	6	4	7	7	-
21+	6	6	12	9	14	-
Don't know	10	7	6	5	1	-
Avon & Somerset	-	-	-	-	57	*64*
Cheshire	-	11	31	23	23	-
Devon & Cornwall	-	14	14	6	10	-
Dorset	-	-	-	-	28	-
Gloucestershire	10	12	21	20	19	-
Humberside	-	10	18	34	46	-
Kent	26	29	37	38	102	*101*
Thames Valley	81	95	70	48	117	-
West Mercia	3	5	24	20	41	-
Unidentified	-	0	11	12	34	-

From the top half of Table 4 above, it will be seen that the pattern had changed by the second half of the 1990s with far more forces reporting in excess of five instances a year of having to obtain evidence from abroad. Those with five or fewer instances each year represent between 15-20% of the respondents compared with the 1996 survey results of more than 50% for the same frequency band. Nicholson and Harrison noted a reduction over time in the number of forces responding "don't know" due to an absence of management data. The same trend was evident in the present study.

In both cases the general police service trend appears to be for an increase in ILOR activity over the period. This is consistent with the overall picture across the EU (EU 2001a:3, 8). The number of forces dealing with only 0-5 requests annually remains stable or decreases whilst the number dealing with 21+ enquiries increases. Where some forces have been able to

provide actual statistics fluctuating patterns, rather than a steady increase, are apparent. Further detailed research would be necessary to review individual force activity patterns.

Police forces in England and Wales represented in the sample population made more requests than they received. Over the period 1997-2001 those forces that were able to supply statistics made 1,398 requests to foreign authorities. In the same period they received 968 incoming requests. [5] Averaged to a yearly mean for each force this equates to thirty-one outgoing requests made against twenty-one incoming requests.

Table 5: Total number of requests received and transmitted by UKCA 1997-2001 [6]

	1997	**1998**	**1999**	**2000**	**2001**
Requests made by UK authorities	1111 *(1163)*	1284 (*1325*)	1495 (*1532*)	1557 (*1685*)	1641 (*1767*)
Requests received by UK authorities	1033 (*2593*)	1166 (*2587*)	1155 (*2455*)	1161 (*2637*)	1335 (*3222*)

A direct comparison between the data produced by the SCQ and the data published by the UKCA is not possible but Table 5 above seeks to provide a context within which to view the data produced by the SCQ. In Table 5 the italicised, bracketed figures are for the total number of requests received and transmitted by the UKCA, which of course serves more public authorities than just the police forces of England and Wales. The total figures incorporate all types of requested assistance including requests for evidence and requests for the service of process. The un-bracketed, plain font figures show only requests for evidential assistance, the same criterion upon which the SCQ respondents were asked to report.

The trend apparent from the UKCA statistics show a steady increase in requests for foreign assistance made by UK authorities, with evidential requests forming the large majority of requests. Incoming requests reveal a far higher proportion of non-evidential requests such as service of court process and traffic offence enquiries. The national picture based on UKCA statistics mirrors the SCQ data in that UK authorities are demonstrably making more evidential requests than their foreign counterparts.[7] Identifying the reasons for this finding warrants further detailed future study beyond the scope of this thesis. A number

[5] To keep the sample comparable, requests made to Kent are excluded from this total because only the number of incoming requests were available from this force.
[6] These statistics are compiled from data published in the UKCA Mutual Legal Assistance newsletters 2 (April 2000), 3 (July 2000) and 9 (January 2002).
[7] Once non-evidential requests are taken into consideration the picture is reversed with the UK receiving almost twice as many requests as it makes. Incoming requests for 2001 totalled 3222, an increase of 22% on the previous year whilst total outgoing requests equalled 1763, an increase of 4% on the previous year.

of possible hypotheses might be tested. Firstly, resource issues dictate that UK requests are almost exclusively confined to investigations of serious crime. UK authorities are less likely to resort to mutual legal assistance merely to serve court process or follow up minor matters regarded elsewhere in Europe as administrative matters, hence this might skew the figures in favour of evidential requests. [8] The second hypothesis, not unconnected with the first, is that the manner in which evidence is adduced in the adversarial trial process generates more evidential requests that might be anticipated in a Napoleonic jurisdiction. Thirdly, as new domestic legislation increasingly permits restraint and confiscation of assets acquired through criminality, a new variable has entered the equation and future studies should seek to identify the extent to which mutual legal assistance mechanisms are used for restraint and confiscation proceedings as well as for acquiring trial evidence.

Question 11 sought to identify the actual or estimated annual percentage of cases dealt with by forces in England and Wales between 1997 and 2001 that necessitated the obtaining of evidence from abroad. The purpose of this question was to provide a context within which to understand the answers to *Questions 9* and *10*. It also provided an alternative means of identifying the extent of the need for foreign evidence in the event that forces were unable to provide suitable data for *Questions 9* and *10*.

It came as no surprise, because of variety of case management systems in forces and the relative absence of mutual legal assistance management data already noted, that fourteen respondents replied 'not known' to this question. The lack of suitable management data regarding mutual legal assistance has been commented on in the UK Parliament (*HC Hansard, Standing Committee A*, 10.06.03 col. 64; 12.06.03 col. 96) and during the three-year evaluation of mutual legal assistance within the EU (*Final Report on the first evaluation exercise*, CRIMORG 55, 8648/01, p.7)).

Of the eight forces that were able to provide a percentage estimate, the City of London produced the highest tally reporting that between 60-70% of the cases they investigated annually during this period warranted the use of mutual legal assistance to obtain evidence located abroad. The City of London fraud squad, with its large case-load of international white collar crime, responded on behalf of the force to the SCQ, stating that the rest of the force had little or no dealings with mutual legal assistance. Certainly the response in this case is plausible. Slightly more surprising was the assertion by Cleveland Police that 50% of all their cases required mutual legal assistance in order to obtain evidence. Suffolk (25% annually) and Derbyshire (10% annually) were also significantly higher than the

[8] The continental European concept of administrative proceedings caused some confusion and misgivings in Parliament as the C(IC) Bill was debated. The UK has no "equivalent domestic proceedings": Attorney-General (Lord Goldsmith). *HL Hansard* 25 February 2003, col. 144-5.

remaining positive responses which reported that 1% or less of their annual case-load necessitated the use of mutual legal assistance. It is possible that the question was not properly understood and that actual or estimated figures rather than actual or estimated percentages were supplied by the three forces in question.

The Nicholson and Harrison study measured the average proportion of cases within police departments (rather than whole forces) that required evidence from abroad to progress an investigation (1996:16). From 29% of all cases in 1990, the proportion rose to 63% of all cases in 1995. Different data sample characteristics mean that the 1996 and present surveys cannot meaningfully be compared on this issue.

It would be interesting to know what proportion of crime investigations in the UK result in requests for mutual legal assistance. With the available data this cannot be accurately calculated. The UKCA records the number of requests and any given investigation may give rise to more than one ILOR. And whilst reported crime statistics are available, there is no separate statistic available to indicate what proportion of these are actively investigated. The proportion of investigations that generate mutual legal assistance requests is a more meaningful piece of data than mutual legal assistance requests as a proportion of all reported crime.

Table 6: The number of cases involving mutual legal assistance as a percentage of reported crimes [9]

	1997	1998	1999	2000	2001
Avon & Somerset	-	-	-	-	0.040
Cheshire	-	0.009	0.021	0.031	0.038
Devon & Cornwall	-	0.009	0.021	0.006	0.014
Dorset	-	-	-	-	0.045
Gloucestershire	0.079	0.037	0.041	0.064	0.059
Humberside	-	0.033	0.038	0.040	0.054
Thames Valley	0.076	0.060	0.035	0.048	0.051
West Mercia	0.084	0.097	0.075	0.076	0.061

Nevertheless an attempt at a rudimentary calculation was made using the available data from those forces that had supplied actual figures for the years 1997-2001 (Table 3).

[9] The statistics from the anonymous return have not been included in this table. Nor has data from Kent which provided statistics for assistance given but not requests made.

It will be seen from this self-selecting sample that in relation to *all* reported crimes, the percentage of investigations necessitating the use of mutual legal assistance is very small. The lack of numerical significance is off-set by the significance afforded to the seriousness of the crimes for which mutual legal assistance will be sought. Available data did not enable a calculation of mutual legal assistance investigations as a percentage of serious crimes only. Even these figures are merely a rough guide. Two different sources had to be used to discover the total number of crimes recorded annually by forces during the five-year period, and during that period the method of counting crimes changed (so-called 'ethical' recording led to a significant increase in recorded crimes) as did the year against which statistics were collected (from the calendar year to the financial year). For all the lack of precision, the basic point is made. Mutual legal assistance is employed only in serious matters and is generally used in rather less than 1% of all crime investigations (Table 6).[10] As will be seen with the interview data, despite the fact that the need for mutual legal assistance is very infrequent when viewed within the context of all reported crimes for which evidence is investigated, when it is utilised, it is usually vital to the success of an investigation.

<u>The processes employed by English & Welsh police forces for gathering evidence located abroad</u>

Questions 12,13 and *14* explored the processes utilised by investigators from English and Welsh police forces in obtaining evidence located abroad.

The general principle of international law (outlined in chapter 1 above) is that agents of one State cannot exercise their jurisdiction in another sovereign State. Permission can be obtained for UK officers to travel abroad to observe and advise the foreign authorities acting on behalf of UK authorities pursuant to an ILOR. In very limited circumstances some States may allow unsupervised witness interviewing abroad by UK officers. For instance Spain will allow ex-patriot consenting Britons resident there to provide witness statements to UK officers in Spain without there needing to be an ILOR in place (Mutual Legal Assistance Forum, Home Office, 30 June 2003). By-passing Federal authorities, some English investigators have been permitted to do the same by State authorities in the US (SIO interview 3 August 1999; prosecutor interview 23 January 2004).

Twenty-six forces responded to *Question 12* which explored how often officers travelled abroad to observe the execution of an ILOR. Two replied that in between 51-75% of

[10] The two sources used as a basis for annual crime statistics were *Criminal Statistics: England and Wales 1999*, presented by the Home Secretary to Parliament December 2000 (which gave figures from 1997 and 1998 as well), Table 2.4, and the *Report of Her Majesty's Chief Inspector of Constabulary 2001/2*, Appendix IV.

foreign evidence cases, officers would be so deployed. One force replied that in 26-50% of cases it had done so. Twenty-one forces replied that this was done in between 1-25% of such cases. The other respondents did not place a figure on this occurrence but indicated it would happen if the case merited it. It is the author's experience from working in the National Crime Squad and the National Hi-Tech Crime Unit that officers frequently travelled abroad, if not to observe a request execution, then to liaise with foreign counter-parts in preparing requests and identifying evidential opportunities. Given the international remit of these specialist investigators, this is unsurprising. This preliminary liaison does not, of course, require an ILOR.

Whilst there are advantages in travelling to observe a request execution – being able to respond immediately to new evidence and lines of enquiry, for instance, that emerge as a result of the requested evidence being gathered - the necessity of such travel is debatable and sometimes unwelcome. US authorities have commented unfavourably on an alleged rise in requests to travel to the US at around Christmas each year (Harfield 2002:214) and formally notified the UK government of US government concern about the high number of unnecessary requests for UK investigators to travel to the US (UKCA 2001:1). As will be seen below (Chapter 7) some prosecutors and SIOs regard it as essential.

Question 13 sought, through free text answers, examples of instances in which UK investigators had acquired evidence from abroad without recourse to an ILOR. Of twenty-seven respondents, nineteen indicated that this had never happened, some emphasising that it would never happen because procedure was always to request evidence via an ILOR.[11] One force indicated that it had very occasionally obtained evidence from Eire with the aid of Interpol but without the use of an ILOR. A second suggested that sometimes foreign agencies had supplied evidential material in response to intelligence and information enquiries. A third force said it very rarely happened but had been possible on more than one occasion when dealing with Australia and the USA, which corroborates the experience of one senior detective seeking evidence from British witnesses resident in the USA to a murder that took place in Britain (interview 3 August 1999).

To this general consensus of 'never' or 'very rarely' one force reported routine exception. "On numerous occasions over the past five years", officers from this force have interviewed witnesses and obtained statements from them on British embassy premises abroad (and therefore within British diplomatic jurisdiction) or had brought the witnesses to the UK for interview and statements to be taken within British geographical jurisdiction.

[11] This figure includes one force which responded to the effect that it never used ILORs or *Commissions Rogatoire*, and only ever used "standard" request procedures, which contradiction suggests confusion upon the part of the respondent in interpreting either the question or mutual legal assistance procedures.

Bringing witnesses to the UK to obtain statements from them was an option that an SIO in a south coast force had also utilised (interview 12 September 2002).

Given that there is currently only one statutory route for the transmission of ILORs from the UK to foreign authorities, via the UKCA following the issuing of a request by CPS, there was a surprising variety of answers to *Question 14* which asked how forces transmitted their requests abroad. There were thirty-one respondents to this question of whom ten replied that they always sent the request via NCIS and another ten replied that they always sent the request via Interpol. Nine stated they always sent the request via CPS and four said they always sent the request via the UKCA. It would not have been surprising if all thirty-one had selected either or both of these latter options.

Even more interesting were the routes sometimes employed to transmit requests. Seven respondents stated they sometimes send requests direct to the foreign authority even though at the time of writing the direct transmission of requests is still being debated as a future possibility. Ten sometimes used the UKCA, whilst another ten sometimes used the CPS, with nine sometimes using NCIS. Five reported that they sometimes sent a request via Europol and eight sometimes used Interpol for this purpose. A small minority sometimes copied requests to NCIS, Europol or Interpol having used another route for the formal transmission. This variety might be interpreted as indicating confusion either over the question as posed or over the statutory processes for making a mutual legal assistance request to a foreign authority.

Types of crimes for which mutual legal assistance is employed

Successive senior personnel in UKCA have indicated to the author on a number of occasions that mutual legal assistance is only ever employed for serious crime investigations (see also Home Office 2004a). The management of file-tracking data at UKCA does not permit analysis of requests by crime type and so *Question 15* sought to identify the types of crime investigation in which mutual legal assistance requests were most frequently utilised. A number of crime types were suggested and respondents asked to identify those which most frequently generated mutual legal assistance requests.

In 1996 Nicholson and Harrison found that various types of fraud accounted for the largest number of requests for mutual legal assistance from UK forces to foreign authorities. The number of fraud-related requests was more than double those of theft investigations, the next highest category, behind which in close order came money laundering and drugs crime.

Table 7 below, detailing the results of the present survey, indicates that fraud generated the highest number of mutual legal assistance requests in five forces, the second highest number in six forces and the third highest number in three forces. Across the sample of twenty-two respondents to this question, it emerged that, as in the years 1990-1995, fraud investigations had generated the highest number of mutual legal assistance requests followed by murder enquiries. Neither of these offences features in current government priorities for local police forces as outlined in the National Policing Plan which focuses on crimes that generate the greatest fear within local communities: dwelling burglaries, street and domestic violence (although arguably this might incorporate murders), vehicle crime and drugs crime. This begs the question whether or not scarce local policing resources should be devoted to complicated transnational investigations into crimes that are not considered a political priority for local forces. Which in turn invites consideration of whether current structures in England and Wales for local policing and the investigation of organised crime are the most effective for investigating transnational criminality in general.

Such questions must be considered within the context of the EU evaluation of mutual legal assistance mechanisms within the UK which remarked upon the lack of resources devoted to mutual legal assistance and responding to requests generally (EU 2001c:paragraph 4.6), recommended that all agencies be invested with sufficient resources "to fulfil the UK's international commitments" (*ibid*., para. 5.1.4), and urged UK authorities to respect the needs of the requesting authorities when prioritising requests in relation to other activity (ibid., para. 5.1.6). It has been recognised in UK political circles that reciprocity pays dividends in ensuring that one's own requests are respected. The message 'reciprocity is key' was reiterated thirteen times during Parliamentary consideration of the *C(IC) Bill* (*HL Hansard* 27 January 2003 col.GC136; 29 January 2003 col. GC225; 03 February 2003 cols. GC6, GC7; 25 February 2003 col. GC190; 03 March 2003 col.669; *HC Hansard* 01 April 2003 cols. 802, 807, 810, 813, 834; 19 June 2003 col. SCA283.)

Table 7 below lists the crime types below together with the number of forces for which each crime type was either the first (column A), second (column B) or third (column C) most frequent source of mutual legal assistance requests.

Table 7: Types of crime for which mutual legal assistance is most frequently sought

Offence type	A	B	C	Total
Fraud, including advance fee fraud	5	6	3	14
Murder	5	3	3	11
Drugs trafficking	6	3	1	10
Vehicle theft (including caravans)	2	1	6	9
Any other type of assault	3	1	4	8
Child abuse (excluding possession/ exchange of paedophilic material)	1	4	2	7
Immigrant trafficking	0	3	1	4
Asset confiscation	0	4	0	4
Theft of property other than vehicles	0	2	1	3
Traffic offences (including collision investigation)	1	1	1	3
Money laundering	0	0	2	2
Exchange & possession of paedophilic material	0	0	1	1
Computer hacking	0	0	0	0

What works and what does not work in mutual legal assistance processes

The final group of questions from the survey sought to identify perceptions of what works and what does not work within the mutual legal assistance arena. Forces were first asked (*Question 16*) to indicate whether any of the consequences in Table 8 below had occurred in the last five years.

Table 8: Solutions adopted where adducing foreign evidence was an issue

Action	Forces in which this has happened
Investigation not undertaken or abandoned because evidence was located outside the UK	7
Investigation / prosecution discontinued because of delay in obtaining evidence from outside the UK	3
Prosecutions discontinued because foreign witnesses would/could not appear	3
Video link used at trial to avoid the necessity of a witness travelling to the UK to give evidence	3
Documentary evidence admitted in lieu of the witness having to attend the UK to give evidence in person	3
Lesser charge preferred in order to avoid having to obtain/rely on evidence from outside the UK	2

There were fourteen respondents (43%) to this question none of whom selected three other answer options: that evidence was excluded from trial in England and Wales because the manner of its gathering by foreign authorities was challenged; because the transmission of the request was challenged; or because the defence did not have the opportunity to be present when the evidence was gathered abroad. It is interesting to note that there had been instances in half the respondent forces in which investigations had either not been initiated or had been abandoned because evidence was located abroad. And that nearly half the respondents had experienced prosecutions being discontinued because either witnesses could be neither persuaded nor compelled to attend a trial in England and Wales or because evidence requested from abroad had not arrived in time for the trial.

Between 1990 and 1995, 28% of respondents to the Nicholson and Harrison study reported that problems encountered in obtaining requested evidence had had an adverse impact upon the investigation and/or trial. There were eleven instances of evidence being lost in transit. With their different respondent sample, Nicholson and Harrison counted the number of cases (1996:28, Table 14) rather the number of forces as in Table 8 above. Despite the incompatible respondent samples, both the 1996 study and the present research have demonstrated that the most likely consequence of problems encountered due to evidence being located abroad is that the investigation/trial will be abandoned or otherwise curtailed. Unlike other areas, there has been no discernable improvement in this aspect of mutual legal assistance between the early and late 1990s. For the criminal operating across borders this is good news: the old adage that national borders frustrate effective prosecution and are a friend to the criminal (*HL Hansard* 13.01.03 col. GC36) is quantifiably proved.

Case management procedures within the CPS do not permit comprehensive analysis of any of these questions from the CPS perspective, so incident reporting by police forces is the only alternative means of assessing the investigation attrition rate arising from the difficulties in obtaining evidence from abroad. The data harvested from this research provides substantive evidence to support the hypothesis that transnational criminals are able to exploit jurisdiction borders as a disruption tactic to frustrate law enforcement (*HL Hansard* 13.01.03 col. GC36; *HC Hansard* 01.04.03 col.801).

Questions 17-19 invited free text answers to three questions:

- *What are the critical factors in ensuring mutual legal assistance mechanisms succeed in securing evidence from outside the UK? (Question 17)*
- *What problems are encountered with current mutual legal assistance structures? (Question 18)*
- *What works well in current mutual legal assistance structures? (Question 19)*

These three questions are essentially three different approaches to discovering good practice. The tactic of encouraging respondents to explore the same issue from three different angles was employed to maximise learning as an instinctive and immediate response to a question posed one way might overlook relevant factors that would have been drawn out had the question been phrased slightly differently. By and large this tactic seems to have achieved the desired result although one respondent did reply to *Questions 17* and *19* by referring the reader to the answer given to *Question 18*. The emergence of some recurring themes from the data was to be expected (for instance the length of time it takes to initiate and respond to mutual legal assistance requests), but the raising of issues outside the general themes justifies this three-pronged approach to identifying good practice for the reasons discussed above.

The data is presented below as direct quotes from the response sheets. These quotes have been categorised subsequently by the present author into the common themes in which they are presented. In two instances a single answer has been split between two themed boxes because it was appropriate to do so.

What are the critical factors in ensuring mutual legal assistance mechanisms succeed in securing evidence from outside the UK? *(Question 17)*

There were twenty-two respondents to this question. The critical success factors were identified as timeliness, direct liaison with opposite numbers and knowledge based on training and acquired expertise.

Box 1 -Timeliness

"Prompt drafting of requests by CPS; prompt processing by UKCA; regular liaison with CPS & UKCA regarding progress; liaison between UKCA & requested state."

"The overriding factor in any request for mutual legal assistance is the time it takes for any response to be received, particularly from certain European countries. Police to police intelligence enquiries can be achieved almost immediately but any official reply takes months & sometimes is never received."

"Timeliness - enquiries have often been delayed and have frustrated investigations in this regard. Common standards in terms of quality leading to the ability to make best use of the evidence gathered."

"Mechanisms should ensure prompt action & reply."

"It is important that the request is promptly dealt with by Interpol, and then swiftly transmitted to foreign country. It is then hoped that the foreign country deals with it as speedily as possible. At this stage it is beyond our control. There are instances where no reply is ever received."

"Timeliness and accuracy."

A contrast is drawn between the speed and effectiveness of investigator-to-investigator enquiries and the exchange of information and intelligence and the time its takes to conduct a formal mutual legal assistance request. The implications of these responses are

that delays are inherent throughout the entire process at every stage. There is evidence that some investigation requests receive no response and that others do not receive a response in sufficient time to be of use. Such findings are consistent with the views of practitioners across the EU (EU 2001a:23). The problems with delay have frequently led to abuse of the 'urgency' provisions within mutual legal assistance structures which ultimately is only leading to further delay (*ibid.*:20).

The first response quoted above also highlights the need for regular liaison between CPS and the UKCA to monitor progress. The issue here is monitoring progress rather than who should be responsible for monitoring. CPS might argue that monitoring progress is the responsibility of the investigator and the UKCA might argue that they have no control over the handling of a request once it has been transmitted. Nevertheless, the management of mutual legal assistance and the monitoring of progress was also highlighted as an issue in the EU survey (EU 2001a:24-26). As will be discussed in chapter 9, the newly created role of liaison magistrate has a key contribution to make in terms of monitoring progress.

Box 2 - Liaison & direct contact

"Effective communication; recognised points of contact; clear understanding of what is required."

"An ability to have personal contact with investigating officers abroad and an opportunity to explain exactly what is required."

"Establishment of direct link between investigators & service to which Comrog allocated, leading to briefing & presence of investigators when acts carried out."

"Early liaison between CPS & Interpol."

"Good working relationships with our sister agencies e.g. CPS, NCS & Europol."

"Early initial advice and involvement of NCIS (Interpol) and or UKCA."

"Support of CPS crucial."

"Close co-operation between regional forces and NCIS/Interpol; when possible a conduit for feed-back should be established in order that an exchange of ideas and views can take place."

"These factors fall within the compass of CPS and HO UKCA. If the force ILO is approached, the recommendation is always to consult with CPS at the earliest point of an investigation."

"*SPOC* [Single point of contact] *for each section.*"

Liaison with all relevant parties was identified as critical by ten respondents to this question, with three highlighting in particular, the need to be able to convey exactly what is required by way of product. A well drafted ILOR should be able to convey exactly what is required but it is the nature of dynamic investigations that, no matter how well drafted, a request cannot cater for unforeseen developments arising out of the gathering of evidence; for instance, the emergence of a new line of enquiry as a result of questioning a witness. Such new lines might require a prompt response which could be frustrated if requesting

investigators learnt of the opportunities only when the product had wended its way back through routes of formal transmission. Direct liaison helps clarify any misunderstanding about the nature of a request and is a means by which the product can be responded to in a timely fashion. Direct liaison also is a means to educate the requesting authorities as to what is feasible. Much of this liaison already takes place on an investigator-to-investigator basis prior to an ILOR being initiated amongst those agencies familiar with mutual legal assistance and international law enforcement co-operation. It is a lesson to be shared with agencies for whom mutual legal assistance is only an occasional activity. Again, corroboration for this perspective comes from practitioners elsewhere within the EU: "reports obtained during evaluations from those active in this area all concurred on one point: visits to the requested State contributed to speed and relevance in executing requests, particularly where searching or interviewing a witness was involved", (EU 2001a:26).

Box 3 - Training & expertise in correct procedures

"Using correct procedures via UKCA or Interpol NCB."

"Use of correct procedures: i.e. ILOR sought via CPS where appropriate and forwarded via correct channels; clear request for information through good preparation e.g. what witnesses need to be seen? What evidence can they provide?; the presence of an UK officer in appropriate cases."

"Training: the ILO should have knowledge of what can and cannot be done."

"Compliance with protocols."

"Comprehensive reports with as much detail as possible."

"Ensure all requests contain all the salient points and are devoid of ambiguity thereby preventing the Q & answer situation before the enquiry can be allocated."

"Having looked to answer this questionnaire, it is clear to me that proper protocols need to exist and clearly documented processes for each force or agency to access such requests [sic]. *This equally applies to receiving and effectively dealing with requests from foreign law enforcement agencies. It is clear that* [the force's] *record keeping appears to be historically quite poor, this has not been helped by a succession of post-holders in FIB. Equally it appears that certain Areas and Depts within the Force have actioned enquiries without reference to the FIB and there are little or no records of this."*

"Need to secure financial aspects of obtaining evidence prior to request being made; sufficient time available to obtain the evidence (e.g. custody time limits, court imposed deadlines)."

Knowledge of and adherence to correct procedures can clearly have an impact upon the speed and clarity with which a request is executed. The responses quoted immediately above reinforce this. Thorough preparation is identified as a critical success factor in the second response. The Nicholson and Harrison study identified a significant training need amongst UK investigators with a great many respondents found to be unaware of basic legislation and Home Office guidance relating to mutual legal assistance (1996:21).

The penultimate response above indicates that the questionnaire itself has prompted at least one force to review its approach to managing mutual legal assistance. The final answer

expands the discussion beyond procedural awareness into managerial awareness. Resource implications occasioned by custody time limits and funding available to translate ILORs and product, for instance, can influence investigation strategy to the extent that lesser charges are preferred to avoid having to resort to mutual legal assistance. Two respondents indicated as much in response to *Question 16* (Table 8 above), and that this practice is employed was confirmed during a case study for this research (interview 20.08.03).

What problems are encountered with current mutual legal assistance structures? *(Question 18)*

It was reasonable to anticipate that problems encountered with current mutual legal assistance practices would mirror those issues identified as critical success factors. Whereas six respondents identified timeliness as a critical success factor in response to *Question 17* (27% of respondents to that question), the delay inherent in bureaucracy was identified as a current problem by eleven (42%) of the twenty-six respondents to this question.

Box 4 - Bureaucracy

"Slow & lengthy procedures both with UK & foreign procedures. Slow reaction/awareness of investigators & SIOs on correct procedures - lots of 'local contacts' used to short-cut procedures."

"The system is totally archaic and hampers rapid investigation; particularly in the financial crime cases. Officers should in 2002 be able to travel immediately to foreign jurisdictions, particularly within the EU - confirm to an examining magistrate the nature of the offence and be allowed to interview key witnesses in the presence of a local police officer or the examining magistrate. The present system delays investigation and frustrates the CJ process."

"None - other than it is quite bureaucratic."

"Bureaucratic and very slow. This leads to direct approaches in more serious/important cases."

"Bureaucracy creating unnecessary delay."

"The most frustrating aspect of the current system is the length of time it takes to get the authority to travel and conduct the relevant enquiries. We have recently has a case where it took in excess of 1 year to obtain the authority to travel to the Netherlands."

"Lengthy process."

"The main problem in obtaining mutual legal assistance is that the whole process is very bureaucratic and is very time consuming."

"Overly bureaucratic process adds to the perception that seeking evidence from abroad is only suitable for those cases that we consider 'serious'; timeliness is also a big issue/problem; the structure/process has not kept pace with technological advances e.g. we can quickly get agreement with a complainant or witness vie email only then to be faced with a lengthy process to formalise the actual obtaining of the evidence."

"Getting the CPS to agree to extradition proceedings, without knowing where the subject is. Foreign countries will not look for a subject without confirmation of the willingness to extradite. So we are left with stalemate."

"The need to burden CPS and the court with requests for ILORs will inevitably lead to some matters not being pursued; ILORs inevitably take time to be prepared and we have suffered delay in receiving permission from foreign agencies to travel; the related issue of extradition makes many investigations unworkable; the rigid wording of the ILORs can cause difficulty if additional enquiries need to be made at short notice."

Five respondents to this question raised timeliness as a problem rather than specify bureaucracy *per se*. Thus sixteen respondents identifying current problems have highlighted, in one or another, the length of time it takes using mutual legal assistance procedures to obtain evidence. In combination this equals 61% of respondents to this question.

Box 5 - Timeliness

"The time that some enquiries take."

"Obtaining the requisite evidenced within legal time constraints."

"Time delay from initiation to receipt of information."

"Time scale - lost ILORs; not using SPOC; insufficient training for officers engaged in international enquiries and inadequate awareness of legislation and policy."

"Lengthy delays in obtaining information and/or evidence. Also there are occasions where information has been passed via another route in advance of the procedures commonly adopted."

The Nicholson and Harrison study found that 86% of all respondents "felt that the obtaining of evidence from abroad was either extremely time-consuming or unnecessarily bureaucratic" (1996:23).

This perception of undue bureaucracy is not unique to UK investigators. The EU evaluation survey of mutual legal assistance within the Member States discovered similar complaints across the union. "Practitioners in several Member States were of the opinion that requests that go through ministries or other channels create significant delays and that direct transmission or requests considerably improve practical co-operation" (EU 2001a:23; see also 16, 18). It reflects the fact that diplomatic mechanisms devised in the immediate post-war period are no longer sufficient to deal with the demands of transnational criminal investigation in a very different socio-economic, political and technological context. The desire to promote direct transmission of requests between prosecuting authorities, rather than transmit requests via central authorities is a direct response to the need to reduce bureaucracy and the time taken to execute requests (EU 2001a:22).

Just as knowledge and awareness of procedures was identified as a critical success factor, so lack of expertise and understanding was identified as a problem. This was expressed in a number of different ways.

Box 6 - Lack of expertise

"Lack of understanding of different procedures."

"Updates."

"Lack of awareness at all levels of the processes. Processes not being followed."

"Lack of feedback."

"Because officers go direct to CPS, which could mean dealing with any number of solicitors, no statistical data maintained by either CPS or police."

A need is identified for information about good practice (and possibly investigation progress) to be fed back to investigators. Lack of procedural understanding is relevant equally to domestic procedures and to the procedures of requested States. The EJN and Eurojust have been established, in part, to address those issues. The final response in this theme raises concerns about the need for expertise to be available not just within the police service but amongst prosecutors as well, and since the circulation of this SCQ the CPS have been actively addressing this issue through publication of its updated internal manual of guidance, and a comprehensive training programme. [12]

There was a fourth category of responses to *Question 18* that were not inverse images of *Question 17* responses. Although there is certainly overlap between the responses in Box 7 below and some of the responses cited in Boxes 1-6 above, what distinguishes the fourth category of *Question 18* responses is the suggested underlying cause: differences in attitudes towards mutual legal assistance among requested States.

Box 7 - Attitudes of requested authorities

"The process in this country is bureaucratic but workable. Once the enquiry transmitted to the host country it is outside of the control of Interpol and seems to fall into a black hole. The urgency of the enquiry makes no difference."

"Some countries appear to have a different system of prioritising. This leads to delays on certain enquiries."

"Different from country to country but the main problems encountered are the failure to obtain a result for which no explanation is ever received; not having any target dates to work to so as to be able to reassure the OICs."

"The advice given by Interpol helps in formulating the request in a way that they stand the best chance of getting the foreign country to respond to them."

"Some countries their time in investigations take far too long example rape/indecent assault of young girl in Greece 2000 still ongoing little [?] *of outcome."*

Attitudes to a request from a foreign authority will be influenced by the extent to which the requested executing authority itself is dependent upon mutual legal assistance for

[12] I am grateful to Bill Wheeldon, CPS HQ London, for providing me with information in relation to this and for the opportunity he gave me to comment on relevant draft sections of the CPS manual. The latter is a restricted document outside the public domain.

the successful completion of its own investigations. An investigative agency which itself has regular recourse to international law enforcement co-operation is likely to view an in-coming foreign assistance request more favourably than an agency for which domestic priorities dictate the allocation of resources. Police forces in England and Wales respond to the political expectations expressed in the National Policing Plan (§1 *Police Reform Act 2002*) and to the performance aspirations devised by the local police authority (§7-8 *Police Act 1996*). Responding to foreign requests is not regarded as a priority function for police forces in England and Wales (UKCA interview, 7.8.98). It should hardly come as a surprise to such forces that the same is true of foreign police agencies, with some of whom the English and Welsh forces have a poor reputation for responding promptly to requests (Mutual Legal Assistance Forum, Home Office, 30.6.03).

"An apparent lack of interest" on the part of requested authorities was also cited in the 1996 survey as a reason for slow responses to UK requests for assistance (Nicholson and Harrison 1996:24).

What works well in current mutual legal assistance structures? *(Question 19)*

Having been invited to identify critical success factors and current problems, the panorama of good practice perspectives was completed by asking the respondents to report on what currently works well in the mutual legal assistance arena. Of this set of three questions, this question attracted the least number of responses: eighteen. They were broadly categorised into two themes which correlated directly with two of the themes identifying critical success factors, thus corroborating the identification of such factors as critical.

The availability of training and expertise were identified through *Question 17* as being critical success factors. Respondents to *Question 19* reported that the current accessibility of advice and guidance was welcome with Interpol NCB at NCIS warranting particular mention (Box 8 below). The next best thing to knowing, is knowing where to ask.

Box 8 - Accessibility of advice and guidance

"Openness & guidance provided by Interpol."

"Advice & guidance from Interpol when requested is always timely and appropriate and in many instances has saved time & resources."

"Interpol staff very helpful. CPS getting there."

"The ability to be able to discuss the request with a case worker when submitted; ability to send requests electronically."

"I have always found the staff at NCIS/Interpol most helpful and readily give advice."

"Advice from NCB Interpol."

"Agencies involved as acting as conduits to facilitate such requests appear knowledgeable and supportive. SFO are prompt with enquiries from ECU. If FIB telephone NCIS with an urgent enquiry they do their best to help and are always approachable."

Just as *Question 17* identified liaison and contact with investigators overseas who would be executing the request as a critical success factor, so effective communication was identified as factor that works well, at least in the experience of some. To this effective communication can be added effective communication processes (Box 9 below).

There seems to be divided opinion between whether a single point of contact is preferable to allowing individual investigators to contact their opposite numbers directly. But this division may lose its significance if a distinction is drawn in the minds of the respondents between a process for initial contact and request and the liaison necessary to sustain a live operation in real time.

The positive reception to enquiries authorised and directed by CPS seems to indicate tacit approval for a more active role for prosecutors in mutual legal assistance; a view seemingly reinforced by the welcoming of the Eurojust initiative. The two contrasting views of UK success in achieving good practice to date, as revealed in the final two responses, highlight the diversity of perception that exists in relation to mutual legal assistance and international law enforcement co-operation.

Box 9 - Process & communication with other investigators

"Effective communication; Recognised points of contact."

"Personal contact."

"System of contact at NCIS & UKCA."

"Once counterparts have been identified - the ability to communicate directly."

"A single point of contact is preferential [sic]. *This survey has highlighted that there are occasions when this route is bypassed for the purpose of undertaking an enquiry in the most efficient manner e.g. personally seeing the witness located overseas. Nevertheless it would be useful to be aware of these occasions in order for best practice to be collated and disseminated for the benefit of all investigating officers."*

"Enquiries authorised and directed by CPS; enquiries authorised by the court."

"Time evidence obtained - having come through the Comrog process - is admissible, providing you can persuade the witness to attend in person (should the defence require it) The network via Interpol is extensive."

"All incoming requests from HO UKCA are received by the ILO. They are logged and sent to divisions or depts for allocation with a covering report clarifying any potentially difficult areas - usually caused by indifferent translations. The reply is quality controlled by the ILO before being returned to the HO."

"Introduction of Eurojust team within the EU is a valuable avenue for fast-tracking and checking progress of applications. Apart from that the whole system is outmoded, bureaucratic and ludicrous in operation - but of course the UK is the worst offender in the whole process!!"

"None come to mind. The system works well, certainly UK end."

Summary

The free text answers raise some key issues.

- It takes too long for requested evidence to be produced, partly because of the bureaucracy of mutual legal assistance and partly because of the attitudes of the requested authorities.
- More training and a higher level of expertise generally are perceived as necessary but it is acknowledged that advice and guidance are already accessible.
- Investigators believe that the best results are to be achieved when they can liaise directly with their opposite numbers who will be executing the request.

To these can be added the key points that emerged from other sections of the SCQ.

- There is an overall lack of management data in relation to mutual legal assistance.

- Available data point to an increase in mutual legal assistance activity.
- Most forces in England and Wales have some form of internal process for managing ILORs, even if it is only a single point of contact through which to receive a request. As such there appears to be a moderate level of awareness at force level within the UK.
- The experience and perceptions of central authority practitioners and government officials across the EU are mirrored amongst their police colleagues in England and Wales. This is a useful corroboration of the EU's findings from a group of practitioners largely excluded from the three-year EU evaluation exercise.
- There has been some improvement in force mutual legal assistance awareness since 1996, but many of the same problems remain, and both the present survey and its predecessor have confirmed that exploiting international borders remains an effective tactical option for criminals seeking to evade prosecution.

To this landscape snap-shot at a general level must now be added the portrait detail available from individual case studies. From an examination of the processes in place, this study now moves to the particular and the experience of making the processes work in practice.

Chapter 7

Mutual legal assistance in practice: case studies

The practicalities and processes surrounding the management of mutual legal assistance and international law enforcement co-operation at local force level, as illustrated in chapter six above, provide only part of the picture. To understand the mechanics of mutual legal assistance, case studies have been gathered which highlight investigative issues from the perspectives of senior investigating officers [SIOs] and prosecutors.

Case study source material

There is very little in the way of published material about criminal investigations involving the utilisation of mutual legal assistance. Law books tend to discuss either the framework of international instruments (for instance Shaw 2003) or else compare procedures and laws across different jurisdictions (for instance Delmas-Marty & Spencer 2002). Studies describing police co-operation within Europe (such as Anderson *et al.* 1995 or Occhipinti 2003) have tended to be works of political commentary about infrastructures. As Chatterton has pointed out (2001), there has been no research to examine how the structures of international law enforcement co-operation actually work. Hence the research strategy adopted for the present study of interviewing SIOs and prosecutors to build up specific case studies through which the operation of mutual legal assistance – one such structure of co-operation - can be illustrated. One published source has been used. Its limitations are discussed below.

A semi-structured interview template was devised and is reproduced in Appendix F. It was adapted on each occasion with additional questions to suit the particular circumstances under discussion but the same generic questions were used for all SIO interviews. Subsequently it was determined to interview prosecutors as well, for which a second template was devised (Appendix G). The decision to extend the case study strategy to prosecutors as well as SIOs was taken when, through both academic and professional contacts, it became apparent that these two groups of practitioners had different perspectives on the problems surrounding mutual legal assistance and adducing evidence gathered overseas at trial in England and Wales. Interviewees were drawn from local police forces in England and Wales, national agencies involved in the investigation of transnational organized crime, and from the CPS. The case studies comprise a range of criminality: the trafficking of drugs, human beings,

arms, and images of child sexual and physical abuse, and contract murder. Common to all the case studies, of course, was the transnational nature of the investigation.

Semi-structured interviews with practitioners conducted for this research have provided material not previously available and give an insight into some common issues faced by both investigators and prosecutors when utilising mutual legal assistance. The recurring themes are identified below:

- Different use of/attitudes towards ILORs
- Different attitudes towards international law enforcement co-operation
- Working relationship with foreign colleagues
- Collaboration with prosecutors (including debriefing)
- Domestic agency rivalry
- Different attitudes towards testimony
- Different attitudes towards intelligence handling
- Different procedural laws
- Disclosure issues
- Loss of evidence / timeliness problems
- Forced spontaneous tactical changes
- ILOR management information available

The data is presented in sanitised form in accordance with the agreed interview regime (also explained in Appendix F) which dictates that original interview material for this study will not be made publicly available.

Case study 1

To assist the reader, publicly available material has been used for one case study. The material from this case is not ideal in that it differs significantly in character from the interview material. Attempts were made to discover other published material that could be used for case studies but no other suitable material was found (thus reinforcing Chatterton's point about the dearth of analysis in this arena).[1]

There are numerous biographies of notorious career criminals of which the career biography of Curtis Warren (Barnes *et al.* 2000) is just one.[2] Like other such works from this genre, the study on Warren is a work of journalism rather than of academic criminology. It is

[1] I am particularly grateful for the extensive endeavours of staff at Bramshill Police Library who went to some lengths to assist me in the ultimately fruitless search for additional suitable published material.
[2] Warren did not participate in the writing of this book, nor did he grant interviews to the authors.

no less useful for that but it does not seek to answer research questions, nor does it observe academic conventions. It does not, of course, examine the issues surrounding mutual legal assistance in the same way as the semi-structured interviews. References to such issues as legal assistance are incidental to the main theme of the book, and as such it is of limited comparative value for this study. Nevertheless it provides a useful description of a transnational organized crime network and how it operates, and for readers unfamiliar with such criminality it is to be commended for that alone. It also illustrates how transnational criminality directly affects and interacts with local communities in England.

Curtis Warren has been convicted by Dutch courts of drugs smuggling and manslaughter in The Netherlands where he is currently in prison. Although the offences for which he has been convicted took place in The Netherlands, they formed part of his global enterprise that principally brought illicit drugs into the UK. At the time of his arrest and conviction in The Netherlands he was under active investigation by UK authorities working closely with their Dutch counterparts. The extent of his global drugs trafficking operation is illustrated in Barnes *et al.* (2000: 7, 8, 72, 87, 95, 110, 200 & 210). Although it was not their main focus, Barnes *et al.* illustrate, as and when it had direct bearing on their story, how mutual legal assistance operated in this investigation. As such, this provides a useful back-drop against which to study the interview material.

Co-operation between different national investigating and prosecuting authorities is key to tackling transnational organized crime successfully. A number of English investigators have commented on the immediate barrier to co-operation they face because mutual legal assistance is structured around the provision of assistance between judicial authorities, which in continental Europe include Napoleonic Code prosecutors, which immediately tends to exclude English investigators because they are police officers and customs officers rather than prosecutors. Yet lack of co-operation, rather like its antithesis charity, begins at home, as evident in the rivalry and lack of trust between police officers and customs officers. It is a recurring theme throughout the investigation of Curtis Warren and has a long pedigree (*ibid.*:111-12; 114; 125; 136). An associate of Warren's, Brian Carrington, had been a primary target for HMCE. After a lengthy transnational investigation, they arrested and charged him with importation. Charges were dropped following an unprecedented political intervention made on behalf of Cleveland Police by Tim Devlin MP to the Attorney-General, Sir Nicholas Lyell, because Carrington was a police informer who could, potentially, provide vital information and evidence against Warren. [3] In a subsequent investigation against Warren, it was determined to establish an elite joint police-customs team working to a

[3] The intervention was discovered by a free-lance reporter, John Merry, and exposed by the *News of the World* when Devlin sought to suppress the story (Barnes *et al.* 2000:114).

documented protocol. In essence it was a prototype for the sort of co-operation model now being envisaged for Joint Investigation Teams (*EUCMA* Article 13). It worked well for the final investigation against Warren (Barnes *et al.* 2000:137; 145) but the temporary goodwill was not sustained (*ibid.*:297). Despite there being a willingness to co-operate publicly expressed at the highest levels, [4] at operational team level relations are still considered to be poor in some areas as "old habits die hard", (Butterfield 2003:paragraph 10.8).

Part of the mistrust emanates not only from different organizational cultures but also from different working practices that exist despite all-embracing criminal procedural laws such as the *Police and Criminal Evidence Act 1984* and the common purpose of investigating transnational organized crime. Although the reputation enjoyed by HMCE investigators has often surpassed the reputation and respect enjoyed by their police colleagues (Barnes *et al.* 2000:125; Butterfield 2003:paragraph 10.11), police investigative methods have often proved to be better practice than those of HMCE (Barnes *et al.* 2000:145; Butterfield 2003:paragraphs 10.85-10.86).

English investigators have on occasions expressed a lack of confidence in the working methods of their foreign colleagues and the practices of the jurisdictions in which they work, which must militate against the building of a trusted working relationship (Nicholson & Harrison 1996:Chapter 6). If trust and confidence do not exist between domestic agencies working in a common language and a single jurisdiction, how much more difficult must it be to establish trust and confidence with foreign colleagues when lack of a common language and different jurisdictional traditions present barriers to optimal co-operation. Yet the responses to *Questions 17-19* of the SCQ discussed in chapter six above clearly indicate the value placed on trust established through direct liaison and working relationships and the role that trust and understanding play as critical success factors in transnational investigations; a point also brought out in the research into the operation of Anglo-French border zone policing (See Gallagher 1998 Chapter 5 for an account of valuable and continuing personal relationships that helped Kent police to establish and sustain cross-Channel law enforcement co-operation).

Different national laws impose their own restrictions on the management strategy of transnational investigations, alongside the cultural differences identified above. This is illustrated in Warren's case by the differences concerning the use of intercepted telephone call evidence. Warren's Dutch associates were subjects of lawful telephone interception conducted by the Dutch police. Dutch law requires that the subjects of telephone interception be advised of the fact of the interception six months after the interception takes place. They

[4] A general operational protocol has now been agreed between the National Crime Squad and HMCE.

must be provided with transcripts of the intercepted conversations. This legal requirement essentially imposed a time limit both on the investigation of Warren and the parallel investigation of Elmore Davies, a Merseyside Police Detective Chief Inspector suspected of having entered into a corrupt relationship with Warren or his associates (Barnes *et al.* 2000:246; 262). Disclosure of the intercept transcripts to the Dutch suspects prior to the arrest of the English criminals would compromise the English operations. This was an additional factor that the English SIOs in these cases had to take into account in their planning.

Ultimately, once a matter has come to trial and evidence has been adduced, defendants learn the investigation methodology which brought them to justice. Even where it is possible to protect certain sensitive techniques or sources (under the English court rules of public interest immunity for instance; see Choo 1998:537-8, 548-63), defendants may be able to draw inductive conclusions based on circumstance. The trial in which Carrington had been involved saw Warren acquitted, but not before the latter had heard and read a considerable amount of evidence about the investigative techniques that had resulted in his being charged. Each trial educates the criminal through the exposure (even if only partial) of law enforcement method (*ibid.*:124). In cases where there are conspirators being tried in different jurisdictions but upon largely the same evidence, investigators have to take account of how the trial practices of a foreign court might expose matters that would otherwise be protected in England. This further complicates mutual legal assistance and the use of the evidential product it facilitates.

If the criminals learn from the investigators, by equal measure so the investigators learn from the criminals. In building a case against Warren and his associates, it soon became apparent that diversity paid dividends. Being prepared to be flexible in the commodities trafficked means that criminals are not tied to a single source of profit (*ibid.*:147; 255). This might complicate matters when planning the use of mutual legal assistance. But whether the commodity illicitly being trafficked is narcotics, alcohol, tobacco or human beings, the common factor is the trafficking. Where suspects maintain a sterile corridor between themselves and the trafficking, then disruption of the transport network is the best available intervention option for the authorities. This influences both proactive and reactive use of mutual legal assistance. The suspect usually has the initiative, to which the investigators have to respond. Warren often took decisions and courses of action that wrong-footed those investigating him (*ibid.*:141). Mutual legal assistance mechanisms may inhibit the strategic flexibility required to keep pace with a major transnational criminal able to exploit a number of different criminal options. And if tackling the transport network was not an option, then there remained only the tracing of the money (*ibid.*:147). Since the 9/11 New York terrorist attacks there has been a considerable amount of international effort committed to enhancing

international financial investigations. Although financial investigation into money laundering, along with extradition, are aspects of mutual legal assistance that lie outside this thesis, their importance can be seen in the Warren case where his criminal assets were valued at up to £18 millions, including 270 houses generating rental income, the funding of a housing development scheme in Liverpool and a number of pubs and retail outlets in Liverpool. Warren disputed these estimates but volunteered the surrender of £5 millions in order to reach a deal with the Dutch prosecutors seeking confiscation of his assets (*ibid*:.314-15).

The Dutch prosecution relied to a significant extent upon evidence from England. One particular line of attack by the defence lawyers in The Netherlands was to question as an abuse of process, information and evidence obtained in England by the English authorities although not, interestingly, the evidence obtained by Dutch police allowed to travel to England and interview witnesses directly (*ibid*.:269; 272). Although their strategy was unsuccessful, it was nevertheless a tactic that any defence team might consider. If tackling the transport network of a crime syndicate is the easiest intervention option for the authorities, attacking the transfer of evidence across borders is the simplest way open to the defendant of muddying the waters.

Whilst not studying mutual legal assistance *per se*, Barnes *et al.* indirectly highlight a number of relevant issues, more often than not being impediments to international law enforcement co-operation. But they also illustrate one particular success arising from the emerging framework of new international law enforcement co-operation and JHA initiatives. At one stage in the investigation one of Warren's English drivers sought to evade Dutch surveillance by crossing the Belgian border (*ibid*.:248), unaware that the *Schengen Convention* allowed the Dutch officers to cross the border with him. In a litany of lessons for law enforcement, this particular episode demonstrated that pragmatic progress is being achieved in enhancing the capability of investigators to prosecute transnational organized crime.

The key themes that emerge from this case study, to which discussion will return at the end of this chapter, are:

- Working relationship with foreign colleagues
- Domestic agency rivalry
- Different procedural laws

Having set the scene with this external view of some of the issues surrounding mutual legal assistance, the remaining case studies present the internal perspectives of investigators and prosecutors.

Case study 2 (interview 7 February 2001)

This was an investigation into a criminal network of at least 180 members operating in at least twenty-one national jurisdictions.[5] The network communicated and committed their criminality via the Internet using this medium to create and exchange within their closed community, images of child sexual and physical abuse. The nature and extent of the criminality were such that it was determined that the investigation should culminate in the simultaneous execution of arrests and search warrants in as many of the twenty-one jurisdictions as were able to participate. Each participating jurisdiction would then be responsible for the prosecution of offenders identified within their jurisdiction. To achieve this outcome international law enforcement co-operation was initially of greater importance than mutual legal assistance but the latter was necessary to introduce into each of the domestic trials the evidence that any given offender had been involved in a global enterprise.

English investigators relied upon mutual assistance from eighteen other jurisdictions for the exchange of intelligence and requested mutual legal assistance from five jurisdictions. The number of requests was not recorded and the SIO indicated that a review of the case files would be required in order to draw up a tally of the number of requests. (It was not possible to do this for the purposes of this research.) Mutual legal assistance was requested in order to detain suspects, obtain witness statements and search for and seize property. It achieved the introduction of evidence into trial in England that would otherwise not have been available: for instance, foreign interception product obtained through mutual legal assistance persuaded an English suspect to plead guilty thus negating the necessity for a lengthy contested trial.

All requested assistance was provided but there were issues of timeliness. The English investigations had been completed some time before the research interview was conducted, but only a few days before the interview a bundle of relevant evidence, which required translation, arrived from a foreign jurisdiction – too late for use at trial.

The ILORs for the English investigation were all issued by the same CPS senior prosecutor and were all transmitted via the UKCA. The early allocation of a prosecutor to advise on this investigation was of benefit to the SIO and ensured an informed and consistent approach to the drafting of requests. English officers were occasionally present when a request was executed. Such deployment was utilised only where it was deemed beneficial to have an investigator present to respond immediately to evidential developments. In this operation, due to the existence of parallel investigations across the world, there was a good

[5] The sophistication with which the offenders sought to protect themselves from investigation and prosecution means that it is possible that some offenders and jurisdictions may have gone unidentified.

understanding amongst all investigators about precisely what their foreign counter-parts needed when requests were made. This probably enhanced the quality of response and the commitment to executing mutual legal assistance requests, at least amongst investigators.

The proactive and covert nature of the investigations meant that suspects were not made aware of the mutual legal assistance requests nor offered the opportunity to be present when requests were executed. From recollection the SIO indicated that the majority of ILORs were individual: a single request per ILOR. Only occasionally would an ILOR itemise more than one request. No requested State accepted a single ILOR, couched in general terms, as the basis for all subsequent requests.

In this enquiry mutual assistance – police-to-police exchange of intelligence for instance – was frequently a precursor to mutual legal assistance. Investigators identified to each other what information or evidence they required. This would be gathered, or the opportunities to acquire it identified, and then on the basis of this intelligence, informed and targeted mutual legal assistance requests would be made. Although the actual mutual legal assistance process was not subsequently challenged by defence lawyers, issues of continuity were raised so that, having obtained a key lengthy statement on behalf of the English investigators a foreign counterpart frequently had to be re-contacted to make a statement about the way in which the evidence had been gathered on behalf of the English authorities, in order to 'prove' the mutual legal assistance process.

There were no contested trials in the UK in relation to this matter so whilst the use of video or telephone links to hear the evidence of witnesses located abroad was considered, it was not necessary to undertake this course of action. It is likely, however, that the prosecution would have preferred to have the prosecution witnesses testify in person. It would have been possible to adduce the evidence of a number of witnesses (but certainly not all) on a documentary basis thus negating the necessity of them travelling to England to testify. The determining factor dictating personal testimony would have been the likelihood of their evidence being disputed by the defence.

The objective of this investigation – the global co-ordination of simultaneous intervention – is a relatively rare phenomenon, certainly on the scale on which it was attempted here. It brings to this case some unique features which nevertheless generate universal learning points.

Interpol played a limited but key role in facilitating early meetings between the various jurisdictions. Once agreement in principle had been reached, there was little more that Interpol could assist with and the practical detail of the co-ordinated intervention was discussed on a mutual assistance basis directly between the SIO and his opposite numbers.

One of the particular problems that had to be overcome was the absence of dual criminality in one jurisdiction where the behaviour being investigated, although criminal in all the other participating jurisdictions, was not illegal in this particular jurisdiction. (The jurisdiction in question has subsequently amended its criminal code as a direct consequence of this investigation.) It provided all requested assistance notwithstanding the absence of dual criminality and made arrests and gathered evidence in response to mutual legal assistance requests from England.

A further complicating factor which could not so easily be overcome, lay in the timing of execution for search warrants. This was to lead, to the frustration of the SIO, to one of the participating jurisdictions first dictating the timing of the entire global operation around its laws and then, just a few hours before the appointed hour, seeking the postponement of the whole operation. The English SIO, with overall responsibility for co-ordinating the action, refused the postponement on several grounds: that action had already been postponed for a month at the behest of this particular jurisdiction; that lives were believed to be at stake in a number of jurisdictions and so police had a duty to act; and that it was going to be impractical to postpone the operation at such short notice because whilst it might still be the beginning of the day in this particular jurisdiction, in other jurisdictions it was already the middle of the night and intervention teams could not be contacted until they assembled to execute the warrants. With a certain amount of frustration on both sides, the SIO informed the authorities in this jurisdiction that the operation would go ahead with or without them. In the event it went ahead with fourteen other jurisdictions, including the one which had sought the late postponement.

The SIO in this case did not understand why the short-notice request for a postponement had been made. Despite the preparatory meetings that had involved the various participating jurisdictions, there had never been a similar debriefing meeting. As far as the SIO was concerned, the jurisdiction in question had proved unreliable but as it did manage to participate no long-term damage had been caused to the operation. He had not sought further explanation but was now wary of ever again working with that jurisdiction.

The jurisdiction in question was the United States, which should more properly be described as fifty-two jurisdictions (LaFave *et al.* 2000:3-6);[6] wherein lay the problem. From the SIO's perspective, he was dealing with one nation, a national Department of Justice and, as far as he was aware, a federal jurisdiction. Although the criminality in question fell within the ambit of federal jurisdiction, thus avoiding the confusion inherent in engaging fifty-one

[6] Each of the fifty states has its own criminal jurisdiction. In addition to these there is a federal criminal jurisdiction and a separate jurisdiction for the District of Columbia, in which the federal capital Washington is located, which is not constitutionally part of the United States.

other criminal codes, even federal jurisdiction is not as simple as it might at first appear because of the variety of procedural rules that may apply (*ibid.*, 39-46).[7]

The opportunity arose for the present author to interview the US Department of Justice lawyer who co-ordinated the US end of this operation. This interview illustrated some of the local issues that might be faced when English investigators make a request (interview, US Dept. of Justice, Washington DC, 19 June 2001).

Federal rules dictate the times at which a search warrant should be executed. Special permission had to be sought to execute warrants in the Eastern Standard Time [EST] zone after 2200 hours EST. Had this not been granted, suspects located in the EST could not have been arrested and their premises searched at the same time as every other intervention was taking place across the globe.[8] These timing issues were further complicated by the fact that although the federal rules of criminal procedure and evidence provide a basic standard, it is open to district courts in any one of the ninety-four federal court districts to establish local procedural rules to supplement the federal rules. So for example, where the federal rules dictate that no search warrant be executed after 2200 as the minimum standard, a federal district court might additionally determine that, within its district for the enhanced protection of citizens' rights, no search may be conducted after 2100. Thus the presence of thirty-two suspects located in twenty-two federal districts across the continent complicated the logistics for the US authorities in ways that the English SIO could not imagine.[9] The request for postponement had been made because Department of Justice officials in Washington were still trying to convince federal district judges in some areas to permit the execution of search warrants outside stipulated times and contrary to local rules. In the event, in at least one instance the judge's signature was apparently still wet on the warrant when officers raided the suspect's house.

The US lawyer concurred with the English SIO about the value of the facilitation undertaken by Interpol in helping the English authorities obtain commitments of support to a joint operation. Unlike the English authorities (who were obliged to issue a separate ILOR for each requested item of evidence), the US authorities in this investigation were able to negotiate with the Italians, the use of a single, open-ended generic ILOR to cover all investigative initial and subsequent actions that the US authorities might need the Italians to

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[7]The English equivalent instrument to the federal rules of criminal procedure, in very general terms, would be the *Police and Criminal Evidence Act 1984* and its Codes of Practice.

[8] The strike time was 0400 GMT. Taking into account daylight saving time, this equated to midnight in the EST and 2100 on the west coast.

[9] There could even be different sets of rules within a single State if there is more than one federal district per state. For instance whilst the East federal district in Washington State adheres simply to the federal rules as given, the West federal district in Washington State has supplemented the federal rules with its own court rules.

undertake on their behalf in relation to the US suspects (interview, Department of Justice, Washington DC, 19 June 2001).

In the post-arrest phase of this investigation, mutual legal assistance has generally been confined to securing witness attendance at foreign trials. Although there was no contested trial in England arising from this investigation, that was not true elsewhere and English officers have had to make regular trips abroad to testify in foreign trials.

For the English SIO in this case, a general reflection in summary on what works and what does not in relation to mutual legal assistance touched upon a theme already familiar from the data considered in chapter 6 above. Although mutual interest in this operation, as described above, had enhanced the quality of response between investigators, such active co-operation was not evident from bureaucrats involved in the process.

> *"For investigators the key issues are timeliness in getting the request in with the UK officialdom to the relevant authority overseas. ... There were a number of occasions when I've given countries mutual assistance in terms of giving them information for intelligence purposes only in the knowledge that a request was almost simultaneously made for the formal remit. Holland, for example, came with a prosecutor. We did it all by fax and by phone on the day he was here. Three months later I get a phone call saying 'where is it?', and it* [the incoming request] *was still in the Home Office. It hadn't even come out of the Home Office. ... We must be careful when we criticise other people because our own house is not in order, and that's happened a couple of times."*

He also commented on the inflexibility of the ILOR instrument as interpreted by some jurisdictions. In a different investigation he had encountered very strict interpretation from foreign authorities when executing an ILOR. On more than one occasion precisely what was requested in the ILOR and no more was provided. This interpretation means that when further clarification was required of the evidence provided pursuant to an ILOR, a further ILOR had to be raised. There was no scope for ensuring clarification at the time, or under the authority, of the initial ILOR. In the global case under review here, as has been seen, English officers were occasionally deployed to observe the execution of a request and try to seek immediate clarification when the need was identified. The fact that the other jurisdictions involved had their own prosecutions arising from this matter may have fostered a greater willingness on the part of requested authorities to accede to requests to send observers. But for this SIO the processes by which foreign evidence might be adduced in English courts was not sufficiently dynamic to support ongoing investigations.

> *"We are in danger of losing evidence because of the bureaucratic nature of the system."*

It is interesting to note that, despite the success of this case study operation, other SIOs have taken from it the lesson that multiple-jurisdiction, co-ordinated intervention

operations are by their nature too large and too cumbersome to be worth the trouble. Smaller-scale operations with fewer partners are preferred by other SIOs being simpler to manage and less vulnerable to the vagaries of international law enforcement co-operation and the bureaucracy of mutual legal assistance across numerous jurisdictions.[10]

The key themes that emerge from this case study, to which discussion will return at the end of this chapter, are:

- Different use of/attitudes towards ILORs
- Different attitudes towards international law enforcement co-operation
- Collaboration with prosecutors (including debriefing)
- Different attitudes towards testimony
- Different procedural laws
- Loss of evidence / timeliness problems

Case study 3 (interview 12 September 2002)

Parallel investigations are also a feature in the third case study. The case involved the smuggling of illegal immigrants from the Far East, through continental Europe and into England. The investigation was initiated upon the discovery in England that deaths had occurred amongst a group of immigrants whilst in transit. In this instance there were two different English investigations and a foreign investigation based in Europe: in England there was a coroner's investigation into the deaths seeking to identify the victims, alongside a criminal investigation into suspected homicides. In another EU jurisdiction (State A),[11] there was a criminal investigation into organized human trafficking that touched upon the network responsible for bringing this group of immigrants to England. The two criminal investigations were covered by the terms of the *ECMA 1959* and previously negotiated Memoranda of Understanding [MoU] between the English police and their foreign counterparts. The coroner's investigation, involving a separate team of officers from the same English police force and the authorities in the Far Eastern State (State B), was conducted on the basis of diplomatic comity in the absence of any bilateral or multilateral MLAT between the two nations. During the course of these investigations, English officers were deployed on enquiries to both State A and State B, and officers from both these States were deployed to England. The strategic decision to treat the corner's investigation into the cause of death and

[10] Such was the philosophy adopted by the SIO for an operation in which the present author was involved against similar transnational criminality.

[11] For reasons of sanitisation, letters will be used to signify different States in the following examples. The sequence re-commences with each new case study and so the State designated A in this case study is not the same State designated A in subsequent case studies.

victim identity entirely separate from the criminal investigation into persons suspected of being responsible for the deaths was based on a number of factors some of which dictate that for this thesis only the assistance provided between the parallel criminal investigations can be discussed.

The deaths were discovered shortly before midnight. By 0800 hours the next day English investigators had established contact with their opposite numbers not only in State A but with two other EU States (States C & D) which had a secondary interest in the case, and an ILOR had been exchanged, couched in very general terms, establishing agreement between the English authorities and the criminal investigation team in State A to share and exchange intelligence in relation to their two enquiries which, it was already obvious, over-lapped. By 1200 hours, officers from State A were working in the incident room in England. By contrast, in trying to establish a working relationship with State B, it took six weeks of diplomatic negotiation before officers from that State were deployed to assist with the coroner's enquiry.

There were a number of lines of enquiry for the English investigators for which they required co-operation from States A, C & D. These included tracing the exact route of the immigrants; searching for, and seizing evidence from, places where the group had rested en route; seizing CCTV footage covering known parts of the journey; and interviewing crew members from a cross-Channel ferry (which was registered in one country but crewed by nationals from another). Where possible, witnesses were interviewed and statements taken in England, with the permission of foreign authorities where foreign nationals were involved. English officers were also permitted to conduct witness interviews in State A. A magistrate in State C requested that officers from State A and England be deployed to conduct his enquiries in State C to ascertain whether any criminality had occurred in State C in relation to this matter (the group of immigrants had travelled through State C). When his request was declined, for resource reasons, the magistrate in question provided no further assistance to either English investigators or those from State A. From the perspective of the English investigators, evidence from State C was not vital to the success of a prosecution. That from State A certainly was and when investigators in State A discovered a location at which they suspected the immigrants had been housed temporarily, forensic officers from England were invited to search the premises because State A regarded forensic scene examination in the UK to be of a higher standard than their authorities had yet attained. DNA, footprints and fingerprints were recovered during the ten-day deployment of scenes-of-crime officers to State A. Consistent with what is now an increasing trend, mutual legal assistance was also sought from US authorities for the preservation and production of computer transaction records.

Mutual assistance, as a precursor to formal requests, was relied upon in this investigation. The initial ILOR established a mutual agreement to exchange intelligence and information. As and when evidential requirements were identified, so additional ILORs were issued to cover the specific items of evidence sought. A total of 392 statements and other documents were received by the English investigators from State A. Physical evidence for forensic examination was also shared pursuant to ILORs, occasionally travelling back and forth between England and State A because the same items of evidence were relevant to both the homicide and trafficking prosecutions. The success of this arrangement was derived from the fact that good working relationships already existed between investigators in England and State A, and an understanding of each other's roles and requirements had been previously documented in a MoU. ILORs were transmitted in duplicate: the formal route of transmission from central authority to central authority was always utilised for procedural integrity, but simultaneously the requests were transmitted direct to the relevant prosecutors to ensure prompt enactment. This fail-safe process proved invaluable. It ensured that evidence was available to be adduced at trial. At the time of the research interview, some months following the conviction of persons involved in the trafficking and the homicide, there were formal evidential requests from the English investigators addressed to the authorities in State A, still awaiting transmission from the UKCA.

Exact figures were not available at interview but in excess of twenty ILORs were issued to different countries by English investigators for this investigation. Some were lengthy and covered multiple requests. One ILOR covered sixteen separate requests including witness location enquiries, organizing ID parades and identifying press officers for the purposes of disclosure rules in the UK. Proving the 'continuity' of the evidential chain was problematic because of differing attitudes to the recording of police actions. Police officers in State A tend to be believed at court. They are almost never required to prove their investigation methods as well as the evidence. A difference in attitudes and procedures was also evident in the handling of exchanged documents. English investigators shared full documentation with their colleagues in State A., including details of 'unused' material that would not normally be disclosed to the defence in England. [12] State A investigators failed to observe the 'use for intelligence only' request, which was in any case inconsistent with their own rules and procedures, so all the material was lodged in the court file to which the defence in State A had pre-trial access. Having thus accessed confidential material, the defence in State A then published it in the foreign press, there being no contempt of court issues in State A. In the words of the English deputy SIO who had responsibility for mutual legal assistance

[12] An explanation of 'unused' material serves no purpose for this thesis. For a full explanation the reader is directed to the *Codes of Practice* for the *Criminal Procedures and Investigations Act 1996.*

issues in this investigation, "*we wouldn't do it again.*" The overall philosophy of mutual co-operation which governed the assistance provided between the parallel investigations did not overcome differences in judicial and organizational cultures that existed between the two jurisdictions.

Arrests were made at the time of discovery and shortly afterwards. Nevertheless the defence team in England were not afforded observer-status to the execution of ILORs. They do not have a right to such access but to reduce the number of contested issues at trial, such access has sometimes been granted (interview CPS, 12th April 2001). As far as the SIO was aware, the defence team in England sought no ILORs for their own case preparation. No challenges to the mutual legal assistance process were made at trial in England.

The defence team from the parallel investigation in State A, however, did request mutual legal assistance. They wished to conduct their own interviews of English investigators and officials as well as interviewing direct witnesses located in the UK. These interviews took the form of depositions made before magistrates at Horseferry Road Magistrates Court, the central court used for the majority of mutual legal assistance issues in England and Wales. The signed depositions were then transmitted to the court in State A via the central authorities in each State. This process took about a week. The foreign defence team subsequently submitted further requests for witness depositions which were granted by the UKCA. However these secondary requests were little more than fishing trips which the UKCA had failed to spot, and which, through disclosure in a foreign court, could have seriously damaged or even thwarted a prosecution in England. English officers attended Horseferry Magistrates Court as required but refused to answer any of the questions put to them. They were represented by a barrister to ensure that public interest immunity issues were protected.

Evidence given by video or telephone link was not a consideration in this case. Six foreign witnesses were brought to the UK at CPS expense to give testimony at trial. Vulnerable witnesses were permitted to give their evidence from behind a screen. All foreign evidence adduced in this case was obtained through the ILOR process, it being the firm belief of the SIO that this ensured that the gathering of the evidence could not be challenged.

A debrief of the operation took place between the two investigation teams. A limited debrief took place between the English investigators, the CPS and the UKCA. All sides agreed that the co-operation had worked particularly well because of the personal relationships which were quickly established and for which the MoU had prepared the ground. Effective personal relationships enabled most difficulties to be overcome quickly. Both investigation teams quickly got in the habit of telephoning their opposite numbers to ask - 'this is what we want, how do we ask for it?', thus ensuring that ILORs were well-informed

and easily executed. One key to success was good communication between the two investigation teams, made all the easier by the English-language skills of the investigators from State A. None of the English investigators spoke the language of State A. Throughout the investigation it had been necessary to translate ILOR product from three foreign languages, at a cost in excess of £20,000. Police-approved interpreters had been fully employed for weeks in translating material.

The English SIO found that having two parallel investigations into related but different crimes, meant that there were awkward disclosure issues that had not previously been anticipated. Custody time limits were also an issue for English investigators as they had only a limited time in which to prepare the court file and present the case. There were also differing investigation priorities but these do not appear to have hampered either investigation seriously, although the potential for impediment existed had there not been such a positive co-operative spirit between the two teams of investigators.

The key themes that emerge from this case study, to which discussion will return at the end of this chapter, are:

- Different use of/attitudes towards ILORs
- Different attitudes towards international law enforcement co-operation
- Working relationship with foreign colleagues
- Different attitudes towards testimony
- Different attitudes towards intelligence handling
- Disclosure issues
- Loss of evidence / timeliness problems

<u>Case study 4 (interview 11 September 2002)</u>

Of all the case studies under review here, this investigation lasted the longest period of time (two years) and encountered the widest variety of issues. In the words of the SIO, "*everything and anything that could make it more complicated happened.*"

The criminality in question concerned the trafficking of illicit commodities across Europe into the UK. Initially the commodities smuggled by this TCO were drugs but their operation was expanded to include arms trafficking. For various operational reasons, the investigators decided to concentrate their efforts against the arms trafficking side of the criminal enterprise. Under-cover officers [UCOs] were deployed and established that criminals from central southern Europe claimed to be intermediaries able to supply on behalf of others, amongst other items, tanks, rocket launchers, small arms, explosives and

undetectable plastic land-mines of a variety banned by the UN. A meeting on neutral territory was suggested for each side to assess the other's capability to deliver and pay.

Based on a previous working relationship, the UK investigators proposed State A as the neutral venue and liaised with the local police. In doing so the UK investigators were prepared to risk a potential breach of protocol by working with the local force rather than the national agency: roughly the equivalent action of a foreign law enforcement agency seeking to fight transnational organized crime in partnership with a local English police force rather than the National Crime Squad. The English SIO wanted to work with people with a proven record of trust rather than have to build new working relationships.

When meetings took place in State A between the UCOs and the criminal suspects, the local police were able to provide comprehensive assistance to the English investigators, including the covert acquisition of evidence not just intelligence. The UCOs established new contacts with further suspects including one who held diplomatic status, all of whom were acting as intermediaries. Eventually the suspects offered to demonstrate their good will with a weapons test to be carried out in another European jurisdiction, State B.

Liaison between the English SIO and the authorities in State B was arranged through the UK DLO stationed in State C, there being no direct UK law enforcement liaison in State B. The authorities in State B agreed to provide evidential assistance and provided a UCO to work alongside the UCOs already deployed from England and State A. It appeared to the SIO that the UCO supplied by State B may have come from that jurisdiction's intelligence community because the individual in question was neither based at, nor seemed to know, any of the law enforcement officers based at the HQ of State B's anti-organized crime unit. This called into question whether State B was serious about providing evidential assistance and whether or not State B might have a political agenda in relation to this issue.

When the UCOs met the vendors in State B, one of them proved to be a high-ranking military officer from State B. The weapons test took place under the covert armed surveillance of the authorities from State B. The evidence obtained through this sub-operation of the main investigation proved high-level corruption amongst officials from State B that would cause considerable political embarrassment not only to State B but also to international allies championing support for State B. The authorities in State B engaged in administrative disruption tactics that prevented the proposed sale of the arms. Had the UCOs attempted to re-engage the vendor after the disruption, there was a danger that they could have been acting as *agents provocateur*, so this element of the operation was terminated.

Back in England, the UK-resident criminals continued to make offers to supply arms (thirty container-loads) from elsewhere, including State D. A second 'buy-bust' operation[13] was decided upon avoiding, if at all possible, liaison with the authorities in State D as there were grounds for greater concern in State D than there had been in State B.

There was considerable debate about payments methods both between the UCOs and the suspects and between the SIO and the UKCA. The suspects wanted to employ a standard business technique; an escrow payment in which the money was paid to a third party pending delivery of the goods. Upon customer satisfaction, the third party would pass the payment onto the vendors. This would have included use of a letter of intent which could potentially have been used by the suspects to gain credit or defraud other individuals, so a cash payment was eventually negotiated. 'Flash money' was arranged and deposited in a safe deposit box in London.[14] This was intended to bring the suspects into English territorial jurisdiction.

The suspects proposed delivery by air from State D to an airport of the UCO's choice. The SIO once again enlisted help from State A. On this occasion it was refused. The authorities in State A, on the grounds of public safety, would not allow an illegal arms shipment to be flown over their jurisdiction and into one of their airports. [15] The SIO was therefore forced to negotiate an alternative delivery mechanism with the suspects. A sea-shipment to Liverpool was agreed but because of the greater risk of seizure this involved to the vendors, they wanted their money in advance of delivery and were not prepared to risk collection in the UK. There could be no question of the suspects being given cash prior to the seizure of the weapons. The SIO had to improvise a new payment method.

It was agreed that the cash would be deposited in a safety deposit bank in State A. The UCOs would meet the vessel carrying the arms in international waters and board in order to verify the consignment. Payment was dependent upon verification by phone from the UCOs. This offered intervention and arrest opportunities in State A and international waters and avoided the need to involve authorities from State D.

Securing such opportunities in State A was unproblematic. Securing such opportunities in international waters required resources to which the SIO did not have ready access. The Ministry of Defence was approached for assistance and made available one frigate, a unit of the Special Boat Service, one AWAC surveillance aircraft and intelligence

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[13] An operation in which the authorities use under-cover officers to purchase the illicit commodity to prove the offence of dealing and/or trafficking, and then immediately arrest the suspects.
[14] Cash purporting to be a ransom or other payment that is shown to criminals by undercover investigators as an act signifying good intent. Agencies have arrangements with financial institutions to borrow such cash simply to be able to show to suspects if required during evidence-gathering of a crime in action.
[15] No legal objections were raised against the request, but the health and safety considerations were significant.

sources located in State D. Authorities in State E were approached should there be a need to off-load the boat before it reached UK territory. The authorities in State F were approached in case the vessel tried to escape to the territorial waters of State F. State F placed a specialist organized crime judge on stand-by together with a law enforcement agency with a maritime intervention capacity. The range of contingency plans was vast. For simplicity sake, it was eventually decided to intercept the suspect vessel inside the territorial waters of State F. The vessel was owned in State G and captained by a citizen of that State. It was crewed by citizens of State H and was registered in State J. State J was approached and granted permission for authorities from the UK and State F to board the vessel.

To summarise: English authorities, assisted by authorities from States E and K were now in a position to intervene in a proposed illegal arms shipment from State D which involved a criminal network whose participants, it was anticipated, would be present in the UK, State A and the territorial waters of State F at the moment of the planned intervention. UK personnel were deployed to States E, K and H. Simultaneous translation into four languages was required in order to utilise the live technical surveillance that had been deployed. The operation was being controlled from the UK.

Matters then became complicated.

Technical surveillance revealed criminal sub-plots not previously evident when the UCOs were physically present with the suspects. The suspects were essentially sub-divided by function; facilitators and suppliers. The facilitators had not revealed the new payment arrangements to the suppliers who remained under the impression that they would receive payment before the vessel set sail. The facilitators evidently felt confident that they could ride out the storm that would occur when the suppliers found out they would have to wait for their money.

The suppliers had their own sub-plot in anticipation of being double-crossed. Through technical surveillance it was discovered that the suppliers planned to request that a facilitator attend their premises in State D to oversee transportation of the shipment from the arms factory to the vessel. They planned to hold the facilitator representative hostage and kill him if the money was not paid in advance. It was apparent that this was no idle threat and knowledge of this intention imposed a duty of care upon the English SIO in relation to the safety of the criminal facilitator concerned. He could not co-ordinate planned enforcement action that was likely to lead to the murder of the facilitator without taking steps to protect him.

The SIO's plan was again adapted. The facilitator travelled to State D with airline tickets and spending money and an invitation to the vendors to attend the bank in State A where they would be paid in advance. Two high-ranking officials from State D, related to the

head of state, duly arrived in State A to receive payment. They were immediately arrested. At the same time, the UCOs in State F contacted the captain of the vessel and the facilitator who had been sent to State D and was still there, told them of the arrests and suggested fleeing to State F. The captain abandoned his ship and crew and sailed by alternative means to State F. The facilitator flew to State F. Both were arrested on arrival. The weapons never left the factory in State D. Extradition was sought by the UK authorities for the suspects now detained in States E and K although State F was also prepared to prosecute the whole matter, including the suspects resident in the UK.

The complications continued post-arrest.

£1.2 million 'flash money', borrowed from English financial institutions, had been exchanged into the currency of State A and deposited into a bank there. It was held there for the seventeen days it took to complete the operation from the moment of deposition. During that time exchange rates altered and by the time the 'flash' money was changed back into sterling, the SIO's agency had to return £100,000 more than had been borrowed.

To progress the extradition request, the authorities in State A required service of evidence and the intelligence reports that gave rise to the operation. The intelligence report was shared and explicitly marked 'not for disclosure'. To the SIO's annoyance and despair, "*they accidentally served that on the defence*". Whilst remanded in custody, the suspects in State A were thus able to read exactly how they had come to be arrested. They also learnt the true identity of the individual who had originally turned informant against them.

All the suspects were extradited to stand trial at the Central Criminal Court, London.

The matter never went to trial: a pre-trial *voir dire* hearing called into question the integrity of the original informant – who had played no part in the investigation since passing on the original information about the drugs smuggling - and the case was thrown out because of something entirely unconnected that had happened four years before the investigation started. [16]

Such were the pertinent facts of this investigation relevant to this thesis. Formal mutual legal assistance requests were made to four States in the pre-arrest phase, and two States in the post-arrest phase of the operation. No exact count of the requests was available to the interviewer. There were some requests that were refused. Authorities in State A refused on the grounds of public safety to allow an airborne shipment of illicit arms to be flown

[16] A *voir dire* hearing enables a judge to examine a potential witness to evaluate the truth of what the witness is saying and/or the competence of the witness to testify. The problematic issue only became known to the SIO at the *voir dire*. Had the SIO known of the issues earlier, a management strategy to address this issue could have been put into place but there would have no question of not proceeding with the investigation to disrupt the trafficking and prosecute the offenders if possible.

across their territory and to land there, and authorities in State D refused to allow any of their officials to travel to England to testify. Mutual assistance was a precursor tactic employed to liaise with the local authorities in State A up until the stage was reached when all material was going to be evidential at which point mutual legal assistance was employed for all requests. The same CPS branch in England issued all ILORs and all contained multiple requests rather than one request per ILOR. Investigators had be as flexible as the TCOs in order to keep pace with the ever-changing scenario. Individual ILORs would have been entirely impracticable in this operation. This technique, and the mutual assistance that preceded it, ensured that results were achieved more quickly and the investigators were able to respond to the "*very rapidly changing scenario*". Speed was of the essence in this investigation. Authorities in States E and K both opened preliminary prosecution files at early stages of their involvement and were prepared to proceed with prosecutions in their own right, taking into account the criminality from England. The locus for trial was determined only at the post-arrest phase and the SIO observed that, with hindsight, it might have been better to have brought the prosecutions under a different jurisdictional tradition given the outcome within the Common law system that allowed challenges that might not have carried the same or any weight elsewhere (for instance the *voir dire* issue).

The proactive nature of the operation meant that no defence representation was feasible at the execution of any of the requests. As the matter never went to trial, no procedural challenges were raised to the mutual legal assistance in respect of evidential matters but there were challenges made to the extradition requests on the grounds that some of the suspects had been enticed into State F because it was believed by the investigators that extradition from there would be easier than from State D.[17] This defence argument failed. Investigators had also given consideration to possible future challenges when considering whether or not to let the vessel sail to the UK before intervention was made. Given that the vessel's movements were being monitored, it was suggested that it could not be allowed to travel unchallenged through the territorial waters of State F in order to proceed to the UK but had to be intercepted within the waters of the first State willing to mount a prosecution. The investigation strategy had been altered to take into account this possible legal challenge.

Had the trial gone ahead there were a number of witnesses located abroad who would have been required to testify in person and there were no plans to use video links for this purpose. The SIO thought that "*there may have been*" some statements that could have been adduced as documentary evidence in lieu of personal testimony. All foreign evidential matter was supported by an ILOR.

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[17] See *R v Horseferry Rd Mags ex p. Bennett* [1994] 1 A.C. 42, where the courts ruled against investigators who carried out just such a process.

An operational debrief was held in England for all the proactive investigative and intelligence authorities involved but the CPS was not invited to participate in this debrief. There was also an informal debrief with the authorities from State A. After these initial responses, the SIO during the interview subsequently returned to this issue and elaborated that CPS had not been involved in the process of debriefing because the matter had not gone to trial. [18]

Such participation may have helped to resolve one of the international law issues left unresolved at the end of this operation. The legality of British authorities boarding the vessel in international waters had been questioned by lawyers for the Royal Navy (whose clients would have had to effect the interception and boarding). There was clear legislation allowing such boarding where piracy was suspected (Shaw 2003:234) or a British ship was being used to traffic drugs (*CJ(IC) Act* 1990 §18-21) but not in circumstances where arms were being transported since it is not unlawful to convey arms by sea. This particular question went unanswered both because authorities in State F volunteered to intercept the vessel in their waters and because the rapidly changing scenario meant that this soon became "*yesterday's problem*" for the SIO.

On the more general point of jurisdiction in international waters, although the circumstances are very different and involve a completed action rather than an inchoate offence, the *Lotus* case (Permanent Court of International Justice, Series A, no.10, 1927; see also Shaw 1997:460) might have provided some general precedent for the British authorities acting (in the absence of suitable domestic legislation) rather than the authorities of State G where the vessel was owned or State J where the vessel was registered. As a precaution, formal permission to intervene was requested from authorities in State J although there was no precedent for this nor any obvious mechanism for doing so. The desired outcome was achieved via the British Ambassador in State J. Had it been necessary to execute such an interception in international waters and had the matter ultimately come to trial, perhaps there would have been a procedural challenge. It was anticipated that the precautionary measures put in place would be sufficient to resist any procedural challenge, but the issue highlights the number of possible permutations that had to be catered for in planning the intervention phase of the operation.

[18] It appeared to the interviewer that the SIO had not given consideration to involving the CPS in the debrief until the question was put in the research interview. The delayed justification was interpreted by the interviewer as an attempt to provide a professional rationale for the lacuna. Given the extensive involvement of the CPS in the active investigation of this operation, with the formulation of ILORs and advice about investigation strategies in the light of on-going mutual legal assistance issues, there would appear to be very good reason to involve prosecutors in the operational debrief.

In terms of what worked well: significant, high-quality evidence was obtained in State A and State B through mutual legal assistance founded upon precursor mutual assistance. The standard of this evidence and its acquisition was such that the SIO felt "*quite comfortable that the process we were allowed to employ in both these jurisdictions would have stood scrutiny within our court system.*"

But there were areas for improvement identified as well. Post-arrest communication broke down between the authorities in England and those in State A, leading to the catastrophic disclosure of raw intelligence to the defence. The case was of sufficient complexity to warrant, in the view of the SIO, a dedicated member of staff at UKCA to oversee the transmission of all the ILORs to ensure consistency of approach and co-ordinated management of the request processes. On a further process note, he observed that being able to arrange for facilities such as 'flash' money on a mutual assistance basis rather than risk significant amounts of money in the vagaries of the international monetary exchange rate system, would be desirable. Whilst it might be possible to reach agreement on this as a common tactic within Europe (similar to the use of controlled deliveries of JITs now provided for in international and domestic law), EU partners might equally be of the view that adoption of the Euro across the EU would remove such a financial risk for UK investigators.

For the SIO, this case was "*the most spectacular failure I've ever been involved in*". Nevertheless it highlights a number of different issues confronting SIOs grappling with the practicalities of proactive transnational investigation and raised a number of mutual legal assistance questions.

The key themes that emerge from this case study, to which discussion will return at the end of this chapter, are:

- Different use of/attitudes towards ILORs
- Different attitudes towards international law enforcement co-operation
- Working relationship with foreign colleagues
- Collaboration with prosecutors (including debriefing)
- Different attitudes towards testimony
- Different attitudes towards intelligence handling
- Forced spontaneous tactical changes

Case study 5 (interview 20 August 2003)

This investigation concerned the trafficking of illicit drugs. Amongst other issues raised, it illustrates the impediments of operational overlap. The primary investigators from

the perspective of the prosecutor interviewed for this case study, belonged to agency I, team 1 (hereafter I(1)). This team was investigating, using the usual menu of covert techniques, the following targets:

- Target 1 (T1) – head of suspected drugs cartel
- Target 2 (T2) – right hand man to T1
- Target 3 (T3) – brother of T1
- Target 4 (T4) – son of T1

There were criminal links between T2 and the target of drugs investigation being conducted in State A. There were also criminal network links between these targets and other individuals who were variously being investigated by agency I, teams 2, 3 and 4, and agency II, teams 1, 2, 3 and 4. In other words, seven other teams of investigators from two different agencies in the UK and another team in State A all had tangential operational interest in the targets of I(1). At various times, the targets from any one of these nine different operations were encountered in the surveillance arena of every other operation.

The investigation conducted by I(1) resulted in the arrests of T2, T3, T4 and four foreign nationals following the shipment of ten kilograms of heroin from London to Liverpool in September 2002. T1 remains at large, believed to be abroad, wanted on warrant with an Interpol international arrest notice issued against him. Upon detention, his extradition to the UK will be sought. At the time of the interview the investigation in State A was ongoing, as were confiscation proceedings in the UK in respect of T2, T3 and T4. At the time of writing, much of these matters remain *sub judice* and discussion here is necessarily constrained.

Although the investigations being carried out by teams I(1) and I(2) were entirely separate, the connections between their various targets led to complicated disclosure issues as a result of prosecution obligations under the *Criminal Procedure and Investigations Act 1996* [CPIA].

The operation being conducted by I(1) was already well in progress when prosecutors were first contacted to assist investigators with the issuing of an ILOR to authorities in State A. Pre-arrest assistance provided by prosecutors to investigators from I(1) consisted of four ILORs issued and advice given on the deployment of specific covert tactics within the UK. The four ILORs all contained multiple requests and sought assistance, *inter alia*, in obtaining surveillance evidential product, interception evidential product and proof of arrests.

As a result of links between the operation in State A and that being conducted by I(2), the investigators from I(2) fed information in to the I(1) investigation that authorities in State A might have information of interest and relevance to the I(1) investigation but only after the

I(1) team had arrested their targets. No further details were provided by I(2) to I(1). I(1) subsequently identified this material of possible assistance as intercept product that would be vital to their case and which they would wish to adduce in evidence at trial, taking advantage of *R v Aujla* (1998 2 Cr App R 16).[19]

For reasons about which the interviewee could only speculate, the I(2) team vigorously opposed the use of this intercept product by I(1). Even if I(2) had sound and reasonable cause to object to the evidential use of the intercept product from State A by I(1), the fact that I(1) now knew of the existence of the product meant that they had to reveal it to the prosecution who in turn had to decide whether or not it had to be disclosed to the defence (*CPIA* §3). It may be that investigators from I(2) had given assurances to their colleagues from State A that certain material would not be used in the UK, in which case they were not in a position to make such assurances because they could not override the statutory obligations imposed on prosecutors in England and Wales.

To resolve the difficulties, prosecutors and investigators from the various I teams travelled to State A to discuss the issues. It gave prosecutors in the different jurisdictions the opportunity to talk directly to each other. In State A prosecutors controlled and directed the criminal investigation, whereas in England and Wales prosecutors can present only the prosecution case at court. In talking to their counter-parts, the English prosecutors were able to explain the issues around disclosure and arrived at a strategy that would facilitate the continued investigation whilst at the same time ensuring that disclosure issues were properly addressed. It was agreed that English investigators would monitor intercepted conversations in State A based on the known dates when T2 was travelling to State A to meet the target under investigation by the authorities in State A. Prosecutors working with I(1) were able to provide their counter-parts in State A with a shopping list of intelligence and evidential gaps that needed to be filled, which enabled the authorities in State A to filter that which was relevant to the I(1) investigation from the whole corpus of intercept product. This strategy addressed disclosure issues satisfactorily because it was impractical and undesirable for English prosecutors to have to listen to the entire intercept product from State A when only a small part of it related to the I(1) investigation. An understanding and accord was reached that would not have been possible between English investigators and foreign prosecutors.

English prosecutors also succeeded in negotiating a regime acceptable to the authorities in State A whereby surveillance officers from that State were permitted to attend court in England and give personal testimony, which they were prohibited by law from doing

[19] Although the *Interception of Communications Act 1985*, now succeeded by the *Regulation of Investigatory Powers Act 2000*, prohibits intercept evidence obtained in the UK being adduced at trial, *R v Aujla* established that there is no lawful impediment to intercept product obtained in foreign jurisdictions being used at trial in the UK.

in their own jurisdiction. The interviewee was convinced that these successful outcomes would not have been achieved on a police-to-police basis or on an English police to State A prosecutor basis because of the different jurisdictional traditions and the differences in roles and relationships disguised by the use of common nomenclature.

All the documentary and physical evidence requested from State A was provided but in the event the intercept product did not arrive in time for use at the trial in England. The reason for this highlights another important issue arising from the practicalities and processes involved in bringing suspects to trial in England.

Second only to disclosure as a headache for prosecutors is the issue of custody time limits. Once a suspect has been charged before the court and remanded in custody, the prosecution has 180 days to bring its case to trial. The I(1) team were not informed about the existence of intercept evidence by I(2) until after the targets had been arrested and remanded in custody to await trial. So the clock was already ticking. There were then delays as working relationships between English investigators and the authorities in State A were repaired and relationships between prosecutors in the different jurisdictions established. Once this groundwork was completed, it took time to negotiate suitable access to the intercept product in a manner that satisfied *CPI Act* obligations and to secure attendance at trial of surveillance officers from State A. Once this "*log-jam*" was cleared, and despite, exceptionally, being granted an extension to the custody time limit by the trial judge, the court order process in State A, by which the intercept product obtained there could lawfully be released for foreign use, could not be completed before the English trial began.

Although there was nothing in the intercept product that undermined the prosecution case or assisted the defence case in any way, and although the defence team in England were given a general indication of what the intercept product would prove, in the event the decision was taken by the English prosecutors not to adduce the product because it arrived after the trial had started and they felt confident in the case they had to present even without the conclusive inclusion of intercepted conversation betweens the defendants and others. [20] All other foreign evidence, obtained through the use of ILORs, was adduced without being challenged by the defence team. At the trial T4 was found to have no case to answer and T3 was acquitted together with two foreign defendants. The jury was irreconcilably split over a third foreign defendant who was vulnerable to deportation on other matters and so, having been deported, avoided a re-trial. T2 and other principal offenders were all convicted as charged.

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[20] The intercept product is available for use as evidence at trial against T1 when that individual is located, arrested and brought to trial.

For the prosecutor in this case there were a number of learning points to be derived. Early collaboration between investigators and prosecutors is viewed as a critical success factor. Earlier involvement of prosecutors in discussions regarding the investigation strategy in this case could have avoided the "log-jam" identified above, or at least resolved it sooner thus facilitating the transmission of the intercept product in time for it to be used at trial. "*We would have had the material. We could have used it at trial. It may possibly have made a difference to the jury's verdict.*"

Part of the issue for investigators in involving prosecutors is perceived to be the organizational culture of 'need to know': the principle of information security that is fundamental to the ethos of agencies investigating serious and organized crime in England. Prosecutors would argue, particularly on the experience of this case, that they need to know in order to turn a complicated investigation into a successful prosecution.

Where foreign surveillance evidence is available, inevitably the disclosure issues will be complex and the involvement of the prosecutor at the earliest possible stage will ensure that all disclosure issues are properly catered for as the case progresses, thus avoiding the risk of subsequent procedural challenges and technical acquittals. Even material supplied on an 'intelligence only' basis is subject to disclosure although suppression for reasons of public interest immunity may be appropriate. The number of different agencies and investigation teams with an interest in these suspects led to logistical complications because each separate vested interest had its own disclosure issues. Only the prosecutor was in a position to co-ordinate the different disclosure issues as they arose, some of them during the trial as a result of flexible defence tactics. There was no operational co-ordination between the different agencies and investigation teams interested in the targets for this case study, and some suggestion that policies of non-co-operation were being pursued to preserve individual investigations that might be disrupted or reduced in significance if certain targets were charged as a result of other investigations.

A way forward, suggested the interviewee in this case, would be to have:

- A strategy to avoid 'blue-on-blue' (i.e. operational overlap between different investigating teams leading to conflicting interests);
- A strategy to manage disclosure; and
- A strategy to share evidence, where appropriate, between different investigations

At a time when the government was circulating discussion papers amongst a closed circulation list of interested agencies for comment on proposals for a new Organized Crime and Fraud Agency possibly to replace and amalgamate functions currently undertaken by the

NCS, NCIS, HMCE and the Inland Revenue, this interviewee felt that proper co-ordination was the key and that this might not necessarily be achieved by the establishment of a single agency.[21] If the amalgamation of investigating agencies was perceived as not guaranteeing any advantage, the establishment of a single independent prosecution agency servicing all the investigation agencies (including those agencies that currently prosecute their own cases with in-house legal teams), was seen to be a progressive step. Not the least advantage would be in establishing a consistent interpretation of disclosure obligations to replace the current disparity evident between different agencies and their various legal advisors. Remitting all HMCE prosecutions to the CPS would be a simple way of achieving this outcome. In fact, this possible route towards co-ordination is not being adopted: instead a second independent prosecution service is being established to service HMCE (HM Treasury Press Notice 131/03, 5 December 2003).

The key themes that emerge from this case study, to which discussion will return at the end of this chapter, are:

- Collaboration with prosecutors (including debriefing)
- Domestic agency rivalry
- Different attitudes towards testimony
- Different procedural laws
- Disclosure issues
- Loss of evidence / timeliness problems

Case study 6 (interviews 23 January 2004 & 1 March 2004) [22]

The final case study illustrates as much what can be achieved without recourse to mutual legal assistance as well as demonstrating uses to which mutual legal assistance has been put.

V (the victim in this case) was a businessman locally (rather than nationally) prominent who, amongst his various legitimate and illicit activities, participated in drug importation and distribution as a middle-ranking dealer. V was suspected of creaming off profits from the drugs-dealing by higher-ranking dealers from whom V received his supply. The higher-ranking dealers commissioned the principal suspect, T1, to murder V. T1 enlisted

[21] The Government subsequently published a White Paper proposing a new Serious Organised Crime Agency with investigation powers (to replace the NCS, the NCIS and HMCE) but retaining the separation of investigation and prosecution functions (Home Office 2004b).
[22] A follow-up interview with a second interviewee was conducted to clarify points about which the first interviewee was uncertain. Quotes are from the first interviewee only.

the help of four others (T2-T5) in doing this. V was lured to a *rendezvous* at which he expected to conduct an illicit deal involving wrist watches. "*He was imprisoned, abducted, then taken to a farm [...] where he was executed.*" V's body has never been found.

At the time of this offence T1 and his associates were the subject of a separate proactive investigation being conducted by a national agency. Electronic and human surveillance had been deployed against T1 and his associates during the course of that investigation, and the day after the murder of V took place, quite coincidentally T1 was arrested in connection with these other matters. T2 made good his escape. T3 was arrested with T1 and in interview surprised the investigators by giving them as much detail as he knew (he had been asked to provide the means with which to dispose of the body) of the murder that had taken place the previous night. Although not an eyewitness to either the murder or the disposal of the body, T3's account was corroborated in numerous ways by other evidence and was considered sufficient to mount a prosecution for murder.

With T1 and others already in custody, it remained only to locate and arrest T2 who had, by this time, fled the country.

T2 was trailed across various jurisdictions in Western Europe through, amongst other information, his use of bank cash machines. He used a number of false identities and took long-haul flights which he then double-backed upon to try to confuse the investigators. The information that finally located him in State A, however, came not from mutual legal assistance or international law enforcement co-operation but from domestic enquiries. T2 put property up for sale in England with his parents acting as agents for the sale. Undercover investigators posed as potential buyers and during a viewing of the property, casually enquired of the parents where their son was now living.

Having thus located T2, extradition proceedings (a separate branch of mutual legal assistance outside the scope of this study) were commenced, with the British DLO posted in a neighbouring state being instrumental in helping to establish some of the direct police-to-police relationships between UK investigators and their counter-parts in State A. Eventually fourteen English investigators and prosecutors attended court in State A to testify at the extradition hearings. Evidential enquiries were also necessary in States B, C and D.

V often travelled to State B and had previously disappeared from the UK, only to reappear some time later having been in State B for a while. To negate suggestions that V had not been murdered but had in fact disappeared again to State B, assistance was sought from State B in searching passenger flight manifests to cross-check information from UK manifests and then tracing for elimination purposes all persons with the same name as V who had travelled from the UK to State B. It proved very problematic for the English officers to secure

permission to travel to State B. The UK DLO stationed there played a crucial role in establishing contacts between the Interpol NCB in State B and the English investigators. Once the contacts had been established, an ILOR was transmitted accompanied by English investigators who then received fulsome assistance from the local authorities, being allowed to interview witnesses in the presence of local authorities who arranged all accommodation and internal travel for the English officers.

Evidential enquiries were also necessary in State C, identified as the sole manufacturing source of a particular type of cabling that linked the suspects to the murder scene. English investigators attended State C and conducted their own enquiries without prior recourse to an ILOR.[23] Attempts had been made before making the trip to conduct business through the Interpol NCB in London but this proved very slow and cumbersome and eventually, in order to make any progress, the English investigators made direct contact with the local law enforcement authorities in the part of State C where they had to make enquiries. The local authorities provided full co-operation. The Interpol NCB in State C was kept appraised of developments as they took place and provided retrospective permission for the trip. No ILOR was issued in respect of these enquiries.

The enquiries took the English investigators to a number of places before they were able to locate the witness they needed to see. The witness voluntarily made a statement and agreed to attend the English trial to testify (both for the original trial and the subsequent appeal). Being able to follow up developing enquiries in real time and being able to form a relationship of trust with the witness were the principal benefits of this course of action. An outcome was achieved in a period of days that could otherwise have lasted years had a series of individual, sequential requests been pursued through formal channels. Equally, without the direct relationship established between the investigators and the witness, it is entirely possible that the witness would not have responded to a witness summons which, under mutual legal assistance treaty law and domestic law, is unenforceable (see, for instance, Art. 8 *ECMA 1959* the provisions of which are essentially reinforced by Art. 5(5) *EUCMA 2000*; §1(3) and 1(4) *CJ(IC) Act 1990*; and §2(2) *C(IC) Act 2003*; for expression of this principle outside Europe see, for instance, Art. 10 of the 1994 UK/US MLAT).

Enquiries in State D were complicated by the prevalence of corruption there. To overcome some of the potential problems an officer from the police in State D (already known to UK authorities and trusted) first attended the UK to meet the English investigators. Once reliable contacts had been established, English investigators then attended State D

[23] In relation to State C this was not an uncommon occurrence. State C has subsequently formally approached the UK government seeking to stop such actions and channel all evidential requests through the respective central authorities, pursuant to mutual legal assistance treaties.

where a suspect's house was searched under a locally-issued warrant. It is not known how the local warrant in State D was obtained and no ILOR was issued from the UK.

At trial T1 and T2 were convicted of murder. A third defendant was convicted of false imprisonment and conspiracy to cause grievous bodily harm. Two others were acquitted. T1 & T2 appealed and lost. At no stage did the defence challenge the processes or manner in which any evidence from abroad had been identified and adduced.

The prosecutor interviewed for this case study was involved in the investigation from the outset and personally issued all ILORs in relation to the case (although without immediate access to the archived files, he was unable to enumerate how many ILORs had been issued). A number of problems had been encountered with mutual legal assistance during this investigation.

> "*It was* [State A] *that really caused us some problems. It didn't really matter what we put in any letters, or in any extradition request, or in any telephone conversation. The fact was they didn't seem to get a grip of what we were asking them to do and how we were asking them to do it. I don't think it was through any lack of willingness to help. They just didn't seem to do business in the same way that we did. ... What was evident to me is that what was effective there was nothing at all to do with any letters which we wrote but was the liaison which the police had with their counter-parts face-to-face. They clearly got a good deal of co-operation.*"

The value of police-to-police co-operation and of sending investigators to accompany and observe the execution of an ILOR was a point to which this interviewee returned time and again.

> *"The most productive stuff was when they* [the investigators] *were dealing directly with police officers."*
>
> *"Unless officers actually go out there to execute them* [ILORS], *you never get anywhere."*

The second interviewee corroborated this perception. The police in State A were found to be very willing to assist but failed to provide much in the way of substantial assistance partly because, in the opinion of the second interviewee, they did not appear to know what they were doing. In the execution of the various ILORs, the judicial investigators would only agree to execute certain of the requests and would never follow up evidential developments that spontaneously emerged. Often a request received just a one-word response which was of little or no use to the English investigators. English investigators were prohibited from conducting their own enquiries. Property was seized in evidence but no statements of seizure and continuity (required for the English trial process) were forthcoming

from the authorities on State A. English investigators were only supplied with copies or photographs of the physical evidence seized. The original evidence was never released to English investigators. In a pragmatic response to this lack of full assistance, the copies were accepted at trial in England. [24]

It is the practice of the prosecutor interviewed in this case to issue ILORs in duplicate, with formal transmission via the UKCA and with a copy in both English and translation for the investigators to take with them to the requested state (having first sought from the requested state authority to travel, which can be facilitated by Interpol). "*That is how you get results.*"

It was the general experience of this interviewee that evidence returned via formal channels pursuant to an ILOR could take up to two years to reach the investigation team. In fact he asserts that he has received no more than half a dozen evidential replies via formal channels, which he attributes to pragmatism on the part of the requested foreign authorities. Because in the cases he handles English investigators take a copy of the ILOR with them when they attend the requested state, they usually are able to bring the required evidence back with them. So when the formally transmitted copy of the request arrives, it has usually already been executed and there is no need on the part of the requested authorities, formally to respond. He has never had an ILOR formally refused but he has had plenty that were just ignored.

The investigation strategy regarding the use (or non-use) of ILORs in this case was heavily influenced by this prosecutor's attitudes and interpretation.

> *"You only should send a letter of request if you are asking the local police to use compulsive powers of search and seizure or seeing people who don't want to see you. The theory behind this is that if you've got a willing witness albeit in a foreign jurisdiction, there is no reason why you shouldn't go across and see them. I know we sometimes go through the device of saying we'll meet them at the British embassy or something of this nature but its not actually necessary is it?"*

His understanding reflects the permissive nature of the interpretation and guidance offered to prosecutors in the mutual legal assistance sections of the CPS *Manual of Guidance*.[25] This practical attitude to evidence-gathering based on what is not specifically prohibited nevertheless can be constrained by circumstance. In any given State, that which is

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[24] The defendant, now imprisoned in England, has repeatedly approached English investigators for the return of the original documents and exhibits seized from him, given that copies were used in trial. The authorities in State A have not responded to any requests to release the material and English investigators are unable to make any progress in relation to this.

[25] The manual is not a public document and so cannot be quoted here. I am grateful for the opportunity afforded to me by the CPS to comment on early drafts of the mutual legal assistance sections.

legally possible, may not always be politically desirable. Where any given State insists upon the use of formal request procedures, even where no coercive powers are necessary, the political preference must be complied with.

The key themes that emerge from this case study, to which discussion will return at the end of this chapter, are:

- Different use of/attitudes towards ILORs
- Different attitudes towards international law enforcement co-operation
- Working relationship with foreign colleagues

Post-script: Italian prosecutor's perspective

An unanticipated opportunity arose to explore the experience of an Italian prosecutor in relation to mutual legal assistance (interview 14 May 2004, Brussels). Although not part of the original research plan and not conducted to the same level of detail as the case studies above, the data from this additional interview is worth including here because it echoes some of the points brought out by the case studies, which in itself illustrates that the issues raised have general applicability and are not necessarily confined to English investigators and prosecutors. All Italian prosecutors can issue ILORs, but mafia and terrorist investigation is reserved for special regional and national prosecutors' offices. Public prosecutors direct the police and are independent of the Ministry of Justice. They can issue search warrants. *Juges d'instruction* issue arrest warrants which are required in all cases where the offender is not detained *inflagrante delicto*. Before becoming a judge, the interviewee was a prosecutor involved in directing many transnational investigations, two of which involved the British Islands.

In 1994 he was investigating Italian organized crime involvement in the importation of out-of-date poultry meat from State A, a South American country. The criminals were falsifying the veterinary and other documents to make it appear as if the meat came from Italy and was still in date, and then exporting the meat to innocent importers in the UK. (There was no link with UK organized crime groups.) The interviewee led a team of Italian customs police to the UK where the Ministry of Agriculture, Fisheries and Food [MAFF] had agreed within hours to execute the ILOR, speed of response being necessitated by the public health implications.[26] Searches were executed across England and Wales and the meat eventually located at a warehouse near Blackpool. The NCIS assisted in the co-ordination of this work

[26] The advantage of having a central authority to direct incoming requests lies in its role as a clearing house to identify which enforcement authority is the most suitable to assist. In this case, it was not the English police.

and the interviewee experienced very good co-operation from MAFF veterinary inspectors. Assistance in this case was provided pursuant to the 1959 *ECMA*.

The case could not be pursued in South America because Interpol NCB Rome was unable to secure, from NCB State A, the identity of the appropriate authority with whom to liaise. The interviewee speculated that the response might have been different if the issue had been drugs-related but that the illegal export of out-dated poultry meat was possibly too embarrassing for the authorities in State A to investigate.

The second case involved a money laundering investigation with the Isle of Man in 1998. Again the NCIS facilitated the operation and the Attorney General on the Isle of Man was very co-operative in relation to the ILOR execution.

In both cases the interviewee was assisted and accompanied by the judicial police (which include *carabineri* and customs). Italian prosecutors frequently accompany ILORs. The interviewee has also been to the Netherlands and Germany on a drugs-trafficking case which included being allowed to interview suspects held on remand in German prisons. And to Belgium investigating the counterfeiting of pharmaceutical products.

As has been seen elsewhere, the critical success factors from this interviewee's perspective included good working relations with the requested authorities and accompanying the ILOR to advise on the relevance of discovered material to the prosecution case. The limitations of Interpol as a facilitating agent (as opposed to an enforcement agent) were exposed in the South American case.

Conclusion

If the plural of anecdote is data and if a mass of data can obscure the significance of the singular, it can be seen that the value of the semi-structured interview data presented here lies in the way the individual case studies illustrate specific problems faced by investigators when conducting transnational investigations: specific problems that are not necessarily recognised in larger and more general data studies such as the SCQ survey presented in Chapter 6. Nowhere before has such fundamental operational experience been collated.

Besides the particular the data from the case studies illustrate a number of recurring themes worthy of further consideration (Table 9). These themes are discussed below (Chapter 8) and are contrasted with the themes that emerged both from the SCQ survey of local forces

in England and Wales and the peer review of mutual legal assistance within the EU. This will not only be a means of cross-referencing the learning from the three research exercises but will, through identification of the common themes, help identify the importance and relevance of the singular learning revealed through the case studies.

Table 9: Key issues identified through practitioner interviews

Issue	Case study					
	1	2	3	4	5	6
Different use of/attitudes towards ILORs		✓	✓	✓		✓
Different attitudes towards international law enforcement co-operation		✓	✓	✓		✓
Working relationship with foreign colleagues	✓		✓	✓		✓
Collaboration with prosecutors (including debriefing)		✓		✓	✓	
Domestic agency rivalry	✓				✓	
Different attitudes towards testimony		✓	✓	✓	✓	
Different attitudes towards intelligence handling			✓	✓		
Different procedural laws	✓	✓			✓	
Disclosure issues			✓		✓	
Loss of evidence / timeliness problems		✓	✓		✓	
Forced spontaneous tactical changes				✓		
ILOR management information available						

Chapter 8

The emerging picture of mutual legal assistance in practice

The three surveys contrasted here are significantly different in character. The EU survey was conducted at government level primarily amongst civil servants. Of the 37 persons interviewed by the evaluation team that inspected the UK mutual legal assistance mechanisms, only four were police officers: two of these were seconded to the Interpol NCB in London and the other two came from the Metropolitan and City of London fraud squads respectively. The SCQ survey appears to have been responded to by a variety of post-holders across numerous ranks but common to all these responses was the perspective of the local force: a perspective characterised mainly by reactive investigation into reported crimes rather than proactive investigation into crimes in action. And whilst some of the case studies were also reactive investigations, the principal reason for seeking semi-structured interview data was to capture valuable lessons from proactive investigations. Thus at one level this is not a comparison of like with like. But what is of value is the contrasting of three different perspectives because such comparison provides the foundation for answering the research questions identified in Chapter 4 above: does mutual legal assistance work and are the bureaucrats providing what the practitioners need from a mutual legal assistance infrastructure?

There are a number of different ways in which the comparison could be undertaken. Any one of the surveys could have been used as the basis against which to compare the other two. Chapter 7 concluded with the assertion that the value of the practitioner interview data lay in the significance of the singular. To build on this assertion it was determined to use the common themes from the semi-structured interview data as the basis for comparison here. Each of the common themes as identified in Table 9, Chapter 7, is briefly discussed together with such cross-referencing of results from the other surveys as is relevant. Then the significant results from the other surveys that cannot be cross-referenced will be discussed. A table illustrating the areas of correspondence and non-correspondence is presented in Appendix H. Some issues were common to all three research exercises (even if perspectives differed about each issue). However there is more non-correspondence than correspondence which illustrates the different ways in which practitioners and administrators approach mutual legal assistance.

Different interpretations about the application of ILORs

International treaties define the content of ILORs (Art. 14 *ECMA*). Domestic laws define how an ILOR may be issued if required (§ 3 *CJ(IC) Act* as amended by §7 & 8 *C(IC) Act*). But where no offence is caused to the authorities in a foreign state, and where the provision of evidence is achieved on a voluntary basis, there may be no need to issue a formal request in order to obtain the foreign evidence. Four of the case studies indicate differing understandings of how and when to use ILORs.

In case study [CS] 2 the SIO was of the view that it was good practice to issue individual ILORs for individual items of evidence and only very rarely did he include more than one request per ILOR. Operating on the basis of a generic ILOR to which supplementary requests were added was not possible for this SIO. Yet another national jurisdiction involved in the same multi-national investigation, which insisted upon separate ILORs from the UK, was for itself able to arrange with a third State also involved in the joint operation a single, initial generic ILOR which was considered to cover all subsequent investigator requests for material. In CS3 initial co-operation was secured with a generic ILOR issued in the very early stages of the investigation which enshrined in principle the framework for mutual co-operation in two parallel investigations. This was supplemented subsequently with follow-up ILORs listing a number of specific requests in each letter to secure specific evidence. In CS4 the need for flexibility to respond to an ever fluid situation meant that individual ILORs for each item of evidence was not a practical proposition and so all ILORs contained multiple requests. The prosecutor in CS6, wherever possible, sought to avoid becoming embroiled in mutual legal assistance: "*it is a particularly, in the twenty-first century, cumbersome way of getting evidence* (sic)" (interview 23 January 2004). In this investigation enquiries were conducted in one foreign state without any ILOR being issued, whilst numerous ILORs were issued to another state largely to no avail. To this variety of strategies for issuing ILORs can be added the variety of attitudes evident in executing ILORs.

In CS2, although different attitudes to the use of ILORs are evident amongst the various jurisdictions involved in the joint operation, it remained the case that each national investigation team had a good understanding of the context for each request and so request products were always of high quality. The SIO for CS2 had, on a different investigation, encountered a very strict interpretation of ILORs by the requested foreign authority to the extent that precisely what was requested was provided and no more. This necessitated a large number of follow-up ILORs which injected significant time-delays into the investigation. Other SIOs and prosecutors were asked if they had ever encountered a similar attitude and it

was a common experience that occasionally such an attitude was encountered. The prosecutor in CS6 asserted that he had never encountered such pedantry because of the way in which he worded his ILORs to cater for any follow up enquiries that might become necessary. However it was the recollection of the SIO in CS6 that precisely this attitude had been encountered in one foreign authority from which assistance was sought in that enquiry. It is interesting to note that a prosecutor and SIO involved in the same case could have such different recollections.

Further confusion is to be found in an example of a State insisting on the use of ILOR procedures where they were not necessary, or possibly even lawful, was provided by a prosecutor (interview 23 January 2004). English police were investigating the sudden death of a foreign national temporarily in the UK. Officers went to the deceased's home country to complete certain enquiries for the coroner having concluded from their investigation that the deceased had committed suicide. It not being a criminal matter, the officers did not seek prior authority from the foreign state and travelled without an ILOR requesting the required information. Authorities within the foreign State refused to assist the English officers, possibly because it was felt that diplomatic protocols had not been observed, and subsequently insisted that assistance be sought through formal channels via an ILOR. The officers then requested CPS to issue an ILOR but it was rightly pointed out to the officers that there was no power to do so because there was no offence and the investigation did not constitute criminal proceedings for which an ILOR could have been issued (§3 *CJ(IC) Act 1990*). An ILOR was eventually drafted couched in terms that allowed for the possibility that evidence of crime might be discovered in order to overcome the hurdles put in the way of investigators by the foreign authorities.

The format for ILORs is dictated by international conventions to achieve a standard instrument, recognisable in all jurisdictions. And yet interpretations for the use of this international norm vary greatly, even within individual jurisdictions. The practicalities of time-critical transnational enquiries may well impose an informal norm for the interpretation and use as well as the format but whether or not this can be achieved will to some extent be determined by the developments in the second variable evident from the case studies: attitudes to international law enforcement co-operation.

Free text answers from the SCQ, relevant to this issue, are recorded in Box 4, Chapter 6 (p.112 above). Although Box 4 data focuses on delays and bureaucracy, these are symptoms of attitudes towards ILORs as instruments of co-operation.

Different attitudes towards international law enforcement co-operation

In relation to the successful execution of ILORs, it was identified in CS2 above that knowledge of the circumstances of the request amongst the requested authorities facilitated a more informed execution of requests. Another feature of CS2 was that one requested State provided assistance even though the behaviour under investigation was not, at that time, a crime in the requested State. Nevertheless the requested authorities took the view that the nature of the behaviour was such that assistance should be provided. This requested State subsequently passed a new law criminalizing the behaviour. Such a positive attitude towards international law enforcement co-operation was not always apparent in the case studies.

The English investigators in CS3 encountered a variety of attitudes towards co-operation. From one State they received the best possible co-operation and as much help as they could have wished. A second State approached for assistance demanded that the resources to execute the request be provided from the English agency concerned. When it was explained that these would not be possible (indeed it was, in the experience of this research, a unique response), the requested authorities asserted that no assistance would be provided.

In CS4, where a number of States were approached throughout the course of a long investigation, attitudes towards the provision of co-operation were clearly dictated by political agenda and professional experience. The English investigators demonstrated this themselves in seeking to work in one State with foreign colleagues they had worked with before, rather than a more appropriate agency in that State. In another requested State, assistance came in the form of staff who, there was reason to believe, were not the law enforcement officers they purported to be. In respect of this State, assistance was provided in the context of seeking to suppress internal corruption and public awareness of this, rather than in the context of true co-operation.

In CS6, attitudes towards international law enforcement co-operation were found to differ between different agencies within a single State. In one of the requested States police officers provided considerable significant assistance but at prosecutor level the same willingness to overcome obstacles was not apparent. In a second requested State, again at investigator level, a willingness to assist a fellow investigator far exceeded the English investigators' expectations but the channels of formal assistance failed to deliver what was needed because there did not appear to be a willingness to drive matters forward.

In terms of Heymann's models of co-operation (above Chapter 2), the prosecutorial model describes attitudes that were perceived by interviewees for this study as being the more positive. But interestingly, attitudes towards international law enforcement co-operation were seen to differ between different actors within individual criminal justice systems. The ready

willingness to co-operate and assist as far as possible a fellow investigator was not always mirrored amongst prosecutors or administrators. Political agenda could influence the manner in which assistance was provided and arguably disrupted transnational investigation rather than the transnational criminality that was the subject of the investigation. To this general observation CS2 provides an exception in that not only was investigator assistance unhesitatingly provided, but the legislature amended national laws in order to support international norms and so be able to provide better assistance in the future.

Attitudes encountered by English local forces are recorded in Box 7, Chapter 6, (p. 114 above). The perception of foreign attitudes to requests for assistance is predominantly negative, as indeed it was when Nicholson & Harrison conducted their survey (1996:24). Here there is a disparity between the mainly negative attitudes encountered by local forces and the largely positive and helpful attitudes encountered by proactive investigators. The difference may be explained by the different types of crime under investigation. The sort of assistance being sought by investigators tackling organised crime in action is dynamic and spontaneous. And in the event that the foreign authorities would need to seek help from English investigators, the English investigators with the skills to undertake such assistance requests will be the same investigators, or will at least work for the same organisations, as those English investigators making proactive requests. Therefore the spirit of reciprocity and comity prevails wherever possible: a driving ethos that will not necessarily exist amongst investigators making and receiving requests for individual pieces of evidence in a reactive investigation.

The EU survey is largely silent on both the above issues, yet in seeking to promote common understanding across the EU, the very undertaking of peer evaluation is itself a step towards overcoming some of the differences that bedevil the mutual legal assistance process.

<u>Working relationship with foreign colleagues</u>

Heymann's prosecutorial model presupposes common values shared between investigators and prosecutors. Common values are a good foundation for a positive working relationship. Although never expressed by interviewees in terms of common values, there was general recognition that a positive working relationship with foreign colleagues contributed significantly to the successful outcome of mutual legal assistance. As identified above, the self-completion questionnaire and Gallagher (1998:Chapter 5) both confirm this. Conversely, lack of confidence in foreign colleagues leads to a poor, and ultimately unproductive, working relationship (Nicholson & Harrison 1996:Chapter 6).

CS3 corroborates both Gallagher and Nicholson & Harrison. The element of the investigation described in detail above illustrates the benefits of a good rapport between foreign investigators. Founded upon a memorandum of understanding, the relationship fostered good practice such as contacting foreign colleagues in advance of submitting an ILOR in order to identify how best to phrase the request in order to achieve the desired objective. The coroner's investigation running alongside the criminal investigation required the active assistance of authorities from State E. Following six weeks of negotiation, officers from State E were deployed to England where the hosting agencies had arranged domestic and office accommodation. No reason was given but the visiting officers declined the arrangements provided for them and found their own accommodation. English officers hypothesised that this was because the investigators from State E were in some way suspicious of the arrangements made before their arrival. Those English investigators engaged in the criminal investigation enjoyed a far more comfortable and fruitful relationship with their colleagues from State A than their counterparts on the coroner's investigation enjoyed with the investigators from State E. And when investigators from the criminal investigation sought evidential assistance from State E, they were frustrated through the lack of co-operation. Coincidentally, one of the investigators from State E deployed to England in relation to the coroner's investigation, studied for his LLM with the present author in England. Although once in the UK he telephoned to make social contact with the present author, when a social meeting was suggested the foreign investigator stated that this would not be possible. Even a pre-existing relationship appears not to have curtailed the concerns that investigators from State E had in coming to England.

The SIO in CS4 was prepared to risk offending protocol by building his investigation with foreign colleagues with whom he had previously worked. For the SIO the advantages of working with colleagues already known and trusted outweighed any political disadvantages that might have arisen by seeking help from an agency that did not have primacy in the matter. As such, the valued previous working relationships influenced the strategy and tactics applied in the new investigation.

In CS6, positive working relationships were established directly between investigators when formal channels of request and communication failed to achieve assistance in a reasonable timescale. Everything that the English investigators wanted to achieve was achieved in spite of the lack of formal assistance. The prosecutor in that case also commented favourably on how good police-to-police relations in another State overcame many obstacles.

To the anecdotal evidence from SIOs about the value of establishing good working relations with colleagues abroad in furthering request execution (which includes deploying English officers abroad to observe the execution) can be added the SCQ data on this issue.

The answers to *Question 13* (discussed pp.104-5 above) note what has been achieved in the way of assistance, including evidence acquisition, without recourse to formal mechanisms. Box 2, Chapter 6, contains ten free text answers that reinforce the data from the SIOs. Box 9, Chapter 6, also contains some responses highlighting the value of direct communication between investigators. The more positive the working relationship between requesting and requested investigators, the more productive the execution of a request is likely to be. Such a truism might not be thought remarkable but the fact that it is emphasised by so many respondents when given the opportunity to do so indicates that this is an important factor in the success of mutual legal assistance. It is a factor for which no specific provision is made in the infrastructure. Europol and Interpol can only facilitate the fostering of such working relationships. Neither can provide the direct operational assistance that investigators need. The instrument framework of mutual legal assistance has hitherto been structured around the provision of assistance between judicial authorities and the transmission of requests between central authorities; different types of working relationship from those at the root of transnational investigation. As will be seen in the next Chapter, the new statutory provision for joint investigation teams implicitly recognises the value of working relationships as a basis for overcoming some of the bureaucratic problems inherent in mutual legal assistance.

The EU survey recognised the value of effective relationships and short lines of communication both in the final report (European Union 2001a:26) and in the report on the UK (European Union 2001c:60) by promoting the concept of direct transmission and the value of the EJN respectively. To these initiatives might be added that of Eurojust which also serves to promote and facilitate understanding and practical co-operation between prosecutors. Eurojust is still in its infancy although it is already establishing itself within the co-operative network (Eurojust 2003). Awareness of its role and potential is still varied. One English prosecutor has observed: "*you know of the existence of these bodies but they are a rather mysterious world, and we have never been disabused. You know, 'here be dragons' don't go there*", (interview 23 January 2004). Which contrasts with the very positive welcome for Eurojust articulated by one police respondent to the SCQ: "*introduction of Eurojust within the EU is a valuable avenue for fast-tracking and checking progress of applications*", (Box 9, Chapter 6 above). It is possible that neither respondent nor interviewee fully understood the role and function of Eurojust. An informal measure of the success of Eurojust will be the extent to which it fosters the positive working relationships that so many practitioners have identified as a key factor in achieving a successful request execution.

Collaboration with prosecutors (including debriefing)

If the prosecutor in CS6 attempted in vain to establish a good relationship with the prosecutors overseas, his experience of assisting English investigators in the preparation of ILORs convinces him that early collaboration between prosecutors and investigators is very beneficial in achieving a successful outcome in mutual legal assistance. It was a view shared with the prosecutor in CS5. In the latter case, unlike in CS6, the prosecutor was consulted only after the case was already well under way, and one of the lessons that the prosecutor felt should be learnt from that experience was that the earlier a prosecutor can advise on the suitability and acquisition of foreign evidence, the better. The interviewee did not go into detail but implied that previous, fruitless attempts by investigators to acquire evidence through mutual assistance rather than mutual legal assistance had unnecessarily complicated matters. The prosecutor was also of the opinion that what he described as the log-jam obstructing the progress of the investigation could have been overcome more quickly or avoided altogether through early collaboration between police and prosecutors. It greatly aided the overall investigation when prosecutors from the different jurisdictions were able to meet and confer directly, explaining each other's evidential and procedural needs and so overcoming confusion and concerns that existed between the various investigators involved.

The advantage of early collaboration is not lost on SIOs. It was commented upon favourably in CS2 where the early allocation of a single prosecutor had ensured a consistent and informed approach to ILORs. When researching related issues for an LLM dissertation, the present author found that there were very few prosecutors with much knowledge of mutual legal assistance and that it was entirely possible that any number of CPS offices would have no staff experienced in mutual legal assistance (Harfield 1999:36-7). The increase in transnational evidence-gathering is such that the CPS has now initiated its own in-house training programme and aims to have staff trained in mutual legal assistance available in every office (Bill Wheeldon, International Directorate CPS, interview 12 April 2001 and subsequent pers.comm..)

What none of the prosecutors or SIOs had ever experienced was the formal debriefing with each other of any given investigation. As outlined above in relation to CS2, such a formal debriefing, especially between prosecutors and investigators from foreign jurisdictions, may have clarified misunderstandings which have fuelled mistrust. None of the interviewees thought that debriefing was a bad idea, but they created the collective impression with the researcher that such an activity was perceived as 'desirable' rather than 'essential'. If it is not considered essential, there is a danger that time will never be made for such reflection and that opportunities for shared learning will be missed. There is a growing body of expertise being amassed within CPS but no formal structures for capturing this learning other than by

revising the in-house manual of guidance on mutual legal assistance (interview 23 January 2004; Bill Wheeldon pers.comm..).

Case-by-case collaboration between prosecutors and investigators did not feature in the EU survey. None of the respondents to the SCQ reinforced the experience of the SIOs and prosecutors about the value of early collaboration, although responses to *Question 8* (Chapter 6, Table 2, p.96 above) indicated that the second most frequently contacted source of advice on mutual legal assistance for local force investigators was the CPS.

Clearly, on the basis of these observations, collaboration offers opportunities to capture learning, both during and after investigations. There should be in place systematic means of recording this learning and making it available for dissemination. Whilst currently there is no central repository for such learning, Eurojust is a potential vehicle for prosecutorial knowledge capture. NCIS would regard itself as already being the law enforcement equivalent but doubts have been raised about the quality of advice disseminated by NCIS to date (Tim Crosland, incoming Head of the newly established in-house legal department at NCIS, pers. comm., November 2003).

Domestic agency rivalry

Rivalry between domestic agencies can be cultural, as in the antagonism documented by Barnes that existed between police and customs (2000:111-2; 114; 125, 136), or it can be derived from a conflict of operational interests. The Curtis Warren investigation illustrated what could be achieved in terms of co-operation to overcome differences between organizational cultures but it also demonstrated that such good practice could be short-lived. To investigate Warren police and customs set up a joint investigation team [JIT] which was entirely covert, operating from specially acquired premises away from any operational teams from either organization. It demonstrated one of the benefits envisaged for JITs to be established across borders under the *EUCMA* (Article 13). Perhaps because of the remoteness of this team, the goodwill and camaraderie fostered during this investigation did not translate across to other operational teams in either organization.

In CS5 operational security and 'need-to-know' principles meant that, initially oblivious to each other's investigations, a number of operational teams from different agencies were investigating the same network of criminals from different angles. The NCIS target flagging system should alert SIOs when this happens within the UK and close liaison

with Europol should achieve the same awareness across borders.[1] But flagging systems are only as effective as the information fed into them and such has the been the level of mistrust between individual SIOs in both police and customs that some have been reluctant to flag their targets for fear of alerting a rival organisation to a conviction possibility.

The impression formed by the prosecutor in this case study was that one operational team, I2, considered it preferable to impede the investigation of I1 by only partially disclosing available intelligence rather than provide full proactive co-operation because to have done so would have disrupted their own investigation. This indicates that the common objective of disrupting and detecting criminality can sometimes be lost sight of in the desire to secure prosecutions out of any given investigation. In this case it took a conference of prosecutors to overcome the counter-productive activity in which various investigators had engaged.

Sharing intelligence and evidence does not necessarily compromise an individual operation and parallel investigations can be managed. For English investigators there will be issues of disclosure which can be addressed from the outset with careful management but which will only become more complicated if matters are concealed from other SIOs or prosecutors.

This issue did not feature in either the EU peer evaluation or the SCQ responses, which is unremarkable as neither of those sample populations is engaged in proactive investigation sharing performance indicators which other agencies. Evidence of inter-agency rivalry is not confined to the UK (Harfield 2003:226; Robinson 2000:343). Its consequences are equally universal: frustrated investigations, impeded prosecutions. This observation provides mirror corroboration of the value of good working relationships.

<u>Different attitudes towards testimony</u>

Cultural differences are also to be found between jurisdictional traditions, leading to some problematic issues for English SIOs when seeking testimony from their foreign counter-parts. English investigators have most frequently encountered problems when seeking evidence from foreign surveillance teams. In England each investigator within a surveillance team would be expected to testify at trial. In civil law jurisdictions, it is often the case that surveillance teams will report to a senior officer and that senior officer will testify on their behalf at trial. English laws of hearsay prohibit such an approach in English trials. Foreign jurisdictions often refuse to allow their surveillance officers to attend trial in the UK in order

[1] Target flagging involves registering an investigation with the NCIS 'ALERT' database. Investigators involved in any form of covert investigation should check with NCIS prior to conducting covert operations to ascertain whether an individual is subject of other flagged operations and whether that individual has previously compromised any sensitive investigation techniques.

to protect their identity and in order to preserve their operational capability (SIO interviews 17 June 1999 and 11 September 2002). It serves no purpose to the Dutch police, for sake of example, to have an entire surveillance team kicking their heels in an English court waiting to give evidence when they could be conducting surveillance against criminals operating in Holland. With Civil Code *Juges* invested with the authority to interpret evidence and its probative value rather than adjudicate trial fairness, the system of exposing only one officer at trial works well. It also works because Civil Code courts tend to afford the testimony of investigators greater probative credibility than English courts.

Different attitudes towards testimony were experienced in four of the case studies. In CS2 a policy decision was taken at the outset by the English prosecutor not to avail himself of the opportunities to have evidence relayed by video or telephone links from abroad because the prosecutor, as much as the defence, preferred to have a live witness in court. In the event a series of guilty pleas meant that live witnesses were not required. Courts have occasionally questioned the practicality of this preference. Stuart-Smith LJ opined (*R v Castillo* [1996] 1 Cr.App.R 438, 442-3) that judges must weigh up the importance of the evidence and how prejudicial it might be to the defendant were the witness not available for cross-examination. Cost should not be a consideration for the prosecution, nevertheless serious consideration must be given to whether it was justified to bring a witness from Venezuela (in the case of *Castillo*) to give evidence on a matter that was not open to serious challenge in cross-examination. Such common sense nevertheless falls foul of a second reason for preferring not to use technology to receive evidence. Hitherto there has been no reciprocal arrangement for testimony required by a foreign court to be heard in an English court and relayed by live link to the foreign jurisdiction. Up until 2004 English statute prohibited the use of cameras in courts so reciprocity was not possible. That paradox is being corrected with the *C(IC)A 2003*, various sections of which will come into force during 2004 and 2005.

In CS4 State D refused to allow any of their officers to testify at trial in England. In CS5 the prosecutor conference that overcame the investigators' issues also secured a solution to the statutory prohibition by State A on its surveillance officers giving evidence at trial in England. On explanation by the English prosecutors of how evidence as adduced at trial in England, the authorities in State A were persuaded to identify from the outset appropriate officers to give direct surveillance evidence.

In miscellaneous material gathered during the course of the case study interviews, one interviewee highlighted an alternative solution to the surveillance evidence problem (interview 11 September 2002). "*In practical terms you can get lulled into a false sense of security because their surveillance teams looks awfully like ours*". Belgium is another jurisdiction that will not permit its surveillance officers to give evidence at trial. Their

evidence is submitted to the *procés verbale* in a statement written by the case officer from a written report produced by the senior officer on the surveillance team who does not take part in the surveillance itself but receives an account from his or her staff. To adduce evidence in trial at England from a joint operation investigating a planned drugs transaction due to take place in Belgium, the SIO had to agree a particular tactic with the Belgian authorities when conducting an undercover operation so as to avoid involving the Belgian surveillance team in the chain of evidence. Belgian investigators were asked to maintain surveillance on the car park where the drugs exchange was scheduled to take place but their role was only to alert English investigators when the suspects entered the car park. Video surveillance was maintained to record the suspects approaching a car that had been hired by the English investigators (and so could be proved by an English officer's testimony not to have had drugs in it prior to its being parked in the car park). The Belgian suspects placed the drugs in the car and departed, being arrested subsequently away from the scene. The drugs were promptly recovered by an English undercover officer while the car was still *in situ* so that their recovery was recorded continuous video surveillance maintained through out the exchange. That officer then handed the drugs to a Belgian investigator who had not been part of the surveillance team and so could testify in a Belgian court. The suspects in Belgium could then be prosecuted and the same evidence could be used to prosecute the English suspects involved in this drugs network in an English court. The Belgian officer to whom the drugs had been handed, and who had subsequently arranged for forensic identification of the drugs, was able to give evidence in England by prior arrangement with the Belgian authorities.

Such complex choreographing of evidential opportunities is only required in proactive investigation of on-going criminality. It illustrates the lengths to which SIOs sometimes have to go in order to accommodate different procedures and practices into their evidence-gathering. In reactive investigations into completed crimes such issues rarely arise. In CS3 testimony issues were in part overcome by the fact that surveillance evidence was not relied upon at trial. Also beneficial was the fact that investigators from England and State A had been allowed to travel to each other's States and secure evidence directly from witnesses. Under mutual legal assistance law no foreign witness residing abroad can be compelled to attend trial in England to testify (*ECMA 1959* Article 8, preserved under *EUCMA 2000* Article 1).

This issue was not a feature of either the EU peer evaluation or the SCQ responses perhaps because both these research exercises invited participants to focus more on processes and outputs than upon outcomes. However, academic lawyers have explored in detail the ways in which different legal frameworks deal with testimony. Spencer (2002) provides a helpful summary that illustrates why the problems noted in Chapter 7 have been encountered.

"In England the rules of evidence are considerably more exacting than they are in the neighbouring systems of continental Europe" (*ibid.*:594). Where juries, lay magistrates and more recently District Judges, determine guilt beyond reasonable doubt, in Civil Code systems the standard of proof is the *intime conviction*, a legal concept that dates from the time of the French Revolution when the previous concept of 'legal proof' (torture and ordeal) was reformed. Courts were no longer obliged to convict simply because certain pieces of evidence (such as a confession) were present and were given the freedom to convict on evidence of any kind if the evidence was found to be compelling. The probative value of each piece of evidence was to be assessed by the judge (*ibid.*:601).

Key differences in evidence admissibility exist between the English system and continental European jurisdictions. Certain types of evidence can be adduced in Civil Code criminal trials that would be inadmissible in most circumstances in an English trial; for instance the previous convictions of a defendant (*ibid.*:602). Observing a number of trials in a court of first instance in Dieppe,[2] the present author noted that in each trial the prosecution case began with evidence of the defendant's previous convictions whereas in an English trial such antecedents would only be introduced post-verdict in order to inform sentencing.

There are different attitudes towards evidence that has been obtained illegally or unfairly. Such different approaches raise potential hazards for transnational investigations in terms of risk to evidence admissibility from a variety of investigative techniques. Although Crompton J (*R v Leatham* [1861] 8 Cox CC 498 at 501) was prepared to overlook entirely the manner in which evidence was obtained, a view followed as recently as 1980 (*R v Sang* [1980] AC 402) and 1992 (*R v Governor Pentonville Prison ex parte Chinoy* [1992] 1 All ER 317), there had been an increasing tendency in English courts to exclude unfairly obtained evidence, particularly since the discretionary power to do so was enacted in §78 *PACE Act 1984*.

"In France, as in England, evidence illegally or improperly obtained is not automatically excluded." (*ibid.*:605). French courts tend to overlook breaches by police of rules relating to arrest, detention & questioning but have regarded breaches of search and seizure rules as sufficient to give rise to *nullité* – the reverse of court attitudes in England. "By making the issue of exclusion turn exclusively on the nature of the rule that has been broken, and ignoring the broader context of the case, French law appears (at least to English eyes) both arbitrary and formalistic" (*ibid.*:606).

Nor is exclusion – *Beweisverwertungsverbote* – automatic in Germany. "The German theory is not that certain acts of evidence-gathering are null and void. It is rather – as in

[2] The English equivalent of a court of first instance would be a magistrates court.

English law – that the use of certain types of evidence, or evidence obtained in certain ways, is forbidden" (*ibid.*:607). The German constitution regards certain types of evidence as legally unobtainable and certain methods as legally unacceptable: for example, statements obtained by improper means; the use of a suspect's diaries; and unauthorised audio-probes. German courts balance the interests of the defendant (fair trial) against the interests of the State (crime suppression): *Abwägungslehre* theory (*ibid.*:608).

Both Italy and Belgium take strong lines in excluding improperly obtained evidence with Italy operating the concept of *nullité* and in Belgium courts generally excluding any evidence that seems improperly obtained. "There is no attempt, as in English law, to weigh up the overall fairness of admitting it" (*ibid.*:609). Belgian courts have been known to quash whole proceedings, not just exclude evidence.

There are similar disparities over the right to silence, (*ibid.*:610-4) and evidence as to the defendant's character, (*ibid.*:614-6) From the perspective of protecting surveillance techniques and methodology, a primary concern of the SIOs and prosecutors in the case studies above (Chapter 7), it is the variety of attitudes towards hearsay that causes particular problems. English law has fourteen exceptions to the hearsay rule, US law allegedly has forty (*ibid.*:617).

The key principle in England is that of immediacy. Oral witness testimony is essential to allow proper testing of the evidence. In Germany the situation is superficially similar but "the immediacy principle is an inclusionary rule, not an exclusionary one." Hearsay is not banned, but where still available, the original witness should testify in court (*ibid.*:618). Hearsay in Germany is generally admissible and this includes German police officers reciting statements made to them by informants.

"In France and Belgium there is nothing that corresponds to the English hearsay rule or to the German immediacy principle ... the President of the court nevertheless has the power to read to the court the *procès-verbaux* of an absent witness, so the situation is not so very different in practice... nothing prevents a witness from repeating the statements of other people in the course of his evidence" (*ibid.*:619).

The Italian penal code of 1988 made strenuous strides towards hearsay and immediacy and the general rule is that a court must decide a case on oral evidence rather than on a written dossier. But "nothing in law prevents an Italian witness from mentioning in evidence something that he heard from someone else" (*ibid.*:620).

The attitude to expert witnesses is as different as it could be. In Common Law trials experts argue adversarily the case for each side whilst in Civil Code systems court-appointed official experts give evidence from a neutral perspective (*ibid.*:632-4).

Each of these statutory approaches in their own way is considered to be generally compliant with Article 6 *ECHR* (right to fair trial) which illustrates how even agreed norms can be variously interpreted or enacted. As will be discussed below (Chapter 9), mutual recognition is the concept currently being developed, by which governments hope to overcome some of the difficulties encountered in mutual legal assistance and international law enforcement co-operation but mutual recognition is intended to address court orders and sentencing rather than evidence admissibility and procedural rules. Common EU positions in respect of procedural protection for defendants in criminal trials are being debated but current proposals do not address the sorts of fundamental differences outlined here (European Commission 2003; 2004).

The point to be made here is that successfully accessing evidential opportunities through mutual legal assistance does not guarantee that such evidence will be successfully adduced at trial. Reducing the risk of evidence exclusion and witness non-co-operation is as important an obstacle to overcome as barriers to mutual legal assistance.

Different attitudes towards intelligence handling

Closely linked to the issue of different attitudes to testimony – the presentation of evidence before a court – is the issue of differences in handling criminal intelligence. The distinction between intelligence and evidence in England is robust. It is preserved with sterile corridors, even extending under the *Police Act 1997* to separate organisations to handle intelligence about organized crime (NCIS) and investigate organized crime (NCS) although the separation of organisations has since been reviewed as counter-productive (Home Office 2004:22). English investigators can seek to protect intelligence from disclosure through prosecutorial scrutiny under the *CPI Act 1996* and public immunity interest applications. The distinction is less clear-cut abroad. It is a recurring complaint from English SIOs that material supplied to foreign investigators on an 'intelligence only, not to be used as evidence' basis is routinely placed into the *procés verbale* to which the defence have access.

In CS3, where good working relations reinforced with a memorandum of understanding between the investigators in England and State A underpinned the success of the operation and parallel prosecutions, just such a request for confidentiality was ignored leading to the publication of confidential intelligence in the media. In CS4 a similar pre-court disclosure of confidential intelligence to the defence meant that the suspects awaiting extradition knew exactly who had informed against them and how they came to be arrested, thus endangering the lives of the original informants. The SIO described this disclosure as 'accidental' but again such pre-trial disclosure of the court files was required by law in this

State. An accused has no right to have a lawyer present during police questioning and so such pre-trial disclosure serves to protect an accused by affording access to the case he or she has to answer.

Outside this study other similar examples are known. It has not been possible within the scope of this research to ascertain the different ways in which life-threatening intelligence is protected from defence access in various other States. But for English investigators the lessons are clear: because neither raw nor sanitised intelligence can be protected abroad in the same way that it can in England, a strategy for addressing this issue must be identified and applied across all agencies likely to be involved in similar scenarios. Serious consideration might have to be given to not sharing such sensitive information at all because once it becomes available in the public domain abroad, it could undermine any related or parallel prosecutions in the UK. Closer preparatory liaison on a case-by-case basis between English prosecutors, investigators and their foreign counterparts may be a way forward. And if so, reinforces the call for prosecutors and investigators to work more closely in such complex cases (Home Office 2004b:32-33).

Although intelligence exchange did not feature in the EU peer evaluation of mutual legal assistance, it is (at the time of writing, late 2003/early 2004) the subject of a current unionwide peer evaluation process into intelligence handling and exchange between authorities in Member States. Such is the sensitivity surrounding this subject, the national and final reports will remain classified as secret (Hans Nilsson, Head of the Division of Judicial Co-operation, Council of the European Union, pers. comm. 21 November 2003). The EU Member States are each developing a National Intelligence Model [NIM] which collectively will inform a European Intelligence Model. The UK NIM has already been developed with full implementation due by April 2004 (National Policing Plan 2003/4; see also www.ncis.co.uk/nim.asp, visited 7 May 2004). The NIM is essentially a business model that seeks to identify priorities for a control strategy, identify gaps in available intelligence, identify emerging trends, patterns and problems and so inform intervention strategies, resource allocation and enforcement action. It remains to be seen whether the UK concept of a NIM (as a business model) is reproduced throughout the EU or whether there will be as many different models as there are Member States. If the business model concept is adopted this single initiative could do more to achieve commonality across disparate jurisdictions that any other. It could also influence a common policy approach to mutual legal assistance.

Different procedural laws

Different attitudes towards testimony and intelligence-handling arise from different jurisdiction traditions and legal frameworks. Outside these specific issues, this study has identified other key differences which English investigators and prosecutors must take into consideration when planning operational and prosecutions strategies. CS1 illustrates how different laws concerning subject notification of surveillance can impose restrictions or time constraints on investigation strategies. English investigators had to work to a time-table dictated by Dutch laws that required disclosure of the surveillance to the subject six months after surveillance commenced. CS2 illustrates how different local laws relating to the execution of search warrants (even within a national federal jurisdiction) can inhibit co-ordination of simultaneous joint operations. Time constraints imposed upon English investigators in CS5 were derived from English laws requiring trials to commence within a set period from charging, which may present problems to foreign civil law jurisdictions where bail pending trial and remands in custody are dealt with very differently, often allowing investigators far more time to collate their case. One of the key issues identified in the EU peer evaluation of mutual legal assistance arrangements was the legal complexity arising "from the accumulation of international and national rules to be applied in the same case; basic training in this matter for those involved in mutual legal assistance is essential" (EU 2001a:4). What is true for the civil servants involved in mutual legal assistance is equally true for prosecutors and investigators. Eurojust has a contribution to make here; so, too, the European Police College.

Whilst specific problems arising from such issues did not feature directly in either the EU survey or the SCQ responses, both these exercises highlighted the need for expertise in mutual legal assistance and, by extension, in foreign jurisdiction procedures in relation to mutual legal assistance (European Union 2001a:3, 4; Box 3, Chapter 6). Within England and Wales, the CPS has also recognised this need and has launched its own mutual legal assistance training programme (footnote 12, Chapter 6). This reinforces the conclusion drawn from the observations about different attitudes to testimony.

Disclosure issues

The problems that can arise from different national attitudes towards the issue of disclosure have been highlighted above where foreign authorities have released information that would have been lawfully withheld from the defence under English law. But even where there is no desire to protect information, English disclosure laws can still present problems. CS3 illustrated how disclosure problems can arise from two parallel investigations into

related but different crimes. The disclosure issues that scuppered the English prosecution in CS4 at a pre-trial hearing would not have arisen had the case been brought before a court in any of the other States that could legitimately have claimed jurisdiction. Potential disclosure pitfalls in CS5 were quickly identified by English prosecutors and were successfully addressed by collaboration between prosecutors. The need for disclosure management strategies was identified by the English prosecutor as a key learning point arising from this case.

Defence lawyers are becoming alert to the possible abuses of due process (which would therefore violate Article 6 of the ECHR guaranteeing a right to fair trial) that may arise from forum-shopping or process-laundering (Gane & Mackarel 1996). Co-ordinated effort between District, State and Assistant US Attorneys is common in the USA in order to achieve maximum punitive effect against suspects vulnerable to criminal sanctions in multiple jurisdictions. Clearly the SIO and prosecutors in CS4 had a choice of jurisdictions in which to prosecute their suspects. In making use of a Common Law criminal trial rather than a Civil Law criminal trial (a decision influenced by a sense of case-ownership rather than objective strategic decisions), the prosecution team left itself vulnerable to a defence intervention which had nothing to do with the criminality that had been investigated and to which the charges related but which nevertheless frustrated a very expensive investigation. The balance to be struck is for the prosecution to avail itself of its optimum prosecution opportunities without causing unfair disadvantage to the suspect. It can reasonably be anticipated that case-law in both domestic courts and Strasbourg will come to define this issue further in the future.

Although disclosure issues featured strongly in anecdotal evidence from the SIO interviews and have been highlighted as a significant problem by Spencer (2002:630-2), they were not mentioned in either the EU survey or the SCQ responses. Such matters could be encompassed within the wider issue of different procedural laws. This is an example of where the SIO interviews have provided a specific example of singular significance within the broader data context.

Loss of evidence / timeliness problems

The *Final Report* on the EU peer evaluation exercise drew the general conclusion that whilst delay and inefficiency were habitual criticisms of mutual legal assistance across the EU, the reality was by no means as bleak as it was reputed it to be (European Union 2001a:3). Nevertheless, the peer evaluation did note problems caused by delays and bureaucracy (*ibid.*:16, 18 & 23) and used this evidence as a reason for introducing direct transmission of requests, by-passing administrative central authorities wherever feasible (*ibid.* 22).

28% of respondents in Nicholson & Harrison's study reported problems arising from delays in or non-response to mutual legal assistance requests whilst 86% felt the process to be too time-consuming and unnecessarily bureaucratic (1996:23). The questionnaire results in Chapter 6 (*Question 17*) revealed that investigators still experience frustrations at the lack of timely responses in mutual legal assistance matters (Boxes 1, 4 & 5, Chapter 6 above). Questionnaire respondents reported three instances of prosecutions discontinued due to lack of requested foreign evidence; two instances of reduced charges being preferred; and seven instances of investigations abandoned or not even attempted because of the problems encountered or anticipated with mutual legal assistance.

Interview evidence gathered in chapter 7 reinforces the questionnaire evidence. Requested evidence arrived too late for use at trial or has never been furnished at all, in CS2, CS3, and CS5. In CS6 the inability of Interpol to provide timely assistance prompted investigators to make their own enquiries, keeping Interpol appraised as they did so. The prosecutor in CS6 also reported that it was his general experience that a wait of two years for evidence to be furnished via mutual legal assistance channels was not unusual. As was seen, he catered for this eventuality by seeking to send investigators to accompany the ILOR or a copy of it wherever possible – a tactic also employed in CS3 where evidence was available at trial that was never formally provided through mutual legal assistance channels although it had been so requested. As demonstrated above, a number of SIOs and prosecutors warn of the dangers of losing evidence. None of the SIOs or prosecutors interviewed here reported having had to abandon a trial as a result of foreign evidence failing to arrive in time because they all argued they would proceed with the best evidence they had, whatever that might be at the time. But they did make the point that had requested evidence arrived in time it may well have persuaded some juries not to acquit certain defendants or it could have supported more serious charges or simply reinforced the charges laid and helped inform appropriate sentencing upon conviction.

Abandoned investigations, discontinued trials, and conviction on lesser charges: none of these outcomes are desirable in the unionwide fight against transnational organised crime. It is difficult to quantify these undesirable outcomes as a proportion of all investigations and prosecutions, and so discern the ratio of successful investigations leading to convictions on appropriate charges compared with the undesirable outcomes. Further work would need to be undertaken across the EU to ascertain whether this was a problem unique to adversarial Common Law systems or one experienced in all Member States. The evidence of this research merely highlights the issue. Further work would also need to be undertaken to identify the relative proportions of the various causes of failure in order to identify appropriate remedial strategies. In essence, this was the objective of the EU peer evaluation

review, but as can be seen in tabulated form in Appendix H, issues examined by the peer review do not necessarily coincide with issues experienced by practitioners.

Forced spontaneous tactical changes

The need for SIOs to respond quickly and with the maximum possible flexibility to spontaneous developments in proactive investigations was illustrated in both CS1 and CS4. Such flexibility is only required for the investigation of inchoate offences still in the process of being committed and is not an issue faced by investigators seeking available evidence of an historic crime. It presents particular challenges to a mutual legal assistance infrastructure geared primarily towards reactive investigative rather than proactive investigation. CS4 illustrates how complicated a proactive enquiry can become. The SIO and prosecutors deliberately structured their ILORs to cater as far as possible for this need for flexibility and it is worth noting that the spontaneous changes imposed upon them were a result not only of changes in the behaviour of the criminals under investigation but in the nature of support given to them by foreign colleagues.

Not an issue identified in either the EU peer evaluation or the questionnaire survey, nevertheless it reinforces the need for flexible and responsive co-operation mechanisms. The Joint Investigation Teams, discussed below (Chapter 9) may be a step towards achieving such flexibility within the Convention framework.

ILOR management information available

None of the interviewees was able to provide specific ILOR management information (despite advance warning of the questions) although some were able to quantify the number of ILORs issued. In all cases there were comments to the effect that reference to the case papers would be required to answer specific questions about how many ILORs, to which authorities, when replies were received and how long this had taken in measured time. Even in CS3, the only investigation studied here in which a senior investigator was assigned the sole responsibility of managing mutual legal assistance matters for the enquiry, no statistical data was available with which to quantify or measure the success of mutual legal assistance mechanisms.

This relative dearth of information is consistent with the findings both of the questionnaire survey (Chapter 6) and the EU evaluation (European Union 2001a:24). Evidence of delays was largely anecdotal and referenced not by how long a response took in terms of days, weeks or months but in terms of whether it arrived in time for trial. Granted the

latter is the key performance measure in terms of outcome rather than outputs, but the absence of specific management information about requests and delays impedes identification of process problems and so inhibits correction of those problems. The then Home Office Minister, Bob Ainsworth MP, conceded that his officials would be unable to provide data regarding mutual legal assistance performance because it "has not been scored and analysed centrally" (*HC Hansard, Standing Committee A*, 10 June 2003, col.64).

Comparison with 1996

Although the exact methodology could not be reproduced, it is useful to include a specific comparison with the principal findings of Nicholson and Harrison (1996: Executive Summary) as discussed in Chapter 5 above (pp.83-4).

Table 10: developments since 1996 in relation to the findings of Nicholson & Harrison

Nicholson & Harrison's findings 1996	Findings of this research 2004
Advanced fee fraud the most common type of offence necessitating mutual legal assistance	Fraud (including advanced fee fraud) remains the offence for which mutual legal assistance is most frequently sought, followed by murder and drugs trafficking.[3]
Experienced investigators obtained evidence from abroad more quickly than those unfamiliar with the process	*[Not tested but a truism that is likely to remain valid]*
From 1990-1996, US authorities provided the quickest average response to UK requests, Spanish authorities the slowest	Not specifically tested but research suggests that the US authorities are no quicker than any other. Indeed when the present author visited the FBI in Washington DC, the one case they chose to use as an example of a request which they were expediting urgently was a high profile murder for which the suspect had already been convicted. CS6 is a particular example where official contacts via Interpol and the US authorities were so slow, the officers contacted state authorities instead and obtained their own evidence in the US. The only jurisdiction commented upon favourably during the present research were the Dutch authorities.
Only one defendant had been acquitted as a result of time delays associated with obtaining evidence from abroad; 69 investigations or prosecutions had been abandoned as a result of such problems	Fewer examples of investigations or prosecutions frustrated by absence of foreign evidence (Table 8, Chapter 6) but this may be due to a smaller research sample. Note comments about alternative charging in CS5 and CS6.
Obtaining original documentation for use at was the most problematic aspect of securing evidence from abroad	*[Not tested]*
50% respondents felt Interpol needed to improve both its performance and its image	Not specifically tested but Interpol was the institution to which investigators were most likely to turn for assistance in gathering evidence abroad.
A number of minor abuses to the formal system were reported but none of these were commented on or tested at court	The situation does not appear to have changed since 1996.
Vast majority of respondents involved in gathering evidence abroad found it both bureaucratic and time-consuming	Despite EU claims to the contrary (*Final Report*:3), and positive action at UKCA to reduce backlogs, this remains a widely-held perception.
Few forces had guidelines or instructions on international evidence gathering	14 forces had internal guidance on making requests. 11 had similar guidance on executing requests. All ILOs have been issued with a Mutual Legal Assistance CD Rom by Interpol NCB London although the new Head of the NCIS Legal Dept regarded the advice therein as poor and in need of rewriting (pers.comm. October 2003)
Few forces consider alternative means or consider the effects of international evidence gathering in their case acceptance criteria	*[Not tested]*
Between 1990 and 1996 the requirement for UK officers to travel abroad had increased by 700%	Not tested in the same way as the 1996 survey. The majority of forces felt it necessary to deploy officers abroad in less than 25% of cases involving mutual legal assistance. The case studies indicate the value of foreign deployment and the innovation of JITs will formalise foreign deployment in investigations into crimes in action.
There was a universal desire for a centralised database of information about mutual legal assistance procedures and contacts	The NCIS, housing as it does both the Interpol NCB and the UK Europol Bureau, considers itself to be the gateway to foreign assistance for UK investigators. HMCE has its own specialist mutual legal assistance lawyers. Since 1996 both Eurojust and the EJN have been established; the latter with a specific remit to produce a mutual legal assistance 'atlas' for the EU which should address precisely the desire expressed by investigators in 1996

[3] What is noteworthy about this finding is that whilst fraud committed against the EU is a priority within the EU, fraud generally is not a priority crime for any police force in the UK except the City of London. It is not a priority crime under the National Policing Plan.

Underlying the superficial improvements since 1996 there is a substantial difference. There is now a political impetus driving international law enforcement co-operation, especially within the EU. This has led to the construction of a co-operative and assistance-focused infrastructure that was unheard of in 1996. Countering the political impetus at the transnational level is the political focus on local policing; dealing with volume crimes and violence that fuel the widespread fear of crime (National Policing Plan).

As a post-script to the 1996 survey, it will be recalled that there was severe criticism of the UKCA. The UKCA has enjoyed increased staffing to help reduce the backlog of requests and better manage the workload. It also has enjoyed a higher profile as the policy lead on mutual legal assistance in the Home Office as international law enforcement co-operation and co-ordinated action against transnational organised crime rise up the political agenda. But as the Home Office review of mutual legal assistance has noted "with the growth in international crime, and the increase in political focus on effectively countering the threat it poses, greater demands are made on the system than were contemplated when the UKCA was set up" in 1990 (Home Office 2004a:10).

Conclusion

The formal recommendations made by the EU evaluation team to the Home Office centre on the restructuring of the UKCA and legislative changes to bring into domestic effect the provisions of the *EUCMA* (European Union 2001c:58-60). The legislative changes have been provided for mainly by the *C(IC) Act 2003* even if they are not yet all in force. A review commissioned in March 2000 to consider the future structure and role of the UKCA was suspended in the wake of the September 2001 terrorist attacks and the needs to respond to America's subsequent war on terror. It was re-commenced only in January 2004 with the circulation amongst interested parties of a consultation document entitled *Home Office Review of Mutual Legal Assistance: A Consultation Document for Law Enforcement/Prosecution Agencies and Relevant Government Departments.*[4] A number of options were offered for consideration all of which sought to find the best fit between the infrastructure of a Common Law system based around 43 police forces and prosecution areas and the "vision within Europe [which] is now for direct communication between competent judicial authorities" (Home Office 2004a:14). Almost immediately the options offered were circumscribed by subsequent developments, namely the publication of a White Paper

[4] The present author, as a member of the Mutual Legal Assistance Forum, received a copy and responded in a personal capacity citing the findings of this research. The author initially attended the forum as a representative of the NHTCU. He now attends in a private capacity as a ESRC-funded researcher studying mutual legal assistance. HMCE is represented at the forum by lawyers rather than investigators. The current Head of UKCA is a seconded HMCE lawyer.

reviewing the future of the NCS, the NCIS and HMCE and the whole UK response to transnational organised crime (Home Office 2004b). At the time of writing, the conclusion of both these consultations is awaited.

Of all the EU recommendations to the UK, only that seeking to address the speed and efficiency of request execution (the recommendation to adopt direct transmission of requests) addresses concerns raised by investigation practitioners. What this dichotomy serves to illustrate is the different perspectives on mutual legal assistance held by policy-makers/administrators and practitioners. There is no real surprise in this dichotomy. The real surprise is in the fact that, even in the Mutual Legal Assistance Forum, established by the Home Office to consult mutual legal assistance participants, it still has not been properly recognised. This is possibly because the forum membership is still heavily weighted towards civil servants and lawyers and has relatively few investigation practitioners. And whilst there are police representatives on the forum, they each represent vested interests rather than the police service (the NHTCU, the MPS Mutual Legal Assistance & Extradition Section, the City of London Fraud Squad and Kent County Constabulary). The absence of ACPO and NCS representation has been notable. As a direct consequence of this point being made by the present researcher in a written response to the MLAF Review, a senior NCS officer and the NCS International Policy Advisor were invited to join the forum, and NCIS were represented by a more senior officer.

Traditional administrative approaches towards mutual legal assistance prevail despite the fact that "international co-operation generally is a much more sophisticated process than when the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters was agreed", (Home Office 2004a:14).

Chapter 9

Mutual legal assistance in the twenty-first century

It has been a persistent theme of the present UK government for half a decade that law enforcement needs to depart the nineteenth-century and use twenty-first century methods against twenty-first century crime. The point was first made by the then Home Secretary, Jack Straw, to an EU seminar on judicial co-operation at Avignon, France (speech by Jack Straw, 16 October 1998).[1] It was re-iterated by the Prime Minister (*The Independent*, 1 September 2000, p.1) and subsequently by Home Secretary David Blunkett (*HC Hansard* 29 November 2002 col.666), and again by Home Office Minister Caroline Flint, who in particular emphasised the role of international co-operation: "we believe that in the twenty-first century – with regard to communications, travel and very serious crimes – closer collaboration is essential", (*HC Hansard, Standing Committee A*, 19 June 2003, col.268). It has been the rationale that has underpinned root and branch reform (*Anti-terrorism, Crime and Security Act* 2001 [ATCS], *Proceeds of Crime Act* 2002, *Police Reform Act* 2002) and radical White Paper proposals for changing the way in which intervention and enforcement against transnational organised crime is executed (*One Step Ahead: a 21st Century Strategy to Defeat Organised Crime*, Home Office 2004b). Yet before the commencement of this research in October 2000, a Home Office official observed to the present author that whilst the UK may have just signed the *EUCMA* (29 May 2000), for many reasons it was very unlikely the UK would ratify the convention in the life-time of this PhD (interview, Lorna Harris, then Head of UKCA, 29 August 2000): a not-unreasonable prediction given the relative inertia past UK administrations have demonstrated in relation to mutual legal assistance and international law enforcement co-operation (as discussed in Appendix A).

To the political impetus provided by Tampere – for which, with hindsight, Straw's Avignon speech may be viewed as but one harbinger – was added the political expediency of fighting the 'war on terrorism', launched by US President George W. Bush in response to the terrorist attacks against New York on 11 September 2001. The rush to be seen to be responding robustly to the attacks gripped the EU (*Conclusions and Action Plan of the Presidency*, Extraordinary Informal meeting of the European Council, Brussels, 21 September 2001; Mitsilegas *et al.* 2003:122, 124, 164-5), one of the measures being an aspiration to have the *EUCMA* fully ratified by December 2002. In an attempt to meet this deadline, the UK government sought to give effect to international obligations through secondary legislation

[1] I am grateful to the Home Office for supplying me with the text of this unpublished speech.

under Part 13 of the *ATCS Act*; an unprecedented mechanism for achieving domestic effect for international obligations which ultimately failed because the government could not meet stringent deadlines set by the House of Lords. The *Police Reform Act 2002* gave effect to the provisions of Article 13 *EUCMA* (JITs) before the UK ratified the *EUCMA* on 31 October 2003 when the *Crime (International Co-operation) Act* [C(IC)A] was enacted. This maelstrom of measures aimed at combating the perceived threat of terrorism, often linked in political debate with transnational organised crime, has not been without consequences for what might be termed routine, daily transnational law enforcement.

Because of all these changes, it has been deemed necessary to update this research with additional consideration of the new measures in order to provide a meaningful context within which to consider the conclusions drawn in Chapter 8. Unconventional though this is for a PhD structure, circumstances dictated this course of action.

This chapter considers developments in the domestic and international framework of mutual legal assistance and international law enforcement co-operation instruments that have taken place during the course of this PhD as the UK positions itself for tackling transnational crime in the twenty-first century within the context of EU. Firstly there is consideration of various international law enforcement co-operation initiatives already in place designed to facilitate co-operation outside the formal mutual legal assistance framework in such a way as to enhance the operation of mutual legal assistance. The chapter then looks towards the future with consideration of both on-going developments in the legal and constitutional framework at the European level in respect of evidence-gathering and JHA issues, a consideration of the implications for citizens' rights, and discussion of relevant policy reviews currently being undertaken within the UK.

International law enforcement co-operation: the ECPOTF and JIT initiatives

The data in chapters 6 and 7 revealed the high value placed by investigators on good working relationships with their foreign colleagues when mutual legal assistance and international law enforcement co-operation is required. The better the working relations, the more chance of a successful request execution and positive assistance being afforded. In the case studies there are examples of parallel investigations and joint investigations, arranged on an *ad hoc* basis, case by case.

The *Tampere Conclusions* and the *EUCMA* each contain initiatives to formalise such relations where formality would add value. At the strategic and tactical levels, the European Chief Police Officers' Task Force [ECPOTF] was established as a forum for police leaders concerned in transnational crime. Its effectiveness is limited by the parallel existence of

different police agencies within many Member States leading to confusion about which agency should represent any given Member State. The UK is represented by the Director General, NCS (the domestic jurisdiction of which is confined to England and Wales only). The Task Force has organised specific 'days of action' and has facilitated some joint operations between Member States, for instance against human trafficking, transnational vehicle crime and on-line paedophile offending (interview, Bill Hughes, Director General NCS and UK representative on the ECPOTF, London, 27 November 2002). In the aftermath of 9/11 and the continuing 'war on terrorism' the ECPOTF is now tasked with reviewing how its operational capacity can best be reinforced to focus on proactive intelligence relating to terrorism (*JHA Council 2588th Meeting*, 8 June 2004, 9782/04 (Presse 173):pp.9 & 11; *Brussels European Council Presidency Conclusions*, 17-18 June 2004, 10679/04, paragraph 15).

At the operational level, the concept of the Joint Investigation Team [JIT] has been introduced. Article 13(1) *EUCMA* 2000 states:

> By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement.
>
> A [JIT] may, in particular, be set up where:
>
> a) a Member State's investigations into criminal offences require difficult and demanding investigations having links to other Member States;
> b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate co-ordinated, concerted action in the Member States involved.
>
> A request for the setting up of a [JIT] may be made by any of the member States concerned. The team shall be set up in one of the Member States in which the investigations are expected to be carried out.

The key feature of JITs in terms of improving mutual legal assistance lies in the mechanism provided for avoiding mutual legal assistance altogether. Article 13(7):

> Where the [JIT] needs investigative measures to be taken in one of the Member States setting up the team, members seconded to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in the Member State under the conditions which would apply if they were requested in a national investigation.

The twelve sub-sections of Article 13 provide the rubric for JITs. The teams will be led by an officer from a competent authority in the Member State in which the team is operating at the time. The domestic law of this Member State will apply. (Thus leadership and local law could vary during the course of a single investigation if the geographical locus of criminality shifted as it did in CS4 above.) There are arrangements for intelligence-sharing

between team members seconded from different foreign agencies. Members of Europol, Eurojust or OLAF may be co-opted in a non-operational capacity into JITs (Article 7, *Council Recommendation on a Model Agreement for setting up a Joint Investigation Team*, 7061/03, CRIMORG 17, 7 April 2003). The initiation of a JIT is achieved by means of an ILOR although, as has been seen, JIT infrastructure is intended to minimise the need for further recourse to mutual legal assistance mechanisms, unless the authorities of a non-EU State are invited to participate, in which case requests for action and assistance between the JIT and those authorities would have to be by mutual legal assistance (Home Office Circular 53/2002:paragraph 9).

Pending the coming into force of the *EUCMA* (upon ratification by eight EU States), a Council Framework Decision [CFD] mirrors Article 13 to give early effect to these measures (*Council Framework Decision of 13 June 2002, OJ* L 162/1, 20 June 2002: Article 5 of the CFD provides the sunset clause linking the lifetime of the CFD to the entry into force of the *EUCMA*).

Upon the initiative of the Greek government (JHA memo dated 24 January 2003, JAI/B3/FP/MW),[2] a *Council Recommendation for a Model Agreement for setting up a Joint Investigation Team* has been drafted (7061/03 CRIMORG 17, 7 April 2003). This provides guidance and a template for the composition and conduct of a JIT.

For all this, in many EU Member States (including for instance the UK and Sweden) it is possible through the permissive nature of relevant domestic legislation for JITs to be set up without the CFD being enacted into domestic legislation. Which begs the question, what is the added value of the CFD and Model Agreement? In the view of EU officials, these instruments bring the added value of clarity into a previously *ad hoc* arena and promote operational consistency (interview, Frederico Prato, JHA Directorate, European Commission, Brussels, 15 May 2003).

A deadline of 1 January 2003 was set for Member States to enact domestic legislation giving effect to the CFD, and subsequently the *EUCMA*. Only the UK and Finland met that deadline, although other Member states have subsequently legislated accordingly. Despite many positive messages declared at an EU conference on JITs held in Dublin, 7-9 October 2002, in which Member States set out their legal positions in respect of JITs, as of May 2003 seven Member States had yet to report their progress in this regard to the European

[2] I am grateful to Frederico Prato at the European Commission for providing me with access to this internal memorandum and relevant conference papers. Signor Prato is the European Commission JHA official with direct responsibility for JIT implementation.

Commission.[3] A report on implementation of JIT legislation was scheduled for completion in July 2004 but at time of writing has yet to be publicly available.

Attitudes to domestic enactment have varied across the EU. In Finland, statute law enacted 30 December 2002 and effective from 1 January 2003 exactly reproduces elements of the CFD and *EUCMA*:

> While a team is operating in a foreign state, if it proves necessary for investigations to be carried out in Finland, the investigations shall, if so requested by the Finnish member, be carried out under the same conditions as they would be if the offence in question had been committed in Finland. (§5, Law 1313/2002)

In England and Wales, the need for new legislation was considered minimal and was confined to provisions regarding the criminal and civil liability of foreign team members operating in England and Wales (*Police Reform Act* 2002, §103) and assaults on foreign team members whilst operating in England and Wales (§104). Given that any JIT operating in the UK would be doing so, pursuant to the CFD and Convention, in accordance with relevant UK laws, there was no further need to legislate specifically for their investigations since coercive powers will only be executed by UK investigators, with foreign seconded members of the JIT being allowed observer status when such enforcement was carried out.

Noting that there is "no obligation to set up a JIT if less formal ways of working are more appropriate" (Home Office Circular 53/2002:paragraph 7), the UK government observed that whilst existing *ad hoc* arrangements had generally worked well, there was an increasing need in combating transnational crime "for clarity and consistency in the way investigations are conducted and information is exchanged so that evidence is admissible in the courts. There is also a need to ensure that the rights and duties of foreign members of teams are not in doubt" (*ibid.*:paragraph 3).

Despite the consensus regarding the clarity that the new framework brings to such co-operative working, unspecified various practical difficulties have meant that whilst informal JITs continue as they did before in those States with permissive regimes, no formal JITs pursuant to the *EUCMA* have yet been established anywhere in the EU (Rosana Mirkovic, Home Office, email to author, 16 August 2004).

[3] Research interviews were conducted during the 14 and 15 May 2003 at the JHA Directorate of the European Commission. The author is grateful for what one EU official described as unprecedented academic access to the relevant JHA departments.

International law enforcement co-operation: liaison magistrates

On 22 April 1996 the Council of the EU adopted a *Joint Action* concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the Member States of the EU (*OJ* L 105/1 27 April 1996, 96/277/JHA).[4] The UK simply did not see "the necessity" of such bilateral exchanges (UKCA 2001a:1) and so did not appoint any UK liaison magistrates for posting to foreign jurisdictions. The Home Office did, however, accept foreign liaison magistrates into the UK, initially from France, then from the US and subsequently from other EU States. Only in 2001 did the UK decide to establish its own liaison magistrates overseas (*ibid.*). The UK now has liaison magistrates in Madrid, Paris, Rome and Washington.[5]

Liaison magistrates are magistrates (in the Civil Code sense) or prosecutors whose role is "to encourage and accelerate all forms of judicial co-operation in criminal, and where appropriate, civil matters" (*Joint Action*, 96/277/JHA, Art.2) pursuant to the overall aim of increasing "the speed and effectiveness of judicial co-operation" and of pooling information about each other's criminal justice systems (*Joint Action*, 96/277/JHA, Art.1(3)). They are usually posted to the justice ministry in the host jurisdiction but also liaise closely with their national embassy in the host nation. Exchange of information and explanation of their own jurisdiction's laws and procedures is part and parcel of this encouragement. The then US liaison magistrate posted to the Home Office, Su Zann Lamb, provided the present author with valuable introductory insights during preparation for a research fellowship in Washington in 2001.

UK liaison magistrates are CPS lawyers and they regularly report on their work to the Mutual Legal Assistance Forum at the Home Office. Numerous successes are reported and the exchanges clearly work well to the mutual benefit of all concerned. The key success factor, resonating with the observations noted in Chapter 8, would appear to be the establishment of personal working relationships that then provide the foundation upon which to facilitate the transactions of official business through effective communication. Examples invariably involve the liaison magistrates resolving confusion on either the part of the requesting or requested authority. They can explain why a request is or has to be structured a particular way thus preventing delays caused by the rejection of requests for redrafting. Where clarification of a request or evidence derived from a request is required, they are on hand to obtain or provide such guidance. They have been able to explain the role of the disclosure officer in

[4] The first such exchange of liaison magistrates took place in 1993 between France and Italy.
[5] As of May 2003 the following European nations were participating in the framework: the Czech Republic, Estonia, Finland, France, Germany, Holland, Italy, Russia, Spain, and the UK. The following non-European jurisdictions had established exchanges with European States: Canada, Morocco and the US (David Clark, then UK liaison magistrate in Paris, seminar, Trier, 15-17 May 2003).

relation to English investigations thus obtaining permission for a disclosure officer to travel to a foreign jurisdiction to make further enquiries for disclosure purposes when such a request might otherwise have been summarily dismissed (CPS 2003:24-27). The successes cited by the CPS not only demonstrate how liaison magistrates have helped mutual legal assistance, they also demonstrate how, in the absence of this role and function, the current mutual legal assistance system cannot work as effectively as is needed.

One new area of work in which liaison magistrates anticipate that they will play an important role involves the European Arrest Warrant [EAW – about which, more below] where the key issue will be the speedy acquisition of accurate and complete information, reinforced by tight statutory timescales intended to deliver expedited extradition. Specifically they will be in a position to advise on initial documentation, to assist local prosecutors at court hearings, to advise on the nature of the offence and any dual criminality issues, to provide a channel of communication for additional information and to discuss with the host/requested jurisdiction the nature of any reply to requests for additional information (David Clark, then UK liaison magistrate in Paris, seminar on the EAW, Trier, 15-17 May 2003).

There is undeniable functional overlap – and therefore a risk of too many working relationships - between the expanding network of liaison magistrates, the European Judicial Network (for Central Authorities and other experts) and Eurojust (for prosecutors). Representatives from each network would argue, with justification, that although there is overlap in some functionality, each offers something unique to overall aim of judicial co-operation between States: members of the EJN include officials perhaps better placed than others to influence the development of policy; Eurojust, located at The Hague, offers a central hub of communication and co-operation whilst the liaison magistrates provide for their home nations, a particular domestic expertise in law and language in relation to their host jurisdiction. (Clark *ibid*,; Kennedy interview, London, 13 December 2002; Angel Galgo, Secretary to the EJN, presentation to the Mutual Legal Assistance Forum, Home Office, 30 January 2004).

International law enforcement co-operation: The *Schengen Convention* 1990

In July 1984 France and Germany agreed to lift border controls between their two countries. In October that year Belgium, Luxembourg and the Netherlands joined the agreement. The following year, on 14 June 1985, this agreement was formally signed as the *Schengen Agreement* (subsequently renamed the *Schengen Accord*). In 1990 what had begun as a consensus objective to work towards the gradual abolition of controls at common

frontiers acquired an institutional structure and formal instruments with the *Schengen Implementing Convention* and by 1996 the number of EU Member States that had signed the 1990 Convention had risen to thirteen. Of the EU States only the UK and Eire had not participated. Iceland and Norway had become associate signatories of the Convention and there was political pressure for the *Schengen Convention* to be adopted within the EU framework which ambition was achieved in the *Treaty of Amsterdam*, 1997.

Having a common land border with only one other EU State, and anxious to preserve the special nature of its geopolitical borders, the UK government initially asserted that it had no wish to participate. The House of Lords Select Committee on European Communities monitored developments closely (1998b, 1998c,) and eventually concluded that "in the three main areas of Schengen – border controls, police co-operation (Schengen Information System)[SIS] and visa/asylum/immigration policy – there is a strong case for full United Kingdom participation". The Committee went on to express the concern that disengagement from the *Schengen Implementing Convention* would diminish UK influence over other JHA policy developments and that "weaker UK influence over the development of European polices will mean that such policies will reflect the preferences of others and fail to take into account particular UK concerns" (1999c:paragraph 59). On 12 March 1999 the Home Secretary announced at the JHA Council that the UK government was:

> "ready to participate in law enforcement and criminal judicial co-operation derived from the Schengen provisions, including the SIS. We have been in the forefront of EU co-ordination in the fight against crime and drugs and we shall maintain that position." (quoted in House of Lords 2000a:paragraph 11).

The Irish government announced a similar intention at the same meeting which took place a few months before the Tampere Special European Council on JHA. Details of the UK's application and the decision to admit the UK to certain articles of the *Schengen Convention* are outlined in a report by the House of Lords Select Committee on the European Union (2000a).

The *Schengen Acquis* (the collective name for the portfolio of the Accord, the Convention and various protocols and other supporting documents) sits outside the framework of traditional mutual legal assistance instruments because, in relation to its police and border co-operation measures, it is essentially a formalisation of international law enforcement co-operation. It makes provision for the exchange of intelligence and information rather than evidence. It defines the operational parameters for investigators dealing proactively with criminals seeking to utilise the crossing of borders to frustrate

investigators. The formalisation of such practical co-operation is a significant step in the expansion of the concept of mutual legal assistance.

In respect of the Convention's police co-operation measures, the guiding principle confirms that this is about operational assistance and that the coercive judicial measures for securing evidential assistance remain matters for mutual legal assistance:

> "The Contracting Parties undertake to ensure that their police authorities shall, in compliance with national legislation and within the limits of their responsibilities, assist each other for the purposes of preventing and detecting criminal offences, insofar as national law does not stipulate that the request be made to legal authorities and provided the request or the implementation thereof does not involve the application of coercive measures by the requested Contracting Party. Where the requested police authorities do not have jurisdiction to implement a request, they shall forward it to the competent authorities." (Article 39, *Schengen Implementing Convention*, 1990).

The key police co-operation measures are cross-border surveillance (Art.40), hot pursuit (Art.41), the establishment of dedicated communication structures for cross-border policing (Art.44), the spontaneous exchange of information (Art.46) and the SIS (pan-European computer access to information about, inter alia, wanted persons, stolen property and criminal records: Title IV). Of these, the first two articles deal with the spontaneous operational deployment of agents from one State into the territory of another, once the sort of prohibited action that mutual legal assistance (along with extradition) was originally intended to render unnecessary.[6]

The cross-border surveillance provisions allow officers conducting surveillance of a suspect in their own territory (State A) to continue their observations in the territory of another contracting party (State B) in the event that the suspect crosses their mutual border, subject to prior authorisation and until the authorities of State B can take over the surveillance for the remainder of the time that the suspect in located within their territory. In the event of a spontaneous and unheralded border crossing, in which case prior authorisation would be impossible, the officers of State A must immediately notify the authorities of State B and may maintain their own surveillance for a period up to five hours from the moment they crossed the border in order to allow the authorities of State B the time necessary to arrange to take over the surveillance. In these circumstances officers from State A maintaining their surveillance in State B "may neither challenge nor arrest the person under observation" (Art.40(3)(f)). There are further qualifications that include the limiting of such authority to

[6] The concept of 'hot pursuit' is derived from the ancient legal concept of 'fresh pursuit'. Hot pursuit has only been codified in relation to the international law of the sea. In respect of hot pursuit across land borders it is expressly prohibited except where permitted by bilateral treaty: Poulantzas 2002:1-13. In 451 pages on the international law of hot pursuit, Poulantzas makes no reference to the *Schengen Implementing Convention*. A further indication that international law enforcement co-operation is not regarded as comprising part of international law.

cross borders to certain police forces and for certain offences only. Officers who cross a border must have the means to identify themselves and prove they are acting in an official capacity (Art.40(3)(c)) and (except in the cases of spontaneous and unheralded border crossing) be in possession of written authority permitting their surveillance (Art.40(3)(b)).

Whilst these provisions could include overt surveillance conducted by uniformed officers (if they were members of police agencies designated under the Convention), they are primarily intended for circumstances in which covert surveillance is being conducted. Article 41, hot pursuit, is specifically limited to uniformed operations, or least to police staff and vehicles that are clearly and visibly identified as such (Art.41(5)(d)). Once again the power applies to specified offences. The suspect must either be trying to escape having committed such an offence or be in the act of committing such an offence. In instances of hot pursuit by investigators from State A into the territory of State B, only officers from State B may arrest the suspect although in urgent circumstances officers from State A may detain the suspect pending the arrival of officers from State B to effect the arrest. Neither the provisions for Art.40 or Art.41 permit the officers from State A to enter homes or private places or undertake coercive investigative actions. Crucially, hot pursuit can only be conducted over *land borders* (Art.41(5)(b). The UK shares only one land border with another EU Member State, Eire, and given special bilateral measures already in place, neither jurisdiction has sought to accede to Article 41.[7]

It was expedient to incorporate domestic measures necessary to give effect to UK *Schengen* obligations, such as they are, within the *C(IC) Act* 2003. The lengthy debates, particularly in relation to the *Schengen* provisions, reveal much about prevailing attitudes within the UK political arena towards international law enforcement co-operation and mutual legal assistance.

The *C(IC) Bill* was introduced in the House of Lords and there had its Second Reading on 2 December 2002, having been announced in the Queen's Speech a few days earlier. Lord Stoddart of Swindon illustrated the depth of opposition early in the debate by evoking the gratuitous imagery of jackbooted foreign police officers trampling at will throughout the kingdom.[8] In a direct reference to the intention to give effect to UK obligations under Article 40 he argued: "it is totally unacceptable to allow police and customs officials from other countries to operate unaccompanied and unsupervised in the United Kingdom for any period of time", (*HL Hansard*, 12 December 2002, col.1007). For Lord Stoddart this was

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[7] The Irish government also opted out of Art.40 because of the sensitivities surrounding its border with Northern Ireland (*HC Hansard Standing Committee A*, 19 June 2003, col.249).

[8] In closing the debate for the Government, Lord Filkin invited Lord Stoddart and fellow peers to consider whether they would prefer foreign police officers or foreign criminals to enter the UK (*HL Hansard*, 2 December 2002 col.1017.

the "thin end of the wedge" that would inevitably lead to "the establishment of a European federal bureau of investigation" (*ibid.*).[9]

The technical confusion over the distinction between cross-border surveillance and hot pursuit persisted throughout the Bill's parliamentary passage. Baroness Anelay, leading for the Opposition, referred variously to "hot surveillance", "hot watch" (*HL Hansard* 2 December 2002, col.977; *HL Hansard* 3 February 2003, col.GC4) and "surveillance" (*HL Hansard* 29 January 2003, col.GC201). Lord Filkin, for the Government, made a patient distinction between 'surveillance' and 'hot pursuit' for the noble lords (*HL Hansard* 29 January 2003, col.GC205). However, a few days later the Opposition were once again bemoaning the issue of "hot surveillance" (Lord Carlisle of Bucklow, *HL Hansard* 3 February 2003, col.GC5) and questioning why it was that foreign surveillance teams might be allowed up to five hours operating in the UK before domestic authorities assumed responsibility for continuing the surveillance (*ibid* & Baroness Anelay, *HL Hansard* 3 February 2003, col.GC4). The Government's answer was unconvincing, relying as it did upon the fact that five hours is stipulated in the *Schengen Convention*, in the drafting of which the UK took no part (Lord Filkin, *HL Hansard* 3 February 2003, col.GC7). Without giving away sensitive tactical information it could reasonably have been argued that, given no prior notice as to time or location, it can take up to five hours to assemble the necessary resources to mount effective surveillance which was why that limit was implemented in the *Schengen Convention*. Lord Filkin further noted that practical experience of the measure's operation on continental Europe has been positive, and it appears to be working well.

The confusion persisted throughout the Commons committee debates on the Bill despite the intervention of Elfyn Lloyd MP who, in response to concerns expressed by Greg Knight MP (following the lead given by Lord Stoddart) about "foreign police officers roaming around the English countryside" (*HC Hansard* 1 April 2003 col.840), felt it helpful to point out that "having a fully dressed gendarme following someone through the streets of London would not be clever surveillance" (*HC Hansard* 1 April 2003, col.841). Apparently lacking tactical awareness of the resources involved, Mark Simmonds MP could see no reason why English authorities could not mount a full spontaneous surveillance operation in the "one hour" it takes to cross the English Channel (*HC Hansard, Standing Committee A*, 19 June 2003, col.250). Nick Hawkins MP sought to have the expression "hot surveillance" inserted into the Bill (*HC Hansard, Standing Committee A*, 19 June 2003 col.243) thus equating surveillance with hot pursuit whilst at the same time introducing confusion and an alien concept into the precise translation of the *Schengen Convention* Title III into UK law (*ibid.*).

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[9] For the Government Lord Filkin asserted: "we are against the EU FBI idea or proposal" (*HL Hansard*, 2 December 2002, col.1017.

David Heath MP described the talk of 'hot surveillance' as "an awful lot of nonsense" (*HC Hansard Standing Committee A* 19 June 2003 col.245) and the Home Office Minister, Caroline Flint MP, spent a significant amount of time reiterating the distinction between surveillance and hot pursuit for the benefit of MPs (*HC Hansard Standing Committee A* 19 June 2003 cols.251-55).

Two aspects of these exchanges disturb the external observer. Mark Hammonds' question demonstrates an understandable lack of awareness about resources required for surveillance tactics. Had he be briefed by law enforcement he might not have asked the question. The Government could not directly answer the point because in doing so sensitive and confidential information would have been placed in the public domain via *Hansard*. This illustrates the constraints within which legislators sometimes operate when debating proposed laws in public.

The second concern is the apparent lack of familiarity with the text and meaning of the *Schengen Convention*. Given that the Convention is a matter of public record to which MPs have access, this is less excusable. The Government eventually placated some of malcontents by proposing an amendment (which itself was slightly amended by the Opposition) that reinforced the text of the Convention by making it unlawful for foreign officers on surveillance in the UK to challenge (i.e. stop and question) and arrest persons under surveillance (*HC Hansard* 14 October 2003, cols.66-74). There appears to have been no legislative necessity for this since such actions are expressly prohibited in the Convention (Art.40(3)(f)) , although it had undoubtedly become politically expedient by that stage.

And the fact that it was politically expedient illustrates the mistrust that MPs had in the *Schengen* text and its interpretation. The UK's lack of input into the drafting of the Convention was the subject of debate three times (*HL Hansard* 3 February 2003 col.GC7; *HC Hansard* 12 June 2003 col.SCA89; *HC Hansard* 1 April 2004 col.854). There was a sense that it was not a good thing to try and translate a 'foreign' instrument into domestic law. The lack of trust in the criminal justice systems of other States (including those of EU partners) was evident on eight occasions during the Commons debate (*HC Hansard* 1 April 2003, cols.820, 821, 828, 829, 833, 838, 839/40, and 849). There was concerted opposition to any innovation that smacked of either a European FBI (*HL Hansard* 2 December 2002, cols.1007, 1017), or a European public prosecutor (*HC Hansard* 1 April 2003, col.810/1).

Table 11: References to mutual recognition and reciprocity

References to Mutual Recognition in the C(IC) Bill debates	References to Reciprocity in the C(IC) Bill debates
HL 2 December 2002 col.973	HL 27 January 2003, col.GC136
HL 29 January 2003 col.GC210-1	HL 29 January 2003, col.GC225
HL 3 February 2003 col.GC23	HL 3 February 2003, col.GC6; GC7
HL 3 March 2003 col.648	HL 25 February 2003, col.GC190
HL 17 March 2003 col.44	HL 3 March 2003, col.669
HC 1 April 2003 cols.802; 853	HC 1 April 2003 cols.802; 807; 810; 813; 834
HC 12 June 2003 col.SCA88	HC 19 June 2003 col.SCA283
8	**12**

The government has placed great emphasis on mutual recognition and the need for reciprocity (see Table 11). Yet there were many views and questions expressed during the *C(IC) Bill* debates that suggested many parliamentarians remain unconvinced about the value of mutual recognition and the part that reciprocity has to play in facilitating international law enforcement co-operation and mutual legal assistance. Without trust neither reciprocity nor mutual recognition stand much chance of success (Mitsilegas *et al.* 2003:162-3). The trust and spirit of reciprocity that are so often found between investigators from different jurisdictions, and which form the foundation for international law enforcement co-operation, are difficult to formalise into treaty instruments in a way satisfactory to all. Investigators reading the debates might be forgiven for feeling disappointed at the lack of understanding of their issues and operational realities evident on both sides of the debate. As Bill Newton-Dunn MEP and supporter of a pan-European investigative operational capability (2004) observed, parliamentarians are generalists representing the public rather than specialist legislators addressing the needs of investigators (interview, 22 January 2004). And balancing the protection of the public interest and civil liberties against statutory excess in favour of the executive is the legitimate duty of parliaments but whether this is best achieved by the use of gratuitous imagery reflecting the xenophobia of the more euro-sceptic elements of the media is a moot point. Officials in the Civil Service and Treasury Counsel oversee the metamorphosis of government policy into law. The comfortable parliamentary majority of the Government ensured that, in this case, the expertise that informed the Bill was not over-ridden by the apparently less-well informed opposition views. But as has been noted already, even the officials in this case were informed mainly by their own perspective as mutual legal assistance administrators and a limited consultation with specialist vested interests rather than

the considered opinion of the police service as a whole. The lack of public awareness about organised crime and how it harms their local communities was noted during the debate (*HL Hansard* 3 March 2003, col.636; *HC Hansard* 1 April 2003, col.820). At times the level of debate about the *C(IC) Bill* will have done very little to illuminate the darkness.

The *Schengen Convention* extends the framework of mutual legal assistance instruments to include operational issues more akin to international law enforcement co-operation than traditional mutual legal assistance. In doing so it enhances co-operative effort by seeking to overcome real practical problems faced by investigators whose subjects are likely to exploit national borders in an attempt to frustrate law enforcement.[10] Nevertheless in implementing such measures alongside the more conventional mutual legal assistance measures from the *EUCMA*, the passage of the *C(IC) Act* has illustrated how much has yet to be done to convince British politicians that this is a desirable way forward in the international effort against transnational crime.

European Developments: The Evidence Warrant [EEW]

Like the EAW before it in the arena of extradition, the EEW is intended to overcome the impediment to transnational investigations posed by the bureaucracy of mutual legal assistance. For British Parliamentarians it raises many of the same concerns as the adoption of elements of the *Schengen Acquis*.

The concept is simple enough. In a *Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters* published on 14 November 2003, (Com (2003) 688 Final; 2003/0270 (CNS)), the European Commission re-iterated mutual recognition as the cornerstone of judicial co-operation (*ibid.*:5). Pursuant to this philosophical foundation, the EEW would provide powers of search, production and seizure for physical objects, documents and data. It would not be applicable to the interviewing of suspects, the taking of statements or the examination of victims and witnesses (*ibid.*:7). Nor can it be used to initiate action or request the performance of investigations. It applies only to evidence already in existence (*Working Document on the Proposal on the [EEW]*, Committee on Citizen's Freedoms and Rights, Justice and Home Affairs, European Parliament, 13 January 2004, PE 339.590).[11]

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[10] It will be recalled from Case Study 1, Chapter 7 above, how Schengen provisions enabled constant surveillance to be maintained despite the suspect's attempts to lose the surveillance teams by crossing borders.

[11] I am grateful to Bill Newton-Dunn MEP, member of the European Parliament Committee on Citizen's Freedoms and Rights, for providing me with a copy of this working document.

As the Commission explicitly recognises, this would create a two-tier regime in which some evidence could be obtained by a domestic judicial order executed directly in the requested State whilst other evidence relating to the same investigation would necessitate the issuing of an ILOR under the existing co-operation regime. The Commission therefore makes clear that this proposal is an interim step towards a single mutual recognition instrument, applicable to all forms of evidence that would replace mutual legal assistance (Com (2003) 688 Final.:9-10).

The latter concept is a long way from achieving fruition. The initial step, the EEW, has yet to be agreed and there is much debate yet to be held over the protection of the rights of the accused. An order to obtain evidence "has many different meanings in the Member States' procedural laws" (*ibid.*:9). To resolve any confusion arising from this, the Commission proposes that an EEW would "specify only the objective to be achieved ... Although it is mandatory under the [EEW] to obtain the evidence, it is left to the executing State to determine, in the light of the information supplied by the issuing State, the most appropriate way to obtain the evidence in accordance with its domestic procedural law" (*ibid.*). For minimum safeguards the Commission relies upon the norms established in the *ECHR*, particularly under Article 6, the right to fair trial. On 26 July 2000, the Commission asserted that it must be "ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process" (*Communication to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters*, COM (2000) 495 Final). A Green Paper was published on 19 February 2003 on the procedural safeguards for suspects and defendants in criminal proceedings, explaining that divergent practices risked impeding mutual trust and confidence between different national jurisdictions (COM (2003) 75 Final). The Green Paper does not discuss protections in the context of the coercive measures proposed in the EEW draft Framework Decision, but the Commission argues that the EEW protections that are proposed are consistent with the principles of the Green Paper (Com (2003) 688 Final:11-12). The issuing judicial authority for an EEW would be a judge, *juge d'instruction* or prosecutor and the issuing authority "must be satisfied that it would be able to obtain the objects, documents or data in similar circumstances if they were on the territory of its own Member State." With considerable confidence the Commission states "this prevents the [EEW] from being used to circumvent national safeguards on obtaining evidence" (*ibid.*:12).

With considerable concern Christopher Murray, from his perspective as a private practice solicitor and part-time judge, argues that it does not (interview, 12 March 2004). When acting as a Recorder of the Crown Court, Murray could issue an EEW for execution in

another EU Member State that would translate the coercive powers applicable in England and Wales to the other State. There would be no discretion on the part of the requested State to refuse the EEW. It would have to execute the warrant in a way that was consistent with the domestic legislation. An accused person about whom evidence was being sought in such a fashion could be confident that the English judge would have to abide by statutory protections such as those of the *PACE Act* 1984 and so an EEW issued from England and Wales could not, for instance, seek the seizure of legally privileged material, as defined (*PACE Act* 1984 §10). But the same level of protection to such material might not be afforded in another EU State. In which case that other State could issue an EEW entirely consistent with its own domestic procedural law, that required the seizure of material in England that would normally be protected under English law. The EEW preserves and affords primacy to the protections of the requesting (or issuing) State not the requested (or executing) State. Once such material has been surrendered and used abroad, it has entered the public domain and can be used by investigators in England (in the same way in which foreign intercepted communications can be adduced). This could facilitate process laundering (otherwise known as forum shopping). It could be 'lawful' to break the law of the requested State using an EEW.

Currently, in relation to mutual legal assistance proceedings before an English court nominated by the Home Secretary to receive such a request, "the court has to consider when faced with an application involving the production of documents, any claim made by a person not to have to produce the documents as if the proceedings were domestic English proceedings. Thus English law and English considerations must apply" (Collins J in *R v Bow Street Magistrates' Court ex parte King*, unreported CO/3489/97, 8 October 1997, Queens Bench Division; discussed in detail in Murray & Harris, 2000:73).[12] As currently drafted, the EEW proposed Framework Decision over-turns that principle of English law. It means, perversely, that English investigators could have more coercive power when acting on foreign request than when acting pursuant to English law. It begs the important question, at which point would the accused person be able to challenge the process and assert his or her rights under *ECHR*? Such a challenge would not be possible in the issuing State because the objectives of the EEW would be lawful there. And challenge would not be possible in English courts because the EEW has direct effect and discretion is limited to the manner of execution only. Execution is mandatory under current proposals. None of the protections in relation to Evidence Freezing Orders, enshrined in the *C(IC) Act* 2003 (§21) are being suggested by the Commission for use in the EEW.

The concept of the EEW and its potential operative effect demands further study outside the scope of this thesis, hence reference here has been no more than introductory in

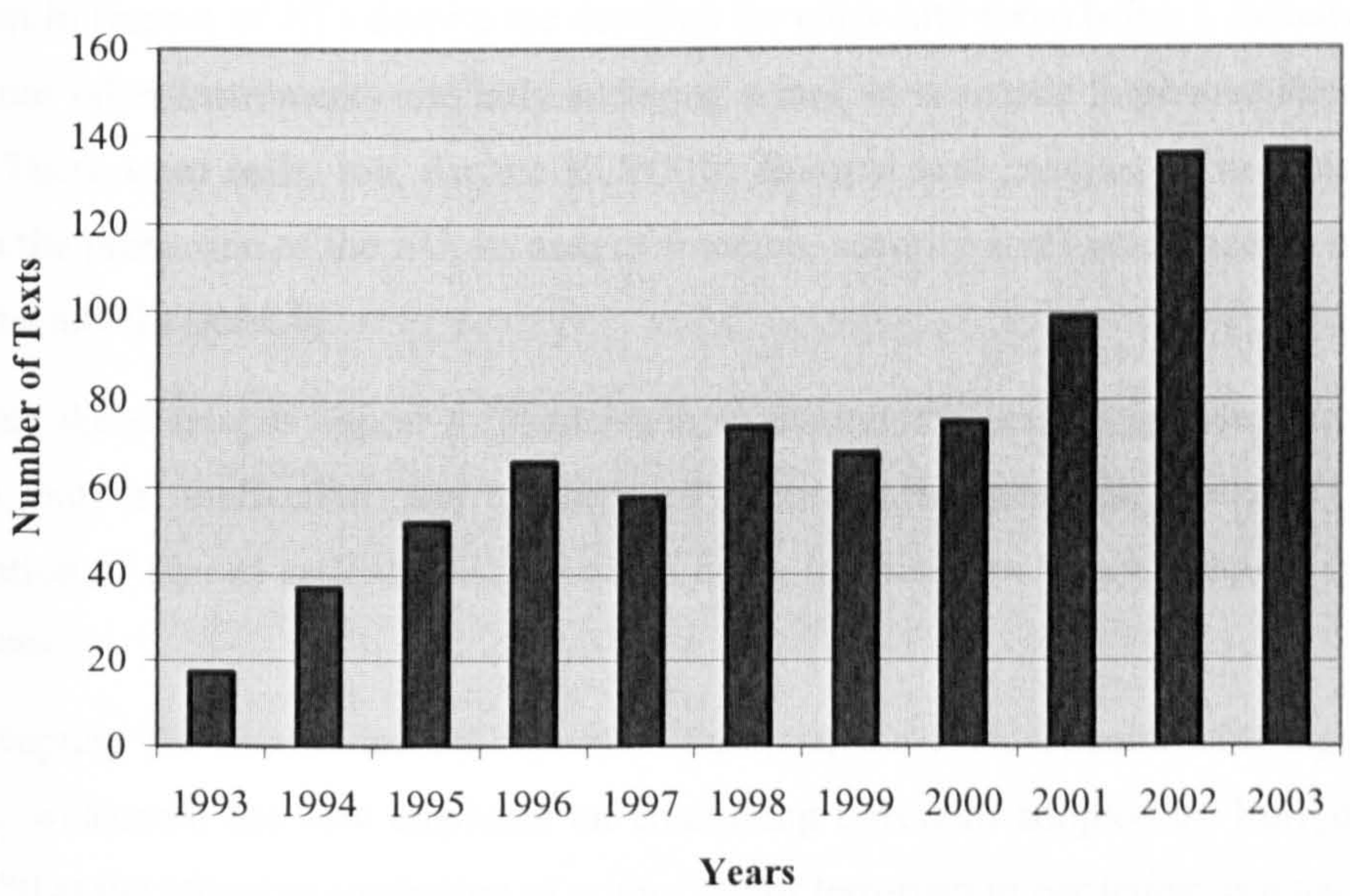
[12] I am grateful to Christopher Murray for alerting me to the significance of this ruling.

nature. In the context of the present study, the fact that such a concept is on the JHA agenda being actively driven by the European Commission is indicative of how far thinking on judicial co-operation has come since the *ECMA* was first proposed fifty years ago. It is seen by the European Commission as a preparatory step towards a single co-operative instrument based on pure mutual recognition. It remains to be seen whether, in promoting mutual recognition as more politically acceptable than harmonisation and a single EU criminal code, the UK government feels it could support such an extension of the principle.

European Developments: Policy and Constitution

The graph below (Figure 1: JHA texts adopted by the EU), based on statistics compiled by the author from information on the EU website (JHA pages), illustrates the significant rise in JHA instruments (Joint Actions, Framework Decisions etc) adopted by the EU over the past decade. Unsurprisingly there was a rise in 1998 coincidental with the coming into force of the *Treaty of Amsterdam* and its documented aspiration to create an area of freedom, security and justice.

Figure 1:JHA texts adopted by the EU



The slight slowing of additional instruments in 1999 is coincidental with the Tampere Special European Council meeting during which JHA issues were refocused. The relatively sharp rise from 2001 onwards coincides with the aftermath of 9/11.

Two themes of ongoing development follow on from these statistics that reveal the increasing concern that EU has with JHA. Firstly, the terrorist attacks of 2001 added

emphasis to an already established momentum but may yet significantly change the character of JHA in the EU. Secondly, there is a political drive to transfer the majority of JHA from the intergovernmental arena to the arena of European law having direct effect.

The changing character of JHA to accommodate the 'war on terror' is evident not only from the immediate reaction in the aftermath of the 2001 attacks but also in recent policy texts published in the aftermath of the terrorist attacks in Madrid, 11 March 2004. On the 19 March 2004 an Extraordinary JHA Council meeting was held in Brussels to consider the European Commission's *Action Paper in Response to the Terrorist Attacks on Madrid*, (MEMO/04/66, 18 March 2004). Recognising the Madrid terrorism as an attack on the fundamental principles upon which the EU is built – respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights – the Commission argued that new instruments and institutions were not necessary as a response but that there should be better implementation of existing instruments and enhanced operational co-operation and co-ordination (*ibid.*:1). Those Member States that had not taken action in respect of either the EAW or the *Framework Decision on the Fight Against Terrorism* (*OJ* L/2002 164/2, 22 June 2003) were encouraged to do so promptly (MEMO/04/66:2). The fact that, as of 18 March 2004, only four Member States had ratified the *EUCMA* was noted with regret, as was the fact that only nine Member States had notified the Commission of their proposed arrangements for transposition in respect of JITs despite the deadline for entry into force being 1 January 2003 (*ibid.*:3). Four other instruments similarly suffering a lack of domestic implementation were identified. There were calls, too, for the ECPOTF, Europol and Eurojust to become more involved in the protection of the EU, its area of freedom, security and justice, and its citizens from terrorist attacks (*ibid*:.8).

What these appeals appear to illustrate is an institutional and legislative framework that exists but is ineffective due to lack of commitment amongst Member States, implementation of agreed actions and provisions being the measure of commitment in these circumstances.

Accepting the second annual report of Eurojust, the JHA Council Meeting on 29 April 2004, welcomed the new emphasis on countering terrorism adopted by Eurojust and reaffirmed "that the effective combating of crime, and of terrorism in particular, is a necessary and essential component in realising an area of freedom, security and justice" (8694/04 (Presse 129):9). Member States were once again urged to make it happen. At its meeting in Luxembourg, 8 June 2004, the JHA Council called for renewed effort against terrorism, particularly from Europol and the ECPOTF (which was directed to develop a proactive intelligence capability in relation to terrorism) whilst Member States were encouraged to make "optimum and most effective use" of Eurojust (*ibid.*).

By the time the Brussels European Council took place, 17-18 June 2004, EU leaders were able to welcome the appointment of an EU counter-terrorism co-ordinator, the re-establishment of the Counter-Terrorism Task Force within Europol, and proposals for the ECPOTF to review operational capacity in relation to counter-terrorism no later than December 2004 (*Brussels European Council - Presidency Conclusions*, 10679/04:2-3).

The *Presidency Conclusions* inextricably linked the maintenance of an area of freedom, security and justice with the fight against terrorism. In doing so it was noted that there had been "substantial progress" in implementing the five-year Tampere programme and that the "time has now come to launch the next phase of the process.... [the Council and Commission were invited] to prepare proposals for a new programme for the coming years to be considered by the European Council before the end of 2004" (*ibid.*:1). All comments in the Brussels *Presidency Conclusions* regarding the area of freedom, security and justice relate to terrorism not crime.

There is an active debate about the relationship between transnational organised crime and terrorism and the extent to which measures to tackle one are suitable for tackling the other. Thus the Home Office:

> "Organised crime groups share many characteristics with terrorists .... A successful approach to organised crime is therefore inseparable from our wider effort against threats to national security." (Home Office 2004b:1)
>
> "Organised crime groups and terrorist groups have many similarities in their ways of operating. ... How much overlap there is in practice between the two types of group is controversial." (Home Office 2004b:7)

Organised crime and terrorism are often linked in rhetoric. But this can sometimes be counter-productive. Communications data is a powerful investigative tool. Prior to September 2001 law enforcement, government and industry in the UK were engaged in protracted negotiations about a policy to inform a statute on the retention of communications data that would cater for the needs of law enforcement without creating an undue burden upon industry resources (the NCIS had the lead for law enforcement on this issue). Industry was keen to avoid any statutory obligation whatsoever. The hasty UK legislative reaction to the events of 9/11, the *Anti-terrorism, Crime and Security Act* 2001 [ATCS], provides for the Home Secretary to issue Codes of Practice in relation to communication data retention. The Codes of Practice (yet to be drafted as of July 2004) are to be purely voluntary and are to be only for the purpose of "safeguarding national security" or "for the purpose of prevention or detection of crime or the prosecution of offenders which may relate directly or indirectly to national security" (*ATCS Act* 2001 §102(3) & (4)). This gave industry the opportunity to appear to be conceding to such measures as a contribution to the war against terror whilst at the same time

actually denying law enforcement an investigative option considered crucial in the fight against crime. Thus a potentially vital tool has been reserved for the purposes of protecting national security.

Bunyan, likewise, highlights concerns over the apparent confusion of aims in relation to terrorism and crime (2004) citing as an example the European Commission's *Communication on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information* (COM 221, 29 March 2004) which seeks to co-ordinate:

> "...the Union's arsenal of weapons against terrorism. Many of these are not specifically anti-terrorism but range wider while including terrorism [and] a link should be established between terrorism and other forms of crime [even though these are] not always immediately obvious ... (COM 221:3)
>
> ... if the fight against terrorism is to be totally effective, it must be handled in conjunction with the fight against other forms of crime." (COM 221:5)

The extent to which the establishment of an area of freedom, security and justice becomes skewed away from the fight against transnational crime towards the fight against terrorism will become apparent in the coming months and particularly with the promised phase two of Tampere, ideas for which are due with the European Council by the end of 2004. Despite the experience of UK law enforcement illustrated above, the concern of civil liberties groups is that, in the name of securing Europe against terrorism, ever-more intrusive and oppressive executive measures will be introduced and made applicable to criminal investigation as well.

The second area of influence over the immediate and mid-term future of transnational criminal enforcement within the EU comes from the new *Constitution for Europe*. At the outset of work on the proposed constitution by the specially constituted European Covention, two important challenges were identified:

> "Firstly ... the detailed objectives set out in the current Treaties do not match up to the political objectives clearly expressed by the European Council at Tampere. Unless the objectives set out at Amsterdam are aligned to match what was later decided at Tampere, there is a real risk that the full development of the area of freedom, security and justice will be hampered."
>
> "Secondly ... For all the advances made at Amsterdam, the separation of issues into two Pillars, decision-making by unanimity, a shared and sometimes competing right of initiative for the Member States and the Commission, and the complexity of variable geometry have proved serious brakes on the efficient delivery of the outcomes heads of State and Government want to see." (The European Convention's Working Group X: *Freedom, Security and Justice* (WG X WD 14, 15 November 2002:4).

The political aspirations of the interior and justice Ministers who met at Tampere appeared to go further than the *ToA* envisaged as the JHA agenda developed apace. And the structure by which political and practical progress could be made was no longer considered fit for the purpose. There was perceived a need to anchor the JHA agenda more firmly to the framework of EU institutions and instruments – or else change the architecture of the EU so as more closely to reflect policy aspirations. It was never going to be uncontroversial.

At time of writing the text of the EU constitution has been agreed but not yet opened for signature so the following discussion is based on the draft text as published 18 July 2003 (*OJ* 2003/C 169/1), and subsequent amendments (CIG 81/04 and CIG 85/04, June 2004).

The Constitution repeals previous EU treaties (Article IV-2) and makes clear its fundamental approach:

> "Reflecting the will of the citizens[13] and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall co-ordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it." (*Constitution for Europe*, Article I-1).

The aspirations articulated in Article 29 *ToA* 1997, regarding the establishment of an area of freedom, security and justice, are retained in Chapter IV of Title III of Part III of the constitution. There are two guiding principles, mutual recognition and respect for different legal traditions:

> "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted." (*Constitution for Europe*, Article I-3).
>
> "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal traditions and systems of the Member States." (*Constitution for Europe*, Article III-158(1)).[14]
>
> "The Union shall endeavour to ensure a high level of security by measures to prevent and combat crime, racism and xenophobia, and measures for co-ordination and co-operation between police and judicial authorities and other competent authorities, as well as by the mutual recognition of judgements in criminal matters and, if necessary, the approximation of criminal laws." (*Constitution for Europe*, Article III-158(3)).

[13] Given the concern expressed by the June 2004 Brussels European Council, (Presidency Conclusions, 10679/04:paragraph 3) about the low voter turn-out in the 2004 European elections, the strength of the mandate for such an assertion is debatable.

[14] A discussion of the legal implications of the phrase 'area of freedom, security and justice', within the context of the *ToA* and *TEU,* is to be found in Boeles 2001.

Specifically in relation to judicial co-operation:

"Judicial co-operation in criminal matters in the Union shall be based on the principle of mutual recognition of judgements and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article III-172", (*Constitution for Europe*, Article III-171).

"To the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial co-operation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States", (*Constitution for Europe*, Art.III-172).

The subsequent qualifications in Art.III-171(2) referred to in Art.III-171 relate to the admissibility of evidence between Member States, the rights of individuals in criminal procedures and the rights of victims. Art.III-172 provides that, in respect of terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime;

> "European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis." (*Constitution for Europe*, Art.III-172(1)).

In combination the message seems to be that mutual recognition will apply wherever the differences between different national jurisdictions are not problematic but that the EU may seek the approximation or harmonisation of domestic laws in order to achieve Union objectives (as per Art.I-1) where it is considered necessary to do so to achieve approximation or harmonisation.

The strategic lead in relation to JHA is vested in the European Council (Art.III-159). National parliaments are required to ensure that proposals and initiatives comply with the principle of subsidiarity and are afforded the opportunity to participate in such peer evaluation of implementation as may, from time to time, be executed (Art.III-160: this would include, for instance, any re-evaluation of mutual legal assistance mechanisms to assess whether improvements had been implemented). There is an article on Eurojust (III-174) which brings this Tampere initiative (Tampere *Presidency Conclusions*, 1999:paragraph 46) properly into the legislative framework of the EU, and an article on Europol (III-177) reaffirming the provisions of the *ToA* 1997. Thus these institutions are identified as key elements of the EU JHA infrastructure.

As well as regularising the *status quo*, the EU Constitution introduces into the JHA arena the new concept of a European Public Prosecutors Office [EPPO] (Art.III-175), as a complementary initiative alongside Eurojust and Europol. This proposal attracted particular criticism from UK Parliamentarians and illustrates how big a gap remains between European policy aspirations and perceptions of national interest among Member States. The Lords Select Committee on the European Union considered the proposal "a surprising and undesirable inclusion in the new Treaty" (House of Lords 2003:34). The Commons European Scrutiny Committee regarded the idea as "impractical and likely to remove the prosecution function from democratic accountability" with the "potential for creating an engine of oppression" (House of Commons 2003:i-5). In evidence to the Scrutiny Committee, Peter Hain MP, Minister and UK representative at the European Convention on the Future of Europe, said in response to MPs' questioning about the EPPO: "Yes, we are still opposed to that and we have sought in our amendments to delete it" (House of Commons 2003:ii-Question 100).

The EPPO article was not deleted from the constitution but the ambition for this institution was severely curtailed in amendment. From having a role to prosecute all "serious crimes affecting more than one Member State" (Art.III-175(2) as at July 2003) and offences against the EU's financial interests in order to "combat serious crime" (Art.III-175(1) as at July 2003), the remit of the EPPO was reduced to "offences against the Union's financial interests" (Art.III-175(2) as amended) in order to combat financial crime against the EU (Art.III-175(1) as amended). A new sub-clause was entered into the draft providing a way to extend the remit of the EPPO at some future date subject to the "European Council acting unanimously after obtaining the consent of the European Parliament and consulting the Commission" (Art.III-175(4)). For the time-being it appears the EPPO will prosecute merely in response to OLAF investigations.

Eurojust and Europol, already established, proved less controversial. The clauses relating to Eurojust were also subject to amendment although its role has expanded. Currently Eurojust may ask the competent authorities of Member States to consider undertaking and investigation or prosecution of specific acts (Council Decision setting up Eurojust, 28 February 2002, Articles 6 & 7, *OJ* 2002/L 63/3). Its constitutional powers afford Eurojust the "initiation of criminal investigations as well as proposing the initiation of prosecutions, conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union" (*Constitution for Europe*, Art.III-174(2)(a) as amended). Following such initiation, Eurojust is empowered to co-ordinate such investigations and prosecutions (Art.III-174(2)(b)). The idea that Eurojust should supervise Europol's activities, proposed in early discussions, was not included in the constitution, although it did meet with

qualified approval from the House of Lords Select Committee which recognised that the proposal mirrored prosecutorial supervision of investigations within Civil Code jurisdictions and saw this as at least some compensation for the lack of supervision by European courts (House of Lords 2003:33-4) and lack of scrutiny by the European Parliament (*ibid.*:38). The final version of the constitution addresses the latter concern by making provision for European laws to stipulate scrutiny procedures for Europol involving both the European Parliament and Member States' national parliaments (*Constitution for Europe*, Art.III-177(2)).

To mirror the general presumption of judicial co-operation (*Constitution for Europe*, Art.III-171 as amended), the constitution also imposes a European obligation in relation to police co-operation:

> "(1) The Union shall establish police co-operation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.
>
> (2) To this end, European laws or framework laws may establish measures concerning:
>
> a)the collection, storage, processing, analysis and exchange of relevant information;
>
> b)support for the training of staff, and co-operation on the exchange of staff, on equipment and on research into crime-detection;
>
> c)common investigative techniques in relation to the detection of serious forms of organised crime.
>
> (3) A European law or framework law of the Council of Ministers may establish measures concerning operational co-operation between the authorities referred to in this article. The Council of Ministers shall act unanimously after consulting the European parliament." (*Constitution for Europe*, Art.III-176: the UK has announced its intention of opting out from Art.III-171(2)(a)).

The *Constitution for Europe* establishes within the infrastructure of the EU key institutions, competences and legislative functions that enable the EU to guide and co-ordinate action by Member States in relation to JHA. The hitherto episodic and *ad hoc* initiatives (for example Dublin 1996, Tampere 1999) have led to the creation of a formal architecture, built upon the foundations of the *ToA* 1997. Yet as the policy documents post-Madrid reveal, lack of implementation amongst Member States severely constrains the effectiveness of these measures.

The private perspective

The Constitution for Europe is, in one sense, a definition of the relationship between the EU and its citizens. It has already been seen, in relation to the EEW, that there are concerns about protecting citizens (when under criminal suspicion) and this concern extends to other aspects of mutual legal assistance and international law enforcement co-operation. Such issues deserve detailed research consideration in their own right. But it is worth briefly highlighting the issues in order to balance the context of discussion about enhanced State co-operative capability.

The mutual legal assistance framework has been established primarily for enhancing co-operation between judicial authorities when investigating and prosecuting transnational crime. Which begs the question, what provision is made for the accused in transnational investigations, seeking to prepare a defence, or to third parties caught up in a mutual legal assistance request by virtue of the fact they have the capability to enable investigator access to the evidence sought (legal or financial representatives for instance)?

It is misleading to think of mutual legal assistance defence work *per se*. Instead, it is more appropriate to think in terms of private practice or non-prosecutorial mutual legal assistance work. A leading private practice authority on mutual legal assistance, Christopher Murray,[15] has made relatively few defence applications under §3 *CJ(IC) Act* 1990 and none so far under the new legislation (interview, Murray 12 March 2004). When he has utilised the measure, it has usually been successful. For instance, when witnesses refused to attend the UK to testify, mutual legal assistance has secured from them either a statement or from the court an order to travel with the prosecutor to examine the witness overseas.

Much of Murray's mutual legal assistance work involves representing third parties caught up in a mutual legal assistance request or representing foreign authorities that have transmitted ILORs to the UK for execution. In the latter circumstance Murray has represented the Canadian government and the Nigerian government because foreign governments requesting assistance "get a much better service" if they are represented by lawyers in the requested State. Among the third parties he has represented have been witnesses from whom a statement is being sought and persons or companies from whom evidence is being sought by way of a requested coercive measure and whose rights, as well as those of the accused, deserve to be protected.[16]

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[15] See Murray & Harris, 2000 for instance.

[16] More detailed discussion of specific case examples is to be found in Murray & Harris 2000:111: *CPS on behalf of the DPP for Australia v Holman, Fenwick & Willan* (a law firm)(unreported, 13 December 1993; and *R v Inner London Crown Court ex parte Baines & Baines* (a law firm) [1988] 1 Q.B. 579.

The position or status of both the suspect and the *partie civile* within mutual legal assistance structures are aspects of mutual legal assistance that merit further academic attention. It is an area that directly engages issues under the *ECHR*. The *partie civile* - a third party other than the accused person or prosecutor, usually the victim - is regarded differently from State to State but in general the victim plays a more active role in Civil Code investigations and trials than the victim would in a Common Law trial. In the latter the victim might be called as any other witness but in France, for instance, the *partie civile* has the right to address the criminal trial judge and be represented by counsel (Hatchard *et al* 1996:72-73) whilst in Germany the *Victim Protection Act 1986* (*Opferschutzgesetz*) affords victims of serious crimes an active part in the proceedings in the role of subsidiary prosecutor (*ibid.*:145-6).

This concept of the participating victim potentially has implications for the way in which UK investigators respond to ILORs. The foreign judicial authority conducting the pre-trial investigation may, for example, issue an ILOR in respect of questions the victim wants answered. Alternatively, a UK witness summoned to give evidence at trial in a Civil Code State (unlikely given the reliance on the documentary *dossier* in such jurisdictions but nevertheless a possibility), may be subject to examination by the judge and the victim, as well as, although not necessarily, by the prosecutor or the defence counsel. Since victims' rights are protected by the positive obligations imposed on public authorities by the *ECHR*, a UK law enforcement agency potentially faces action for violation of rights from a victim overseas in the event of mishandled request execution.

By far the more frequently-voiced cause for concern, however, is the protection of the rights of the accused within mutual legal assistance provisions. Neither the *ECMA* nor the *EUCMA* make provision for accused persons to gather evidence from abroad in their defence. This is a consequence of the underpinning principle in Civil Code criminal investigations that the investigating judge seeks the truth of what has occurred. Only the investigating judge is responsible for gathering evidence. The trial judge then evaluates the evidence and determines the outcome. In Common Law States the adversarial trial pits the evidence selectively presented by the prosecution against that selectively presented by the defence. Each side aims to prove the justness of its claim.

Since the investigating judge in a Civil Code jurisdiction is charged with gathering all relevant evidence, incriminating or exculpatory, an ILOR executed by a UK investigator on behalf of judicial authorities in a foreign State might be in search of 'prosecution' or 'defence' evidence. Either way, the actions of the UK agents in executing the request will be subject to scrutiny under Article 6 *ECHR* (Right to Fair Trial). As has been seen from the SIO interview data (chapter 7 above) the compilation of the *procés verbale* and subsequent defence access to

this file permitted by the *juge d'instruction* has caused some practical problems for English investigators and prosecutors.

For a person accused or suspected within England and Wales the matter is rather different. There it is a duty imposed on investigators to pursue "all reasonable lines of enquiry" (§23(1)(a) *Criminal Procedure & Investigations Act 1996* [CPIA]) and so discover both incriminating and exculpatory evidence. The effectiveness of this legislation (both prosecutors and defence lawyers regularly allege that the other side has failed to comply with its respective obligations) has been reviewed by Sir Robin Auld and recommendations for its improvement made (*Criminal Courts Review*, Summary, paragraph 13, www.criminal-courts-review.org.uk/summary.htm, accessed 10 September 2001). It does not appear to amount to the same duty imposed upon the investigating judge in a Civil Code State. If law enforcement agents in the UK believe they have sufficient evidence to charge a suspect (i.e. demonstrate all the points to prove a particular offence), then as soon as they hold this belief the *Police & Criminal Evidence Act 1984* requires that the suspect must be charged (§37(7)). Under these circumstances the investigators may not decide to pursue a supplementary line of enquiry abroad that would prove a more serious offence, which appears on the face of it to undermine the political strategic aim of prosecuting effectively transnational organised crime.

Far more likely is that foreign authorities may not understand or be willing to co-operate with English disclosure requirements. US authorities are notoriously reluctant to accede to disclosure requests being "unimpressed" by the concept of unused material that may undermine the prosecution case or assist the defence (as defined in the *CPI Act* 1996 and accompanying *Codes of Practice*) despite the concept of 'discovery' in US pre-trial procedures (CPS representative at the Mutual Legal Assistance Forum, Home Office, 30 January 2004; LaFave *et al.* 2000:chapter 20). The relationship between the *CPI A*ct and mutual legal assistance provisions is worthy of further exploration by both practising and academic lawyers.

If an accused person (already charged with an offence) believes that there is evidence abroad that will help prove innocence, or cast doubt upon the prosecution's allegation, then §7(3) *C(IC) Act* 2003 (which updates a similar provision under §3 *CJ(IC) Act* 1990) provides a mechanism for request to be assisted. The accused person may apply to a court for an ILOR to be issued but has no more guarantee than an investigator that the requested State will execute the request. The English court will have discharged its statutory obligation simply by issuing the ILOR. It cannot force the foreign authorities to execute the request. Unlike the investigators, the accused may not have the resources to make precursor enquiries in support of such a request or the resources to press for the execution of such a request in the event of inordinate delay. Seeking mutual legal assistance can be "very problematic" for accused

persons (interview Christopher Murray, Kingsley Napley Solicitors, London, 12 March 2004; see also Van Den Wyngaert & Stessens 1995:290). To that extent the accused appears at a disadvantage.

In the US, the thought of permitting accused persons access to mutual legal assistance mechanisms is an anathema (interview Lystra Blake, Office of International Affairs, Dept of Justice, Washington DC, 16 May 2001 and reinforced by many other US government lawyers and law enforcement officials). Their argument is that the accused person will have access to all the material they need simply because they are the accused. This may not necessarily be true even in cases where the correct suspect has been charged. An accused person seeking to prove a particular point might need access to evidence abroad that can only be secured and adduced through coercive action, official records for instance, in which case the denial of mutual legal assistance forces the accused to request such coercion in a private capacity, which may not be an option available to them. Such a request made to the US authorities, for instance, may simply not be countenanced because of US official attitudes to defence requests (interview, Blake). In other instances US authorities have been known to frustrate a defence *ex parte* request under §3 *CJ(IC) Act* 1990 by disclosing details of the confidential request to English investigators and the CPS (interview, Murray).

Even if an accused person is able to approach witnesses abroad directly and seek their voluntary co-operation and attendance at trial without the bureaucracy involved in an ILOR, the accused is still disadvantaged because defence witnesses seem obliged to pay their own travel expenses (unlike prosecution witnesses). Witnesses cannot be compelled to attend and give evidence.

Case law regarding extradition indicates further practical limitations of §3 *CJ(IC) Act* 1990. In *Cuoghi v Governor Brixton Prison and another*, [1997] 1 WLR 1346, the applicant's extradition was sought by Swiss authorities. In support of a *habeas corpus* application an ILOR was issued on behalf of Cuoghi. This was subsequently quashed on the grounds that the *CJ(IC) ACT* did not apply to Swiss domestic offences. (See also *R v Governor Brixton Prison and another, ex parte Evans* [1994] 1 WLR 1006.)

The manner in which evidence to be used against them is collected is of concern to accused persons. States may prefer to disregard breaches of domestic law when evidence is gathered abroad in favour of pursuing their own prosecutions (Gane & Mackarel 1996:104-5). Such behaviour is prejudicial to an accused person. Occasionally this issue may be addressed if provision is made by the requested State for the defence to be represented when prosecution witnesses are examined abroad. UK investigators requesting evidence are under no obligation to include in that request provision for the defence to be represented when it is so secured.

Indeed, such representation would disrupt on-going proactive investigations into transnational organised crime. "Neither the accused's right to cross-examine witnesses nor his right to call defence witnesses is absolute" (Harris *et al.* 1995:267). In such circumstances mutual legal assistance provisions concerning the trial testimony of witnesses assume great significance at least in Common Law adversarial trials. The current defence preference for being able to cross-examine prosecution witnesses in person may be tempered if the only way a witness will agree to testify on behalf of the accused is via video link. The prosecution might then protest at the lack of opportunity to cross-examine the defence witness in person but the court will almost certainly opt for the lesser of the two evils and permit live video testimony rather than deny the adducing of exculpatory evidence.

Within Europe, as the authorities utilise mutual legal assistance instruments, so individuals resort to the *ECHR*. The development of human rights case law has run parallel with the growing need for enhanced mutual assistance between judicial, prosecuting and investigating authorities. Investigative actions that violate protected rights are permissible in certain circumstances provided for in statute. The relationship between the development of human rights law and mutual legal assistance law that permits intrusive investigation is thus a subject of much interest. Norms in human rights philosophies must be matched by international harmony in properly authorised use of intrusive investigation tactics. In the absence of such cohesion, the effectiveness of mutual legal assistance may be reduced for the investigator (techniques allowed in one State are prohibited in another), whilst the risk of unwarranted violation arguably is increased for the accused. For transnational criminal investigation to be effective using the investigative tactics necessary to combat sophisticated criminality, mutual legal assistance provisions must keep pace with human rights requirements that violations be founded in law (Art. 8(2) *ECHR*).

When requests for assistance are executed between national jurisdictions, it is unclear which country assumes responsibility for safe-guarding the suspect's rights (Klip 1997:456). *ECHR* Commission decisions, insofar as they offer any guidance, have regarded evidence obtained from another country as the responsibility of the requesting state (*X v Germany*, [1988] 10 EHRR 521]. This sits uneasily with the *locus regit actum* principle because the requesting State has little or no control over how the requested State executes the request although, as already been observed, this principle is reversed in the *EUCMA*.

Domestic caselaw indicates an equivocal approach among courts and prosecuting authorities. Chinoy, residing in France, was wanted in the US for money-laundering. Crucial evidence to support his prosecution was obtained in France in a manner contrary to French law. On a visit to the UK Chinoy was arrested on behalf of US authorities who then sought his extradition. Chinoy appealed against extradition and sought to have the French evidence

excluded. In dismissing his appeal (*R v Governor Pentonville Prison, ex parte Chinoy*, [1992] 1 All ER 317) Nolan J cited *R v Sang*, [1979] 2 All ER 1222, as authority for adducing relevant admissible evidence even if it was improperly obtained. Gane & Mackarel describe this as "process laundering" by the US authorities in order to use otherwise inadmissible evidence (1996:113-4: 'process laundering' appears synonymous with Schomburg's concept of 'forum shopping', 2000:56).

The reverse phenomenon is to admit evidence obtained lawfully in the requested State in circumstances that would not be lawful in the requesting State. Belgian courts have admitted evidence obtained in France according to French law and in compliance with the *ECHR*, which would have been inadmissible if obtained in Belgium (*ibid.*). "Where evidence is obtained abroad its admissibility at the domestic level is enhanced by effectively applying the lowest available threshold for the admission of evidence. Thus, where the standard of admissibility at the domestic level is lower than that applied in the foreign jurisdiction, the domestic level is applied. If, however, the evidence is obtained abroad in a manner which would normally render the evidence inadmissible if such methods had been adopted domestically, the foreign impropriety is ignored, either absolutely, or subject to qualification" (Gane & Mackarel 1996:116).

When, as in the Belgian case cited here, investigative actions are undertaken abroad that comply with the *ECHR* but breach domestic laws, what redress, if any, is there for the accused person? In such circumstances applicants to the Strasbourg Court may have to rely on the margin of appreciation (Harris *et al.* 1995:12-15) normally applied to national authorities.

The *ECHR* has influence beyond European jurisdictions and has provided protection for Member State citizens at jeopardy from non-European authorities in relation to extradition (*Soering v UK* [1989] 11 EHRR 439). It could therefore be argued that the *ECHR* applies in circumstances where non-European authorities have gathered evidence on behalf of European investigators in a manner that breaches the *ECHR*. Non-European requesting States may find themselves subject to the provisions of a European convention, even though they are not party to it.

The area of human rights and mutual legal assistance has hitherto been subject of some academic comment (Gane & Mackarel 1996; Klip 1997) but will undoubtedly attract more. Both the gathering of the evidence and its subsequent admissibility are important issues. Evidence obtained abroad is currently the responsibility of the requested State (Art. 13(2) *ECMA*), in which case "it might not be appropriate to apply national norms on admissibility" (Klip 1997:454). But the *EUCMA* allows requesting States to stipulate how evidence is gathered on their behalf and in what form (Art. 4). The norms of admissibility

should then cease to be an issue for a trial State, whilst the convention that requested States may refuse requests contrary to their own domestic law should afford some protection, but this has not always been true in the past.

Domestic developments: SOCA

Moving from the international and regional issues to specific UK developments, in March 2004 Home Secretary David Blunkett promised: "we will create a new Agency tasked with defeating organised crime" (Home Office 2004b:iii). Despite individual successes for existing agencies such as the NCS and the NCIS, "we have not yet seen reductions in the overall harm caused by organised crime on the scale of those seen for volume crime" (*ibid.*:2). The new Agency will amalgamate the current functions of the NCS, the NCIS, the intelligence and investigative work of HMCE in relation to serious drug trafficking and the Home Office functions for tackling organised immigration crime. This radical departure from the current law enforcement infrastructure in England and Wales is considered necessary because of the new challenges posed by transnational organised crime in the context of increased globalisation and an increasing disparity between rich and developing nations (*ibid.*:10-12).

The Home Office rightly identifies international efforts as a critical success factor and once again lengthy quotation of extracts is appropriate to establish context:

> "Criminals recognise and exploit the potential of borders to frustrate law enforcement action against them. The criminals' task can be made easier by the low priority given to offences not harming the source or transit country or by law enforcement in some countries, particularly those with weak or failing governments ...
>
> The continuing importance of engaging foreign governments on matters of international crime is demonstrated in the Foreign and Commonwealth Office's eight strategic priorities, the second of which sets an objective of 'protection of the UK from illegal immigration, drug trafficking and other international crime'....
>
> Much bilateral assistance relies on smooth and effective co-operation between law enforcement agencies, including through the network of Interpol bureaux ... UK diplomatic posts host over 120 UK law enforcement liaison officers who support domestic and enforcement agencies ...
>
> We will work to identify any practical obstacles to operational co-operation, and use diplomatic effort to seek to overcome these, and to ensure partner Governments are able fully to deliver their international obligations. We are also committed to getting best results out of the extensive mechanisms which already exist for multilateral co-operation...
>
> The UK is an active and leading player in developing more effective EU action against organised crime. Significant advances have been made in the last few years in developing an EU framework to tackle organised crime, built on the principle long advocated by the UK of mutual recognition of diverse legal systems."
>
> With our EU partners, we are seeking to develop common policies to tackle organised crime through capacity building and EU Action Plans, such as in new and candidate Member States and the Balkans. EU membership is a key objective of these

countries and it is essential that their ability to tackle serious crime reaches EU standards...

Ultimately, international co-operation can lead directly to action in court cases in this country. Yet the handling of evidence obtained from overseas continues to be problematic. The Government has continued to seek improvements in judicial co-operation. Modernisation and streamlining of legal procedures, for example, in extradition cases and requests for foreign evidence, are essential for effective investigation and prosecution of organised international crime, and for tracing and seizing criminal assets. The framework for such co-operation must also include as many countries as possible....

We are seeking to establish whether the difficulties of operating across different jurisdictions might be alleviated by further legislation ... and welcome views on this issue." (extracts from *ibid.*:16-20).

What immediately strikes the reader is how far the Home Office has travelled in policy terms from the robust rejection of European-level co-operation in 1959 (Appendix A below) and its *mea culpa* internal review of 1988 (p.41 above). Policy collaboration and operational co-operation are now the mantra. Consultation is actively being pursued. [17] The political priority that mutual legal assistance and international law enforcement co-operation now enjoys is obvious to all.

But what are the likely implications of the creation of such an Agency for mutual legal assistance and international law enforcement co-operation? What difference might it make to the issues raised during this research?

The proposed name for the agency is the Serious Organised Crime Agency [SOCA] (Home Office 2004b:21). Its investigators will be agents rather than police or customs officers – thus creating a new type of law enforcement officer, which further develops the innovation founded in §38 *Police Reform Act* 2002 that enabled senior police officers to designate suitably trained civilians to exercise certain specified investigative powers. This approach achieves a number of aims. It offers the political opportunity for radical and headline-grabbing policy innovation: a fresh start to deal with the recently-recognised, 'new' strategic threat of transnational organised crime and to focus on outcomes (reduced harm to the community) rather than outputs (arrests and commodity seizures). It separates the new body from any negative perceptions associated with existing police agencies and the label 'crime squad' (the former regional crime squads were impeded by the lack of corporate status as held by the NCS following its creation in 1998 and corruption amongst certain officers tainted the name of the West Midlands Crime Squad in the 1970s and 1980s). It separates the investigative arm of HMCE from the recent disastrous series of failed organised crime prosecutions (Butterfield 2003; *File on Four*, BBC Radio 4 broadcast 16 March 2004,

[17] Such a clarion call further supports the academic case for the present research: a satisfying reinforcement of the justification for such research just as the thesis was being written up!

transcript available from www.bbc.co.uk/radio4; 'Customs stripped of the right to prosecute after failed cases' *The Independent* 6 December 2003 p.9). It combines in a single entity intelligence about organised crime with the capability to take enforcement action based on such intelligence; a potential not fully realised in the relationships between the NCIS and its clients such as the NCS (which felt it necessary to develop its own operational intelligence capability with its Central Intelligence Unit) and HMCE, which never gave up its intelligence capability even though in theory the NCIS existed to service HMCE (from which organisation a great many of the NCIS staff were seconded). Moreover, it offers an opportunity to dispel future problems arising from inter-agency rivalry as illustrated in Chapter 7 (above).

But it raises serious questions left unanswered (in some cases even unasked) in the White Paper about some of the functionality of the NCIS which fits very well with a criminal intelligence service servicing local and national law enforcement agencies but not necessarily within an organisation devoted to serious organised crime. The units devoted to gathering, analysing and disseminating intelligence about football hooligans and individual sex offenders are two such NCIS departments that obviously seem to fit well within SOCA since they fail the organised crime 'test': "normally working with others, in continuing serious criminal activities for substantial profit, whether based in the UK or elsewhere" (Home Office 2004b:7).

The impact of the changes on the Interpol and Europol bureaux and their relationship with local forces is also uncertain. Currently sited in the NCIS, which has successfully positioned itself as an information and intelligence gateway to UK law enforcement for both domestic and foreign agencies, the co-location of the two bureaux within a single open-plan office area at NCIS HQ has contributed much to the work of the two international agencies and to that of NCIS. The bureaux, even as 'tenants' of the NCIS, have a clear identity and, as was seen in Chapter 6 (above), the majority of local police force investigators regard the Interpol NCB as the centre of excellence within the NCIS for advice on international co-operation.

Would the Interpol NCB and Europol bureaux appear less accessible and less likely to be interested in local force assistance if, along with the remainder of NCIS departments, they were subsumed within the functionally-specialist SOCA as appears to be under consideration? If they were not subject to the overall amalgamation, where else would they sit in terms of location and organisation? The functional speciality of the NCIS focused on intelligence and information sharing. It was logical to re-locate the Interpol NCB from New Scotland Yard to the NCIS, and equally logical to locate the Europol office there when that was created. But the same argument for moving the Interpol NCB away from the Metropolitan Police Service HQ (because the Interpol NCB was dominated by the MPS to the

detriment of others, House of Commons 1990:paragraphs 80-81) is an equally valid reason for not locating the bureaux within SOCA. There must be a potential danger that the Interpol NCB will align itself to the business of the host organisation and so tend to neglect the very different needs of local police forces. In the US, precisely to avoid such a tendency, the Interpol NCB sits within the Department of Justice. [18]

It is apparent from data cited in Chapter 7 that Interpol, whilst providing a vehicle for international communication between law enforcement agencies (when planning co-operative work for instance, CS2, or when circulating information about wanted persons), cannot necessarily meet the needs of investigators engaged in dynamic investigations either into completed crimes (CS3, CS6) or crimes in action (in CS4 and CS5 the investigators made no use of Interpol and had no need to). Given its limited operational functionality, how comfortably would Interpol sit within an agency focused on proactive investigation of crimes in action? SOCA will need to develop its own mutual legal assistance expertise and capability (both lawyers and investigators) but this need will not necessarily be met by Interpol or Europol.

On policy issues, particularly within Europe, close consultation can be anticipated between SOCA and Europol but rather like the problems already being encountered with the EPCOTF, will SOCA be able effectively to represent the interests of the remainder of UK law enforcement, particularly if it is not a police agency *per se*?

These are issues that can only be highlighted here as the project team is assembled and begins work on creating the new agency which is scheduled to become operational in 2006. The impact of SOCA on international law enforcement co-operation in the UK is a matter worthy of future academic study. How the SOCA project team will address such uncertainty remains to be seen.

<u>Domestic developments: mutual legal assistance review</u>

The EU peer evaluation of mutual legal assistance mechanisms in Member States was well under way, although the UK had not yet been inspected, when the Home Office commissioned a review of mutual legal assistance in the UK, recruiting from the Serious Fraud Office Lorna Harris, a senior lawyer experienced in mutual legal assistance, to undertake the review as the new head of the UKCA. The terms of reference are set out in Table 12.

[18] Federal agencies second staff to the Interpol NCB in Washington DC and in doing so the NCB has become, *de facto*, a vehicle through which US federal agencies communicate with each other in circumstances in which they might not otherwise do so, if only because the NCB is acting as a clearing house for incoming requests.

Table 12: terms of reference for the review of mutual legal assistance, 2000

- The role of the central authority in the execution of mutual legal assistance requests, including in the light of the EU's Schengen provisions on direct transmission between judicial authorities;
- The location, operational procedures and staffing of such a unit;
- The role of the designated prosecuting authorities in the preparation of requests for mutual legal assistance;
- The role of agencies in the execution of requests for assistance;
- The relationship of the UKCA in the Home Office, with the central points in the devolved administrations in Scotland and Northern Ireland;
- The provision of adequate management information;
- Current legislative provisions and the impact of international instruments;
- Anticipated legislative requirements resulting from the new international instruments, and from the review.

Questionnaire surveys were conducted with key partner departments and agencies relating to mutual legal assistance legislation and the role of the central authority and the results circulated in two discussion papers in August 2001.[19] The review then went into hiatus for, as a circulated discussion document put it with masterly understatement, "a series of operational pressures and changes to proposals for legislation ... resulted in a delay of the review" (Home Office 2004a:paragraph 1.2). In the aftermath of the terrorist attacks on New York and Washington DC, the staff undertaking the review were diverted from the review and consideration of how best to implement the *EUCMA* in UK legislation to new legislation such as the *ATCS Act* 2001, and certain sections of the *Police Reform Act* 2002 in an immediate response to the political imperatives arising from the attacks. There immediately followed an effort to bring the *EUCMA* into UK legislation (the *C(IC) Bill*) as soon after the December 2002 deadline for enactment as possible.

"As a result of these operational and legislative pressures, the review has had to be broken down into component elements and both undertaken and implemented, at least in part, in a more piecemeal way than originally intended." (*ibid.*:paragraph 1.3).

Not only was the piecemeal approach not was originally intended, it was clearly far from ideal. The ideal would have been to have a single piece of legislation that implemented considered policy following comprehensive consultation and review but the political need to be seen to be doing something as soon as possible as a response to President Bush's 'war on

[19] I am grateful to staff at the UKCA for providing me copies of the discussion papers and questionnaire results. Subsequently having become an attendee at the Home Office Mutual Legal Assistance Forum, the present author also received a copy of a further circulated discussion document (Home Office 2004a). All this unpublished documentation has informed the remarks made here.

terrorism' denied the Home Office such luxury. Policy was made and enacted on the hoof. Hence the ultimately redundant sections 111 and 112 of the *ATCS Act* 2001 in which the Government sought, without precedent and ultimately in vain, to introduce certain EU mutual legal assistance measures by way of secondary legislation. Hence the inclusion of JIT liability legislation in the *Police Reform Act* 2002 because that happened to offer a convenient alternative vehicle for enacting at least that particular initiative. Hence the discomfort in Committee of Bob Ainsworth MP, the then Home Office Minister, as the opposition probed to discover just who, besides police constables and customs officers, the Home Secretary had in mind when seeking the ability to prescribe "others" as having the authority to assist in evidence gathering under sections 13-26 *C(IC) Act* 2003. The Minister conceded that the Government had no idea at that stage who else might be so empowered: "we have no immediate plans to confer powers on other authorities, but a general review of our mutual legal assistance system is in progress ... that must be considered in the review of our mutual legal assistance provisions", (*HC Hansard Standing Committee A*, 12 June 2003 col.122). Clear evidence that with the *C(IC) Act* 2003 the job was only half done and the Government had yet to identify the full catalogue of changes necessary to make the UK's mutual legal assistance and international law enforcement co-operation regime fit for purpose in the fight against twenty-first century crime.

Not until January 2004 could the UKCA resume work on the mutual legal assistance review free from the burden of preparing new legislation and monitoring it through Parliament, by which time the co-operation landscape had changed significantly. The Home Office discussion paper of January 2004 updates the discussion presented originally in the papers of August 2001, in the light of changed political circumstance and recently enacted legislation. But the January 2004 paper has itself been overtaken by events with the publication of the White Paper discussing a twenty-first century strategy to defeat organised crime (Home Office 2004b).

The most significant change that must be brought about is the system to permit direct transmission of mutual legal assistance requests between judicial authorities; easier to achieve in Civil Code jurisdictions than in the UK. Pending discovery of a way of doing this successfully, the UK has opted out of the direct transmission provisions of the *EUCMA* (Home Office 2004a:paragraph 5.3). In consequence the French authorities have declared that they will not accept direct transmission from UK authorities until the UK is in a position to reciprocate. The role and location of the central authority have yet to be agreed upon. A central authority is still required pursuant to bilateral MLATs with non-EU States. Three options are under consideration:

- Move the UKCA to another department of government

- Transfer the function of the UKCA to the Director of Public Prosecutions and CPS
- Enhance the functionality of the UKCA by giving it capability to execute requests itself

None of these options is without significant problems and thus, at time of writing, the review remains a work in progress. Realistically this work cannot be finalised until consultation and review of the organised crime White Paper has concluded, and any new legislation required (for instance to relocate the UKCA) is unlikely to be accommodated in the Parliamentary schedule until the Queen's Speech of 2005. Depending upon prevailing circumstances, that may mean that the Bill is a 'Fifth Session Bill', vulnerable to the political tactics of a Prime Minister who will be obliged to call a general election at some point during that Session.

Conclusion

So might any of this new work address the practitioner issues identified in this research?

The JIT, ECPOTF and Liaison Magistrate initiatives all have the potential to utilise the value widely perceived in personal working relationships. Early success has been noted with the Liaison Magistrates and the first JIT will no doubt be monitored with great interest. But within the ECPOTF, confusion about which domestic agencies should represent their particular national jurisdiction illustrates the continued risk of inter-agency rivalry hobbling international law enforcement co-operation.

Access to a cross-border surveillance capability is likely to be as positive an experience for UK agencies as it has been for their Continental counter-parts. It enables some tactical spontaneity which, as was seen in CS4, can be an issue for SIOs commanding a proactive transnational investigation in which the suspects retain the element of surprise. But sustained political opposition within the UK may agitate for reasons to withdraw from Schengen, and the Gibraltar issue means that access to this capability is still denied to UK agencies.

The *Constitution for Europe* provides the legislative framework for mutual recognition as the way forward and regularises the JHA *Acquis* that was in danger of increasing incrementally rather than within a strategic framework founded upon legal and constitutional certainty. Regardless of political perspectives, increased legal and constitutional certainty is, without doubt, beneficial. Supporters and opponents will at least be clearer about

the concerns at issue. But the Constitution will not resolve difficulties arising from different procedural laws (evidential disclosure and intelligence handling, for instance), nor will it resolve different attitudes towards international law enforcement co-operation although it has the potential to enshrine common values.

The use of the EEW as an alternative to ILORs within the EU, if accepted across the EU, will be dependent upon the level of trust invested in mutual recognition – the issue of working relationships once again. The adoption of the EEW will not resolve all the issues identified in Chapter 8 regarding testimony and the adducing of foreign evidence. Nor will it necessarily resolve the issues of timeliness as delays are caused not by the issuing of an ILOR but by its execution, and that will be equally true for EEWs. Nor will it necessarily overcome the sorts of problems caused by variable interpretations of the functions of an ILOR. There may evolve just as many variations on how an EEW might be used.

The Constitution also provides for a pan-European prosecution capability despite Parliamentary opposition to the proposal. The working relationships between the EPPO, Eurojust and domestic prosecution agencies may well generate furious debate. It is not a proposal geared towards resolving the practical problems arising from the different characteristics of adversarial and inquisitorial prosecution services. English investigators and prosecutors will still be the odd ones out.

But the Constitution appears to depend upon the *ECHR* for protection of personal rights and due process norms, and the new provisions focus primarily on enhancing law enforcement capability without balancing this increased provision with a restatement of due process protections. Both the EEW and the issues concerning due process protections for suspects subject to a transnational investigation warrant further research study.

Domestically, the on-going mutual legal assistance review cannot yet be commented upon but the progression towards the new SOCA is gathering pace. This is one potential mechanism for overcoming some of the problems of inter-agency rivalry, although as the interviewee in CS5 noted, better operational co-ordination is the key and this may not necessarily be derived from amalgamating existing agencies. The way in which the organisational culture of the new agency evolves will significantly influence whether it succeeds or fails and amalgamation may lead to the incorporation of deep-seated prejudices within the new culture despite the logic of such a re-organisation in trying to eradicate such impediments. There is also uncertainty about the future of the Interpol and Europol UK bureaux that must be resolved quickly and in a way that does not effectively divorce these institutions from the wider UK law enforcement community.

Whilst the initiatives that have emerged during the course of this research all connect in some way with most of the concerns identified by SIOs and local force international liaison officers, it is by no means certain that the concerns identified in this research will be fully addressed even if the initiatives succeed. There remains plenty of scope for the current problems to prevail, even if in modified form. And, of course, there is always the potential for new problems, as yet unforeseen, to emerge. Problems in international relations also have the potential to derail mutual legal assistance and international law enforcement co-operation progress (for instance, the troubled relations between the UK and Spain over Gibraltar).

Where there is hope is in the increased willingness to debate the issues and at least try to resolve them. Nowhere has this been more apparent than in the attitude of the Home Office. The EU, too, is now much more focused on addressing JHA issues (Mitsilegas *et al.* 2003). Progress depends upon political will. With increased dialogue, particularly dialogue that includes stakeholder practitioners, comes increased opportunity to resolve the issues.

Chapter 10

United in diversity?

As has already been alluded to, at the outset of this research neither the Home Office nor the author anticipated the extent to which the mutual legal assistance arena being studied would change during the life-time of this work. After all, the UK's record in mutual legal assistance between 1870 and 1990 was hardly characterised by a vigorous dynamism. Yet what began as a work of political commentary became, by force of circumstance, more a work of contemporaneous historical record as the 1990 UK statutory regime supporting mutual legal assistance (*CJ(IC) Act*) was replaced by the 2003 statutory regime (*C(IC) Act*) while the thesis was being written (and re-written!). Despite the changing political and legislative contexts, the research remained valid and, arguably, became more topical than could have been realised at the outset. The original aspiration, that a review of the practicalities experienced by investigators using the 1990 legislation might be offered to the Home Office to inform future policy considerations, was realised if a little more rapidly that might have been expected and considerations arising from this research informed both the author's work at G8 concerning international law enforcement co-operation and his contributions to the Home Office Mutual Legal Assistance Forum. Written submissions based on this research have been made both to the Home Office mutual legal assistance review and to the Government's consultation exercise seeking views on the White Paper proposals for a new agency to tackle transnational organised crime (Home Office 2004b).

This thesis will be submitted before the Government's consultations and subsequent deliberations are concluded. Indeed, at the current rate of progress it will be submitted before the *C(IC) Act 2003* comes fully into force. At time of writing this conclusion (late summer 2004) the diplomatic problems concerning the status and sovereignty of Gibraltar look set to impede UK progress in mutual legal assistance within Europe. Spain has concerns about the UK's membership of Schengen because of the border implications for Gibraltar. Until the UK is fully accepted by other States into those parts of the *Schengen Convention* in which the UK wishes to participate, the UK cannot ratify the *EUCMA* and so implement its measures. It had been hoped that the UK would ratify the *EUCMA* in April 2004. There is currently no scheduled date for ratification. As of late summer 2004 the *EUCMA* still requires a further three ratifications in order to come in force within the EU.

Mutual legal assistance in criminal matters came about as a result of the need for jurisdictions to be able to repatriate through extradition fugitives from justice. This need was

first recognised and addressed in the nineteenth century. In the aftermath of World War II, within a context of the search for war criminals, there emerged an international consensus that *ad hoc* and bilateral extradition arrangements could and should be supplemented by a multilateral convention in Europe, just as human rights norms had been established through such instruments within the UN and Europe. Almost as an afterthought upon conclusion of the extradition convention, provisions were made for evidential assistance in support of extradition measures. The political rationale underpinning these initiatives was the need to preserve national sovereignty by protecting the integrity of national jurisdiction and ensuring that criminal fugitives could not easily evade justice. The processes for achieving this aim were, unsurprisingly, formal and diplomatic in character.

Ultimately, in the UK, this resulted in the *CJ(IC) Act* 1990 and a statutory regime in which the diplomatic *Commission Rogatoire* familiar within the Foreign Office was transformed into an ILOR process administered by the Home Office, a further guarantee against possible violations of sovereignty. What changed was the nature of the threat to national sovereignty.

The debate about whether or not transnational organised crime is a threat to national security is largely a diversion that matters most to agencies that feel threatened by the roles and remits of other agencies.[1] It can occasionally result in unwelcome by-products such as ill-considered legislation or policies that fail to recognise the distinction between the immediacy of actual organised crime leading to daily harm in local communities compared with the perceived permanent threat of terrorism leading to irregular (albeit spectacular) atrocities. The relevant priorities differ; intelligence is required to prevent the latter while evidence is required to prosecute the former. The intelligence and evidential communities operate in different ways for different aims and are not always well served by instruments intended to approximate both objectives. A national security threat is not necessarily a threat to national sovereignty; the latter is evident in the undermining of national jurisdiction by those capable of evading it.

It is in the latter category that there has been witnessed a change of degree and emphasis. The original mutual legal assistance framework was intended to address the problems posed by those who committed a crime in State A and then went to State B to escape justice. With the economic infrastructure of the late twentieth and early twenty-first

[1] The Home Office MLA Forum demonstrates its own interesting political dynamics. Chaired by the head of UKCA, a former HMCE lawyer, the forum is dominated by HMCE lawyers (six at the last meeting compared to the three sent by the CPS). No other agency feels the need to send so many representatives to this meeting. Not a little ironic given the criticism of HMCE lawyers in the 1999 and 2000 case reviews by Sir Gerald Hosker and Gerald Butler QC respectively, the departmental review of Gower & Hammond (2000) and the Butterfield Report (2003); all leading to the establishment of an independent customs prosecution service.

centuries, it is now possible to commit serious crimes in State A without ever going there. Indeed, it is possible and often necessary for the multinational criminal businesses to structure their activities through a variety of national jurisdictions because of the economic structure of their criminality (product-sourcing in one State in order to feed a market in another State, transporting the illicit products via however many States might lie between source and market). The diplomatic processes of nineteenth-century mutual legal assistance, formalised into international norms through the *ECMA*, were well structured to enable extradition with supporting evidence (the primary aim) in a way in which agents of the requesting State were least likely to cause diplomatic offence to the requested State (the secondary aim). It has been conceded by all EU governments that such structures cannot cope with the new transnational criminality that emerged in the latter part of the twentieth century.

The problems it caused government officials and their administrative processes were highlighted in the EU peer evaluation review of mutual legal assistance conducted in 1999-2001 leading to a number of reforms both at national and EU level. Some of the problems caused to investigators were hinted at in Nicholson & Harrison's survey of 1996 (which principally highlighted a lack of awareness and expertise amongst police investigators) and by the survey and case studies undertaken for this PhD which have detailed the practical problems current processes pose for reactive investigators at local force level and proactive investigators at national level tackling transnational organised crime. The documentation of these practical problems is an important contribution to what is now a vigorous debate. Mutual legal assistance and international law enforcement co-operation have risen high upon the political agenda, initially because of EU concerns expressed at Dublin (1996) and then Tampere (1999). Transatlantic impetus, with the potential to derail European progress because of different perceptions (Harfield 2003), was injected following the 9/11 attacks. In the UK prosecutors are beginning to adopt a more proactive role in relation to mutual legal assistance which is a move for the better.

Repatriating fugitives remains important and has now been joined on the priority list by the repatriation (or at the very least confiscation) of criminal proceeds.[2] Extradition and mutual legal assistance processes put in place fifty years ago to protect sovereignty by ensuring that national agents do not offend foreign jurisdictions and that fugitives cannot escape now militate against its protection because they are open to exploitation by the increasing number of criminals and criminal groups operating across national borders. To adhere to mutual legal assistance processes that reinforce and protect national sovereignty along traditional lines perversely reinforces the very structures exploited by transnational

[2] Both the operation of new extradition and asset recovery laws are each equally worthy of concerted academic study, probably with the capacity to sustain a number of PhDs.

criminals for their own protection against prosecution. The process was in danger of becoming self-defeating.

In principle then, traditional mutual legal assistance structures may no longer be fit for purpose because of the way in which they seek to protect sovereignty and because of the way in which sovereignty is viewed as sacrosanct and invulnerable. Sacrosanct it may be but invulnerable it is not, either to legitimate international influences (economics, international relations, foreign policies) or illegitimate (transnational organised crime). From the invidious pervasion of transnational crime, no single government can protect its sovereignty. Each needs the help of others. This has been recognised in the last five years particularly in the EU which has generated a plethora of initiatives with consequential impact upon UK legislation. But the focus has been on updating traditional infrastructures rather than rethinking the paradigm and such an approach does not address all the problems. This seems evident from the lack of correspondence between areas of concern identified by officials in the EU survey and areas of concern identified by investigators in this present research. And here the two different data sets utilised in this research have reinforced this distinction because some of the major issues arising from the SCQ data (drawn from reactive investigators) may well be addressed in due course by some of the innovations emerging as a result of the EU peer evaluation survey but reforms based solely on the latter will not resolve the issues raised by SIOs in the mainly proactive case studies.

Time and again in this research interviewees have stressed the value of close and spontaneous communication between key players. Extant formal mutual legal assistance communication processes are far from spontaneous, nor are they particularly close. The direct transmission of requests permissible under the *EUCMA*, if fully adopted (there are worrying differences in the interpretation of direct transmission based on various adoption strategies pending the *EUCMA* coming into force (UKCA 2004:1)), may speed up part of the communication process but it is the preparatory communication in advance of formal requests that is proving so valuable. The issue is not the speed with which formal requests can be transmitted but the preparation of a feasible request beforehand and its informed execution.

For this numerous liaison networks have been created and there must be a danger of overlap. The Liaison Magistrates, EJN, and Eurojust, for instance, all seem to be serving the same audience although they have the potential to define distinct roles and complement each other. David Clark, then UK Liaison Magistrate in France, argued at an EAW seminar that "it is a question of deciding how best to use these tools in the circumstances of an individual case" (Trier, 15-17 May 2003).

Here there is scope for future research to assess the value of these new prosecutor liaison structures once they have had time to establish themselves. Will they prove to be more effective at securing successful prosecutions than traditional investigator liaison networks (Interpol, Europol, the DLO system for instance)? Indeed, have they already overtaken investigators in the sophistication of their co-operation? Will they reduce the number of instances reported in both the SCQ and the case study interviews where a stronger prosecution case and more serious charges could have been made if the foreign evidence known to exist had actually been successfully secured and adduced, thus bringing an added value to investigation outcome? What further barriers to effective communication have yet to be identified in order that they can be removed?

Another area suitable for future research, too new for detailed consideration here, is the concept of mutual recognition which was referred to many times in Parliamentary debates on the *C(IC) Bill*. Mutual recognition is the alternative to having international criminal procedural law, itself a relatively new concept only recently considered in relation to the pre-trial stages of investigations likely to end before the ICC (Safferling, 2001, in particular Chapter 2). The EAW and EEW are logical expressions of the concept of mutual recognition but neither enjoys whole-hearted political support. This thesis has examined the context in which mutual recognition, as an alternative to procedural harmonisation, came to be common currency in the mutual legal assistance debate. In the years to come the account of this genesis will serve as a starting point for a review of the philosophy and the achievements deriving from it. For the doom-sayers, it is inconceivable that mutual recognition could ever succeed between asymmetrical legal systems (Bill Cash MP, *HC Hansard*, 1 April 2003, col.834).

As argued elsewhere (Harfield 2003:230-232), asymmetry is the cornerstone of US policies in relation to international law enforcement co-operation, geared towards achieving unilateral rather than regional objectives. Yet in the aftermath of 9/11 the US, whose officials have scoffed at the ineffectiveness of EU multilateral approaches as leading to a lowest common denominator outcomes (*ibid.*), now actively seeks participation in the sorts of fast-track assistance based on mutual recognition currently being instigated within the EU, made possible because of documented European norms. A dynamic 'can-do' approach suits the American psyche. But transatlantic perceptions of what mutual legal assistance is and is about are at such variance that at times it appears the various parties are not really talking about the same concepts even if they think they are (Harfield 2003). Witness the UK-US MLAT in which are to be found articles to which the UK signed up at US insistence but which cannot possibly be enacted under current UK law no matter how insistently the US authorities might request such assistance (Home Office official, pers.comm. July 2003). The Americans are happy because the measures are in the treaty even though they recognise that such requests

would never be granted because they are contrary to UK law. Similarly the EU-US MLAT suffers from unenforceable drafting because it is an issue upon which only individual Member States (most of whom have bilateral treaties with the US) can negotiate such instruments, not the EU – or at least not at that time. Some EU initiatives simply cannot be translated into the current transatlantic relationship. For instance direct transmission is at odds with US insistence upon central authorities. The wider context of mutual legal assistance between the EU and third parties is a third area of future research, increasingly important within the context of the so-called war on terrorism and apparently non-executable treaties.

Over-capping all these areas of detail is the whole issue of supranational policy in relation to justice and home affairs. This thesis marks not only the end of the UK's 1990 statutory regime but also the end of the EU concept of 'justice and home affairs'. With the appointment of Rocco Buttiglione as the new commissioner to replace JHA Commissioner Vittorino, comes the parallel announcement that the EC Directorate General is to be re-named 'Justice, Freedom and Security', picking up the concept of an 'area of freedom, security and justice' articulated first in Art.29 *ToA*. Whether this is a cosmetic change or the harbinger of a significant shift in philosophy and approach only time and future research will reveal.

Through original research this thesis has identified problems inherent in the processes and practicalities of mutual legal assistance at a given moment in time, coincidently the moment at which the UK over-hauled its existing statutory framework in order to incorporate new ideas and methods of working within the context of EU membership. Some of these problems hitherto may not have been identified by governments and their officials although HM Government has recognised that there may be practical problems in the operation of mutual legal assistance of which it is not yet aware with its call for relevant research (2004b:20). This research has contributed to that consultation and in doing so has highlighted where problems in processes and practicalities remain. It provides a bench-mark against which to measure future developments in the UK and against which to assess whether, through the current JHA, international law enforcement co-operation and mutual legal assistance initiatives, the EU is moving any closer to being united in diversity.

APPENDICES

Appendix A

British policy in relation to mutual legal assistance 1950-1990

Statutory UK engagement in European mutual legal assistance began in 1990 when the *CJ(IC) Act* ratified the recent UK signature to the *ECMA* 1959. To provide a historical context, it is worth exploring briefly UK official attitudes around the time that the *ECMA* was being negotiated to understand why it was the UK took so long to engage with its European neighbours. Such Government records as have been released reveal that at the time that both police co-operation and mutual legal assistance initiatives were being developed in Europe, UK attitudes were characterised by disdain, ambivalence and vested interests.

Although commentators have noted (Brown 1998:51) that the UK took no part in negotiations concerning the drafting of the Convention, such negotiations were at least monitored in Whitehall. Invited to respond to specific German proposals, for instance, the Foreign Office at least declared that it had no objection to them whilst the Home Office chose not to comment at all (minute dated 20 July 1959, National Archives:FO71/146282:WUC 1651/2).

Mr (later Sir) Samuel Knox Cunningham, the Ulster Unionist MP for South Antrim 1955-1970, was a member of the UK delegation to the Council of Europe between 1956 and 1959. [1] He it was who gave the formal explanation of the UK position to the Council of Europe Consultative Assembly on 22 January 1959:

> "In the United Kingdom we have three different systems of law. In England and Wales there is one system; in Scotland there is another which is fundamentally different. Again, in Northern Ireland the system is very similar to that of England and Wales, but differs with regard to land law, and there are also other statutory differences. On the other hand, there is a marked difference between all these three systems and the main system of law existing in Europe across the Channel.
>
> May I give you an example from the draft Convention? There is a provision for evidence to be taken in one country for use in another under 'letters rogatory'. Such evidence can be taken in the United Kingdom, but *our rules of evidence do not permit the use in criminal matters of evidence taken in another country under 'letters rogatory'*. There are other fundamental differences and I do not believe that it will be possible for the United Kingdom to ratify this Convention. That is not to say that my country is not deeply interested in giving assistance in criminal matters to other countries. The United Kingdom is a member of Interpol, the organisation through which police forces render mutual assistance in criminal matters, and it plays its part fully in that work." (*Report of the Council of Europe Consultative Assembly*, 10th Ordinary Session, 30th Sitting, National Archives: FO371/146282: WUC 1651/6, my emphasis).

[1] I am grateful to staff at the House of Commons Information Office for supplying career details of Sir Samuel Knox Cunningham MP.

What is not available is the brief given by Whitehall officials to Cunningham. This is unfortunate because had it been available it would have enabled comparison between his brief and his formal statement, and between these sources and the brief officials compiled one month later for a Written Answer to a Parliamentary Question tabled by Cunningham (*HC Hansard* 19 February 1959 col.92W). The brief for the Written Answer is unequivocal.

> " The United Kingdom have been against this Convention from the start. UK Experts did not take part in its preparation. We have indicated that we are unlikely to sign it.
>
> The main reason for our opposition is that it would require a change in our law to permit us to enter into agreements whereby witnesses in this country could be compelled to give evidence at a foreign trial. We should be unlikely to be willing to permit foreign police forces to come and pursue their enquiries here, and especially to interview witnesses.
>
> On the other hand, our Extradition Acts of 1870 and 1873 and our agreements with Interpol already cover some of the activities dealt with by this draft Convention" (minute dated 12 February 1959, FO 371/146282:WUC 1651/7).

Leaving aside the issue that the second paragraph does not accurately reflect the provisions of the *ECMA* (Articles 1 & 4) concerning the role of authorities from the requesting State, none of this candour was reflected in the reply to Cunningham's invitation by Written Question to the Foreign Secretary to make a statement. "In the circumstance" came the formal answer, "it would be premature to make a statement now" (*HC Hansard* 19 February 59 col.92W).

Quite why Cunningham felt the need to table such a question and quite why the Government was so reluctant to reveal its position in public is not apparent from the records but a briefing note for officials attending the Council of Europe meeting in March 1959 details further the belief that the UK was already in a position to respond positively to requests for assistance from other States. The issue of whether UK authorities might need foreign assistance seems not to have been a consideration: it is a matter not mentioned.

> ""We have been against the draft convention from its inception... the purposes of any such convention are to a great extent achieved as far as the United Kingdom is concerned:
>
> a) by our Extradition Acts of 1870 and 1873 which provide means whereby evidence may be taken in this country to be used in criminal proceedings pending before foreign tribunals;
>
> b) by the use of Interpol by our police authorities to pass on information and histories of criminal antecedents to foreign police forces.
>
> ... It is most unlikely that we should agree to permit officers of foreign police forces to come and pursue their enquiries here, and especially to interview witnesses." (Minute prepared for meeting on 2 March 1959, National Archives:FO371/146282:WUC 1651/9). [2]

If the UK had no interest in contributing to the development of co-operative mechanisms to tackle crime more effectively, it was, perhaps by default, actively setting the agenda in defining the most pressing crime problems facing Europe in the late 1950s. A European Committee of Experts on Crime Problems [ECCP] was founded, established at the

[2] The provisions of the *Extradition Act* 1870, as amended in 1873, are summarised in Appendix I.

suggestion of the Committee of Experts who drafted the *European Convention on Extradition 1957* rather than at the instigation of the Council of Europe itself. The Council of Europe allowed the ECCP to draw up its own programme of work (briefing note 21 January 1959, National Archives: FO371/146282:WUC 1651/10). Sir Lionel Fox, Chairman of the Prison Commission in London, was the UK representative and was elected Chairman of the ECCP (*Report of the First Meeting of the* [ECCP], National Archives:FO371/146282:WUC 1651/1). The programme of work decided upon by these experts seems certainly to incorporate Fox's professional interests (see Table 13) but to what extent it accurately reflects the most pressing contemporary crime problems in Europe is less clear.

Table 13: Programme of work identified by the ECCP, 1959

- Punishment of motoring offences
- Prison wages and related questions
- Civil and political rights of detained and released persons
- Mutual assistance in after-care or post-penitentiary treatment including repatriation after sentence or probation
- Abolition of the death penalty
- Juvenile delinquency

Despite Fox's concern to avoid both an "ambitious, general and costly programme" and any duplication of effort with the UN in this area (*ibid.*), it was precisely these issues that Foreign Office officials cited as reasons to treat the ECCP with caution (briefing note 21 January 1959, National Archives:FO371/146282:WUC 1651/10). The note also reveals that the Home Office were "a little unhappy" about the budget proposals for the ECCP.

The 1959 ECCP programme focuses on post-conviction issues.[3] Nowhere did it consider pre-trial mutual assistance and co-operation or any particular type of criminality. Both the Foreign Office and the Home Office held the view that, in any case, all these issues were properly the remit of the UN, not a regional body in Europe (*ibid.*). In a context in which the UK had recently declined an invitation to join the 'Common Market' (Leonard 1994:6), such an attitude might be interpreted as wanting to limit the influence of European neighbours rather than a policy to enhance the role of the UN.

UK foreign affairs at this time appear to have been dominated by the metamorphosis of Empire into Commonwealth. In this arena the records reveal a rather different attitude

[3] The ECCP now has a much broader brief and regularly reports on all aspects of criminal law enforcement in Europe.

towards mutual legal assistance. Between 1959 and 1961 the UK loaned a Parliamentary Counsel to Ghana to help this emerging nation adapt an off-the-shelf criminal code to local circumstance. The proffering of such 'designer codes' was usual UK practice and that being adopted in Ghana, Jamaica had recently rejected. Dr Kwame Nkrumah, the Ghanaian Head of State, in a letter to Harold Macmillan (14 April 1961, National Archives:LCO2/8471) suggested that Ghana could make its experience of such an implementation available to its African neighbours but would require UK assistance to achieve this. One of the issues that was being resolved in Ghana involved the very extradition procedures that the UK had cited as reason not to ratify the *ECMA*.

> "Because of technical differences between Colonial Territories which were regarded as Protectorates or settled Colonies different Extradition Acts applied in different parts of the same Colonial Territory. When Ghana became independent in March 1957, there were no less than four different Extradition Acts, each one applicable in one part of the country" (briefing note 17 April 1961, National Archives:LCO2/8471).

> "The original proposal by Dr Nkrumah had obvious drawbacks. It was essentially a scheme for extending Ghanaian influence in other parts of Africa, and in the light of recent events, it is decidedly doubtful whether Ghanaian legal arrangements are to be commended as a model for others to follow. Nevertheless the letter seemed to contain the germ of a good idea" (letter from Colonial Relations Office, London, to British High Commissioner, Accra, 29 November 1961, National Archives:LCO2/8472).

The germ of a good idea bore fruit in the shape of the *Commonwealth Technical Legal Assistance Scheme* operated by the British Institute of International & Comparative Law, headed by Lord Denning, by which means the UK Government diverted (and diluted) the original suggestion, making it pan-Commonwealth rather than just pan-African. The *Scheme* (National Archives:LCO2/8473) is of little relevance to this thesis but the circumstances of its generation illuminate Government thinking. At the same time as the UK was shying away from closer co-operation with European neighbours, it was fully prepared to impose harmonisation on newly independent States that were once colonies.

The relationship between British Colonies and Interpol was also the subject of close attention at this time following the re-constitution of Interpol in 1956. The issue had first been raised following a telegram to Whitehall from the Governor of Gibraltar (24 December 1952, National Archives:CO968/268). The Governor described a request he had received from an organisation he had never heard of to make three arrests, a request retracted three days after it was received. The Governor sought advice. The UK was represented at meetings of the International Criminal Police Commission (as Interpol was then called) by the Assistant Commissioner in charge of CID at Scotland Yard. On 20 March 1953 the Colonial Office informed the Assistant Commissioner that it was now thought "desirable to furnish the Commissioners of Colonial Police Forces with some information as to the constitution and purposes of the Commission [Interpol]" (*ibid.*). The Interpol Bureau at Scotland Yard became

the conduit for contact between colonial police forces and Interpol, an arrangement that remained in place even after the re-constitution of Interpol (National Archives:CO1037/93).

Interpol offered (20 June 1957:*ibid.*), within the terms of the UK subscription to the organisation, the opportunity to establish sub-Bureaux in each of the colonial police forces. The UK would retain just one vote in the General Assembly. Whitehall consulted the colonial police commissioners advising them at the same time that they would be responsible for their own travel expenses in attending Interpol meetings and should offer voluntary subscriptions in lieu of having to pay full subscriptions. Unanimously the colonial police commissioners decided that they had no need of their own sub-Bureau whilst Scotland Yard was prepared to represent them.

In 1958 Interpol held its General Assembly meeting in London. Besides the official UK delegation consisting of the Metropolitan Police Assistant Commissioner for CID and the Inspector-General of Colonial Police (also based at Scotland Yard), six provincial chief constables were invited to attend as observers. Government and police attitudes to the role of Interpol now came under scrutiny (National Archives:HO287/453 [4]). The Chief Constable of Hertfordshire (Wilcox) led the charge. Confessing how remiss he had been in ignoring his obligations to the wider international police community, he sought permanent provincial representation in the UK delegation (letter to the Under-Secretary of State, Home Office, 24 January 1959). The Under-Secretary envisaged undefined "administrative difficulties which it might not be possible to overcome" (27 January 1959). Wilcox did not give up, and was joined by (amongst others) Colonel Young, Commissioner of the City of London Police, who volunteered to be a UK delegate and cited his extensive foreign travels on behalf of the City of London police as qualification for the role (14 January 1959).

The Home Office engaged in a strategy of sequential procrastinations with which viewers of the situation comedies *Yes, Minister* and *Yes, Prime Minister* would be familiar (BBC TV, first transmitted 1980 to 1986). Correspondence went unanswered for months. Requests to put this matter on the agenda for the chief constables' conference were ignored for as long as civil servants could get away with it. The file was temporarily mislaid, for many weeks. The Scottish Home Office was incited to agitate the argument that Scottish chief constables had a stronger claim than their English counter-parts. And when these stratagems regarding principles had run their course, the Home Office ignited a vigorous debate between HM Treasury and the County Councils Association on the practicalities of the issue by asking who would pay for provincial delegates to attend Interpol meetings. On the 25th June 1964,

[4] All subsequent correspondence on this matter is contained within the single Home Office file archived at the National Archives and released in 1995.

six years after he had volunteered his services, Colonel Young was at last authorised as a UK delegate to the Interpol meeting in Venezuela, at the expense of the Corporation of London.

Neither Wilcox, Young, nor any of their colleagues appear to have advanced a substantiated business case for provincial delegates. If they did, it is not recorded in the correspondence. Nor did the Home Office ever present a convincing argument against such representation. There is nothing in official government files to provide hard evidence one way or the other of the actual need for police co-operation or mutual legal assistance at this time. Interpol appears to have been viewed, to borrow an historical analogy, as a "good thing" (Sellar & Yeatman 1930) but little thought appears to have been given to the nature and purpose of interaction between UK law enforcement and Interpol. The lack of hard evidence allows the deduction that, in fact, there was probably little significant demand at this time for transnational police co-operation. Had there been, a more timely response to the issue of provincial representation might have been apparent. This sheds further light on the context within which Kent police established the CCIC.

Reluctance to enter into formal MLATs was reflected elsewhere when a meeting was held early in 1986 to consider mutual assistance between Commonwealth countries.

> "Senior officials opened their deliberations with a discussion of a suggestion that the new arrangements take the form of a multi-lateral treaty, but concluded that the non-treaty, informal 'scheme' approach (under which countries adopting the scheme enact similar legislation) still offered the most appropriate approach to mutual judicial assistance within the Commonwealth" (Commonwealth Secretariat 1986:6).

The conference recommended to law ministers the adoption of two schemes: the first to enhance mutual assistance in the investigation and prosecution of criminal matters; [5] and the second to permit the transfer of prisoners convicted abroad to their home State to serve their sentence. A third scheme concerning the protection of cultural heritage was referred for further policy guidance from ministers (*ibid*:38).

The Commonwealth *Harare Scheme* in fact came to provide a model for subsequent UN treaties such as the 1988 Vienna drugs treaty, that echo the call for the harmonisation of domestic laws and the criminalisation of agreed behaviours (Gilmore 1995:xviii). Nor was the cross-fertilisation just one way. Increasingly, Common Law countries are entering into MLATs because they obviously feel a need to do so. By doing so they can at least ensure that their concerns are addressed when dealing with non-Common Law countries. The latter, of course, have little alternative within their constitutional arrangements. Australia and Canada each have drawn up Model Treaties (Gilmore 1995:224-247) and the UK, having signed a MLAT with the US concerning the Cayman Islands in 1986 (Gilmore 1995:280-297; see also National Archives FO 93/8/476) followed that up by ratifying the *ECMA* and the UN Vienna

[5] The *Harare Scheme*, text as amended in 1999 with commentary in Murray & Harris (2000:264-282).

drugs treaty in 1990 (*CJ(IC) Act 1990*) and by negotiating a separate general MLAT with the US in 1994 (Murray & Harris 2000:362-373; National Archives FO 93/8/537).

In its dealings with the drafting of the *ECMA*, the role of the ECCP, colonial legal developments and relations with Interpol, the UK government adopted wherever possible the role of a detached observer whose own house was in order and who was anxious that neighbours should not unduly disturb the *status quo*. Such attitudes were to change from 1986 as the Commonwealth ushered in its informal *Harare Scheme* and the UK and US had to negotiate a bilateral MLAT to resolve their differences over jurisdiction in the Cayman Islands. And as discussed in Chapter 3, within this context practitioners marshalled peer pressure which the Home Office recognised in 1988.

Appendix B

Recommendations of the EU mutual legal assistance evaluation Final and UK Reports

This appendix quotes at length recommendations arising from the *Final Report* on the whole three-year evaluation exercise across the EU and from the EU evaluation of the UK mutual legal assistance mechanisms. It supports discussion outlined in chapter 4.

European Union, *Final Report on the First Evaluation Exercise – Mutual Legal Assistance in Criminal Matters*, 8648/01 CRIMORG 55, 10 May 2001

Unlike the UK evaluation report cited below, the Final Report discusses its recommendations at it progresses through its text. Thus there is no separate list summarising the recommendations. What follows are the recommendations as extracted from the main text.

"Recommendation 1 (p.9)

The Council urges the Member States to devote particular attention to ratifying, in compliance with their constitutional requirements, international instruments which facilitate assistance in criminal matters within a reasonable period. Special attention should be given to an early ratification of the 2000 Convention. [Member States to be asked to report on reasons for non-ratification by 1 October 2001.]

Recommendation 2 (p.10)

The Council invites the Member States to review their national legislation and practices with a view to ensuring that a request for mutual legal assistance from another Member State is not refused solely on the ground that the offence giving rise to the request is barred by statutes of limitations in the requested Member State.

Recommendation 3 (p.12)

The Council notes with satisfaction that work is being carried out in the Working Party on Cooperation in Criminal Matters on an expedited procedure for tracing bank accounts of natural or legal persons and requests the Working Party to seek satisfactory solutions to this matter as quickly as possible.

Recommendation 4 (p.15)

The Council notes that double criminality remains controversial among Member States and recommends continued discussion on this subject.

Recommendation 5 (p.17)

The Council calls upon the Member States to:

- Rationalise the internal procedures and the administrative path and eliminate red tape in the authorities dealing with mutual legal assistance by defining exact lines of demarcation and specific tasks, simplifying the role of the hierarchy and making the officials concerned responsible. The objective is to achieve a flexible and dynamic service; the informal approach developed in some Member States should be taken into consideration.

- Ensure that a request for specific measure from another Member State will not be executed in a less efficient way than a measure in a domestic case.

Recommendation 6 (p.18)

The Council calls upon the Member States to examine their national procedural provisions in order to prevent rights of appeal from being used for delaying purposes.

Recommendation 7 (p.18)

The Council calls upon the Member States to examine their structures relating to investigations into financial crime with a view to drawing on best practices on how other Member States are organised and examining if it is necessary to reorganise their own structures in order to improve co-operation between the Member States.

Recommendation 8 (p.19)

The Council calls upon the Member States to simplify the procedure for transfer of material to the requesting Member State by dispensing with multiple controls.

Recommendation 9 (p.19)

The Council calls upon the EJN to continue the further development of a standard form for outgoing requests aiming at facilitating mutual assistance and make it available as soon as possible. The Council also recommends the Member States to examine the potential within their own country for a computerised system for the drafting of outgoing requests and coordinate these efforts at EU level, possibly with Community funding.

Recommendation 10 (p.20)

The Council invites the Member States to assess the respect for the measures set out in the Joint Action of 29June 1998 on good practice in mutual legal assistance in criminal matters. The EJN contact points could assist by notifying their own judicial authorities or their counterparts in the Network of any failings encountered.

Recommendation 11 (p.21)

The Council encourages the Member States to issue guidelines, through the means which are in line with their constitutional traditions, to their judicial authorities to ensure the dissemination of homogeneous practices,

Recommendation 12 (p.22)

The Council calls upon the relevant Working Party to discuss the role of the central authority and how this central unit, despite the moves towards decentralisation, could maintain an effective role, and examine whether there are any functions, such as overall guidance and monitoring, which central authorities are best placed to perform in the developing scenarios.

Recommendation 13 (p.23)

The Council calls upon the Member States and the EJN to make the Network more widely known to the judicial authorities in the Member States and remind them of the advantages to make more extensive use of the Network's contact points, especially in urgent cases.

Recommendation 14 (p.23)

The Council calls upon the Member States to provide the EJN contact points with all necessary resources and training, and insists on the speedy implementation of the Council decision[1] to provide contact points with Intranet facilities as well as a secure email.

Recommendation 15 (p.24)

In reiterating the need for an early ratification o the 2000 Convention the Council calls upon the Member States to promote and support the direct communication between judicial authorities of requests for mutual legal assistance in accordance with the provisions of the Convention. In this respect, the implementation of the European Judicial Atlas will play an instrumental role.

[1] A decision was taken on 11 January 2001 to implement the pilot project concerning the Virtual Private Network with a view to it becoming operational in August 2001.

Recommendation 16 (p.24)

The Council calls upon the Member States to install and use a computerised system for record keeping in order to give a clearer picture of the actual situation regarding mutual assistance and enable a better monitoring and follow-up for each case.

Recommendation 17 (p.26)

The Council calls on Member States to formulate a genuine forward-looking policy on mutual assistance, which could include a policy to facilitate visits abroad by police and judicial authorities concerning mutual assistance, and accordingly to provide the administrative departments and judicial authorities responsible for these matters with the premises, means and resources they need.

Recommendation 18 (p.27)

The Council calls on Member States to:

- Promote and extend, from recruitment and during the course of careers, initial and further training for the purpose of at very least acquiring and maintaining and subsequently improving knowledge and fluency in at least one language in addition to the mother tongue. This requirement could apply to the police, judicial and administrative authorities operating in the field of mutual assistance.

- Accelerate, amplify and update the initial and continuous training for prosecutors and judges in order to ensure that judicial authorities have the necessary minimum skills to practise active and passive mutual assistance. Specialist training should be encouraged for the prosecutors and judges most involved in these issues.

- Encourage and promote initial and further training to impart and improve knowledge of the legal, judicial and institutional systems of the other Member States. The initiatives taken by certain Member States in this area and also in the framework of the Eurojustice conferences should be supported and initiative by France regarding a European Judicial Training Network could, when adopted, contribute to furthering this process.

Recommendation 19 (p.28)

The Council calls on the Member States to examine the possibility of having judicial and administrative staff specialising in the management of mutual assistance in criminal matters. In that context should be examined the possibility of having a specific Union financing programme under Title VI to meet these needs. Such a programme could for instance address training in mutual legal assistance.

Recommendation 20 (p.29)

The Council calls on the General secretariat of the Council of the European Union and the EJN to make the information contained in the evaluation reports available in electronic form.

Recommendation 21 (p.29)

The Council asks the Presidency to prepare a letter on the basis of the conclusions of the evaluation report on each Member State and to forward it to the Member States according to a timetable reflecting the original order of evaluations; each State would then have to describe the institutional, legal, practical, administrative and logistical measures it had taken or will take in response to the recommendations addressed to it. The outcome could then be passed on to the Council by means of a Presidency report.

Recommendation 22 (p.30)

The Council calls upon the relevant Working Party to extend the mechanism for evaluating international mutual assistance to the States candidates for accession.[2] "

European Union, ***Evaluation Report on Mutual Legal Assistance and Urgent Requests for the Tracing and Restraint of Property: Report on the United Kingdom*** **7249/01 CRIMORG 31, 26 March 2001**

In this document the recommendations fall into two categories, those directed to the UK (and where applicable to other Member States) and those directed to the EU and its Member States. The numbering of the original report is utilised here.

"5.1 To the United Kingdom, and where applicable, to other Member States of the EU:

5.1.1 The evaluation team recommends that the UK should take the opportunity of the imminent signing of the new Convention on Mutual Legal Assistance in the EU and its application to join parts of the Schengen system, to consider some changes at a legislative and administrative level and

a) Ensure full implementation of its international commitments made under the 1959 Convention;

b) Consider ways for a more direct transmission of requests where appropriate between requesting and executing authorities and for a limitation of checks;

c) For outgoing requests, consider direct transmission from the issuing agency to the foreign executing agency;

d) Examine search and seizure legislative provisions and procedure and simplify them; consider at the same time abolishing the two separate schemes and two types of designation for

[2] The Council Secretariat has informed the Presidency that, if this proposal were to entail any additional expense to the Council budget, it would have a formal reservation on this matter and that it would have to inform the Deputy Secretary General of the proposal.

restraining assets; improve the possibilities to restrain assets at an early stage of the investigation;

e) Recommend considering solutions, which would allow restraining amounts of less than £10,000 in England, Wales and Northern Ireland;

f) Consider and examine the possibility and feasibility of a centralised banking information system as well as a central registration system for stolen property;

g) Consider legal changes in order to allow its authorities to co-operate more fully concerning the taking of finger-prints and DNA evidence;

h) Allow the seizure of evidence of offences other than the offence to which the request relates, pending a new letter of request;

i) Allow for video recording in courts whenever requested by a foreign authority;

j) Consider whether transmission of evidence via the UKCA should be maintained;

5.1.2 The evaluation team recommends that the UK should redefine, through legal changes or new practice, the role of the UKCA in mutual assistance cases, which will

a) Enable the UKCA to take the lead role in the entire process of mutual legal assistance and make arrangements to plan for the co-ordination of the process across all agencies;

b) Give the UKCA overall responsibility for all training in mutual legal assistance in consultation with other agencies, to ensure nation-wide consistency in these programmes by preparing modules on specific topics and developing minimum training standards;

c) Provide that the UKCA co-ordinate all guidelines, and eventually prepare in consultation with the main agencies a single, comprehensive guide covering all agencies to advise foreign requesting authorities;

d) Allow the UKCA [to] undertake to co-ordinate between all authorities involved in sending requests in order to achieve a better standardisation of UK requests;

e) Allow the UKCA [to] devise a mechanism for monitoring requests which will provide for consistency in approach by all agencies in monitoring requests e.g. set time limits for issuing incoming requests to executing authorities, issuing reminders, checking full execution etc.;

f) Allow the UKCA, in consultation with other agencies, [to] take all initiatives necessary to better organise and centralise the record keeping of mutual legal assistance cases and consider the development of a uniform fully comprehensive computer based system in all the main agencies and across agencies both for incoming and outgoing requests;

g) Allow the UKCA [to] co-ordinate the work of the EJN at national level and inform all smaller agencies on a regular basis of the activities of the Network;

5.1.3 The evaluation team recommends that the UKCA is given appropriate resources to carry out its duties and implement the recommendations of the evaluation team. This would include:

a) The provision of sufficient staff, including experienced lawyers and other practitioners to enable it to fulfil all its tasks and implement the recommendations made by experts;

b) The integration of the mutual legal assistance and extradition sections in the Home Office;

c) Access by the staff of the UKCA, eventually through the use of modern technology, to at least some of the information in the 'Alert' System held by NCIS;

d) The provision of clear guidance and consistency for deciding on refusal of a request;

5.1.4 The evaluation team recommends that all agencies be provided with sufficient resources to enable them to fulfil the UK's international commitments;

5.1.5 The evaluation team recommends that UK authorities coSnsider changing their practice concerning the hearing of witnesses under oath when these refuse to testify, whenever a specific request is made to it [*sic*];

5.1.6 The evaluation team recommends that UK authorities respect as much as possible the classification as urgent given by foreign judicial authorities;

5.1.7 The evaluation team recommends that UK provide the designated authorities including EJN contact points with Internet; appoint EJN contact points in all major agencies, and provide them with the necessary resources such as Internet access; involve more the EJN contact points in Scotland and in some of the agencies in the meetings of the Network; improve the work of the liaison magistrate through a more pro-active approach and a better involvement in the daily work of the UKCA; consider exchanging liaison magistrates with other countries with which the UK have most problems;

5.1.8 The evaluation team recommends that the Crown Office examine its processes to shorten procedures and to arrange for direct transmission of requests or evidence to the overseas requested authorities; organise regular meetings with all Procurators Fiscal under the direction of the Crown Office for training purposes, to arrange seminars etc. and exchange views and to learn of new developments in mutual legal assistance;

5.1.9 The evaluation team recommends that requests for service of summonses/documents be co-ordinated centrally to ensure compliance with legal requirement of requested states;

5.1.10 The evaluation team recommends the UK to put its practice in line with its commitments and that UKCA case officers have clear instructions how to deal with urgent requests in compliance with the UK's statement of good practice;

5.1.11 The experts invite the UK to consider ways to speed up court practice in appeal procedures in cases of serious crime.

5.2 To the European Union and its Member States:

5.2.1 The evaluation team recommends that Member States and the European Union address the problem of improving the definition of the distinction between police and judicial co-operation in all Member States where it is appropriate, with due respect to the protection of citizens but also to avoid

overloading the channels for mutual legal assistance in criminal matters with requests of a minor nature; The team recommends that the EU should discuss the different traditions of mutual legal assistance within the Member States;

5.2.2 The experts recommend that both the Member States and the Union ensure that in all Member States all forms of serious crime are criminalised or reduce the requirement of dual criminality for the use of coercive measures in the fight against serious crime;

5.2.3 The team recommends that Member States and the Union take all necessary initiatives, if necessary in the framework of the EJN, to improve the quality of requests for mutual legal assistance and co-ordinate initiatives in setting up computer based systems for drafting letters of request;

5.2.4 The evaluation team suggests the discussion at European level of court practices in Member States in order to arrive to a balanced situation in all Member States, which would take into account both the need for efficient prosecution and the rights of individuals in legal proceedings;

5.2.5 the evaluation team recommends that all judicial authorities respect as much as possible the classification as urgent given by foreign judicial authorities in accordance with the Joint Action on good practice in mutual legal assistance."

Appendix C

Recommendations made by Nicholson & Harrison, 1996

This appendix quotes in full, without comment, recommendations made by Nicholson and Harrison on the basis of their review of police experiences of gathering evidence from abroad (1996). It supports discussion outlined in chapter 5.

Nicholson W & Harrison S, 1996, *International Evidence Gathering – Are We Succeeding?* (Police Research Group, Home Office, London).

Pages 41-43: Key Point Notes

1. "The Interpol Guidance Manual on obtaining evidence from abroad should be included within all Force procedures, orders and guidelines.
2. Police managers should be aware of the likely increase in police officers to undertake foreign travel and cater for this in their strategic planning.
3. There should be a central point within the UK for the collation and distribution of advice from and to police officers who are involved in the obtaining of evidence from abroad.
4. Further research should be commissioned in respect of combining offence types, trends and suspects to facilitate the investigation of future offences which will necessitate obtaining evidence from abroad.
5. To encourage better performances, those concerned in administering UK requests for the obtaining of evidence from foreign countries should keep and publish performance indicators which include turn around times.
6. Police managers responsible for determining case acceptance criteria should consider in their decision making process the anticipated time and resource implications associated with the obtaining of evidence from abroad.
7. Police managers should consider the cost benefits of transporting foreign witnesses to the UK to give their evidence as an alternative to foreign travel.
8. UK investigators when abroad should try and obtain the original documentation or copies thereof and return with them personally.

9. UK investigators, prior to obtaining evidence from abroad, should consider the effects in their investigation of foreign data protection, disclosure, privacy, media and freedom of information legislation.

10. There should be a national register of interpreters who are accredited and prepared to travel abroad. Entry onto this register should be via a system of competitive tendering and based on a 'value for money' concept.

11. The Interpol *Interpost* Bulletin should be made the subject of a marketing drive, directed at all relevant departments with UK police forces.

12. All forces should review the role of their Interpol Liaison Officer. Included in that review should be the relationship between the Force and Interpol and the co-ordination of Force activities requiring the assistance or support of Interpol.

13. Consideration should be given to the formation of a 'one stop shop' approach to international evidence gathering.

14. Police managers should consider, where appropriate, initiating or encouraging civil proceedings to assist in the process of obtaining evidence from abroad.

15. Police managers should consider, where appropriate, the use of postal and facsimile facilities to supplement the process of obtaining evidence from abroad.

16. There should be a central database, available to all UK investigators and prosecutors involved in the obtaining of evidence from abroad which contains information or contacts, advice and relevant working practices."

<u>Pages 44-45: Recommendations</u>

"1 - Recommendations at force level

a) The Interpol Guidance Manual on obtaining evidence from abroad should be included within all Force procedures, orders and guidelines. Such instructions should: i) cater for the requirements of individual forces and emphasise the role of the Force's Interpol Liaison Officer and ii) include advice in respect of such evidence gathering.

b) Police managers should be aware of the anticipated use rise in the requirement for police officers to undertake foreign travel and cater for this in budget planning.

c) Police managers responsible for determining case acceptance criteria should, in their decision making process, consider the anticipated time and resource implications associated with gathering evidence from abroad.

d) Police managers should consider the cost benefits of alternative methods of obtaining evidence such as transporting foreign witnesses to the UK to give their evidence.

2 - Recommendation at national level

There should be one central point to co-ordinate the passage of requests for evidence to and from the United Kingdom. Personnel within this central point should include representatives from Interpol, the Home Office, investigative bodies and prosecutors. The operation of this unit should be based on a 'One Stop Shop' philosophy and the following functions should be included within its Terms of Reference:

a) Advice on how to progress enquiries in the form of a Help Desk

b) The identification of offence types, trends and suspects.

c) The creation and maintenance of performance indicators and management information.

d) The creation and maintenance of a national index of translators and interpreters.

e) Regular reporting to Forces, prosecuting authorities and other relevant agencies.

f) The creation and maintenance of a computerised database which contains information on contacts, advice and working practices.

g) To conduct further research in respect of international evidence gathering as appropriate.

h) To conduct research on the effect non co-operation may be having on the well-being of member states, especially in respect of financial crime."

Appendix D

The self-completion questionnaire used to survey ACPO forces

This Appendix, supporting Chapter 6, presents the template used for the SCQ. A covering note from Chief Constable Kernaghan, not copied to the author, was sent with the electronic distribution. The template begins with an introduction setting the context of the SCQ.

Introduction: purpose of survey

In 1996 Supt. W. Nicholson & D/Insp. S. Harrison, Devon & Cornwall Constabulary, undertook a questionnaire survey into evidence-gathering outside the UK for UK-based police investigations as part of the Home Office Police Research Award Scheme. The results of their survey, covering the period 1990-1995, were published by the Home Office in a Police Research Group (as it then was) Report: *International Evidence Gathering – Are We Succeeding?*

Since the completion of the above work there have been a number of significant developments in the arena of mutual legal assistance, particularly within the EU and including recent evaluation of mutual legal assistance structures at government level. Within this context a second survey (attached) is being conducted as part of a portfolio of research activity into mutual legal assistance that includes both doctoral research at the University of Southampton and a Fulbright Police Fellowship at Georgetown University, Washington DC.

With permission from the Home Office Police and Reducing Crime Unit (successors to the PRG) and with the support of the Home Office Judicial Co-operation Unit (UK Central Authority) and ACPO, this present survey revisits some of the questions used by Nicholson and Harrison in order to provide comparative data six years on. Areas of interest not researched by Nicholson and Harrison are also explored in the light of recent EU political developments.

The survey seeks:

- To identify force procedures for obtaining evidence from outside the UK
- To identify force procedures to respond to requests for assistance from foreign authorities
- To identify the frequency with which foreign evidence is required
- To identify the types of criminality being investigated using mutual legal assistance mechanisms
- To identify what works and what doesn't work in current mutual legal assistance mechanisms

PLEASE RETURN COMPLETED QUESTIONNAIRES TO:

Clive Harfield, *[physical address given]*

or to *[email address given]*

by **1st October 2002.**

Thank you for taking the trouble to complete this questionnaire.

FORCE & STAFF MEMBER COMPLETING SURVEY:

1: Does the force keep records of the number of enquiries that necessitate gathering evidence outside the UK?

a) Yes b) No

2: Does the force keep records of the number of enquiries that are carried out in the force area on behalf of foreign authorities?

a) Yes b) No

3: Does the force have a single point of contact for *transmitting* out-going requests for mutual legal assistance and for *receipt* of requests from foreign authorities?

a) Yes b) No

If yes, what is that single point of contact:

4: Does the force have a special unit/department for *undertaking or facilitating enquiries to obtain evidence from outside the UK* for force-led investigations?

a) Yes b) No

If yes, what is that unit or department:

5: Does the force have a special unit/department for *undertaking enquiries* to obtain evidence *in the force area* in response to requests from foreign authorities?

a) Yes b) No

If yes, what is that unit or department:

6: Does the force have published guidelines in respect of gathering evidence from outside the UK?

a) Yes b) No

7: Does the force have published guidelines in respect of providing evidence in response to requests for assistance from foreign authorities?

a) Yes b) No

8: Where does the force seek guidance in obtaining evidence from outside the UK? Select as many as are appropriate.

a) NCIS (Interpol NCB)
b) Other NCIS unit (please specify)_____
c) CPS
d) UKCA
e) Other (please specify)_____

9: How many force enquiries have necessitated gathering evidence from outside the UK in the last 5 years? (In the absence of confirmed statistics, estimates are acceptable.)

No. of Occasions	1997	1998	1999	2000	2001
0-5					
6-10					
11-20					
21+					
Don't know					

10: How often has the force secured evidence in the force area on behalf of foreign authorities in the last 5 years? (In the absence of confirmed statistics, estimates are acceptable.)

No. of Occasions	1997	1998	1999	2000	2001
0-5					
6-10					
11-20					
21+					
Don't know					

11: What percentage of total cases dealt with by the force have involved the obtaining of evidence from outside the UK over the last six years?

	1997	1998	1999	2000	2001
% of cases					

12: Are officers deployed outside the UK to gather evidence or observe it being gathered on the force's behalf?

a) Never
b) In up to 25% cases
c) In between 26-50% cases
d) In between 51-75% cases
e) In more than 75% cases

13: How often, and under what circumstances, has evidence from outside the UK been obtained without the need for an international letter of request (*commission rogatoire*)? Please give a numerical figure is possible. (Please use additional sheets if required.)

14: How does the force transmit formal requests for evidence located outside the UK? Select as many as are applicable.

a) Direct to the foreign authority	Sometimes / Always
b) Via the UKCA	Sometimes / Always
c) Via CPS	Sometimes / Always
d) Via NCIS	Sometimes / Always
e) Via another route but copied to NCIS	Sometimes / Always
f) Via Europol	Sometimes / Always
g) Via another route but copied to Europol	Sometimes / Always
h) Via Interpol NCB	Sometimes / Always
i) Via another route but copied to Interpol NCB	Sometimes / Always

15: In ranking order of frequency over the last five years, what type of offences have necessitated gathering of evidence from outside the UK? (The type of offence for which evidence from outside the UK is most frequently requested by the force should be graded 1, the second most frequent type should be graded 2 etc.) If there have been no instances of the force requesting evidence from outside the UK in any of these categories, this should be indicated with a tick in the third column.

Offence type	Frequency ranking	No occurrence
Murder		
Child abuse (excluding possession/ exchange of paedophilic material)		
Exchange & possession of paedophilic material		
Any other type of assault		
Drugs trafficking		
Immigrant trafficking		
Money laundering		
Asset confiscation		
Fraud, including advance fee fraud		
Computer hacking		
Theft of property other than vehicles		
Vehicle theft (including caravans)		
Traffic offences (including accident/ collision investigation)		

16: Please indicate if any of the following have occurred in the last five years:

Action	Yes – please tick	Number of occasions (if known)
Investigation not undertaken or abandoned because evidence was located outside the UK		
Investigation / prosecution discontinued because of delay in obtaining evidence from outside the UK		
Prosecutions discontinued because foreign witnesses would/could not appear		
Lesser charge preferred in order to avoid having to obtain/rely on evidence from outside the UK		
Evidence from outside the UK excluded at trial because the manner of its being gathered by foreign authorities was challenged		
Evidence from outside the UK excluded at trial because the transmission of the request for assistance to foreign authorities was challenged		
Evidence from outside the UK excluded at trial because the defence did not have the opportunity to be present when the evidence was gathered.		
Video link used at trial to avoid the necessity of a witness travelling to the UK to give evidence		
Documentary evidence admitted in lieu of the witness having to attend the UK to give evidence in person		
A conviction obtained that depended upon the adducing of foreign evidence at trial		

17: What are the critical factors in ensuring mutual legal assistance mechanisms succeed in securing evidence from outside the UK? (Please use additional sheets if required.)

18: What problems are encountered with current mutual legal assistance structures? (Please use additional sheets if required.)

19: What works well in current mutual legal assistance structures? (Please use additional sheets if required.)

Appendix E

Forces that participated in the self-completion questionnaire survey

Avon & Somerset Constabulary

Bedfordshire Police

Cheshire Constabulary

City of London Police

Cleveland Police

Cumbria Constabulary

Derbyshire Constabulary

Devon & Cornwall Constabulary

Dorset Police

Durham Constabulary

Dyfed-Powys Police / Heddlu

Essex Police

Gloucestershire Constabulary

Gwent Police / Heddlu

Humberside Police

Kent County Constabulary

Lancashire Constabulary

Leicestershire Constabulary

Lincolnshire Police

Merseyside Police

Norfolk Constabulary

Northamptonshire Police

Northumbria Police

Nottinghamshire Police

South Wales Police / Heddlu

Staffordshire Police

Suffolk Constabulary[1]

Thames Valley Police

Warwickshire Police

West Mercia Constabulary

West Yorkshire Police

One unidentified respondent

[1] No contact details given on response form but post-mark indicated force identity.

Appendix F

Interview template used for case study SIO interviews

This basic template was the foundation for all the SIO case study interviews. It was adapted on a case-by-case basis with supplementary questions relevant to the case in question. This appendix supports Chapter 7. Interviewees were sent the questions in advance together with an accompanying letter which precedes the template below.

Text of letter to interviewees

This interview is being conducted as part of a programme of research for a part-time PhD degree examining the role of mutual legal assistance in combating transnational organised crime. Study commenced in October 2000 and is scheduled to last four years.

The research is intended to identify and discuss issues facing UK investigators when they seek to secure evidence from a Civil Law system European jurisdiction [1] for use in a Common Law system criminal trial in England and Wales. It will also seek to evaluate whether mutual legal assistance mechanisms are effective in prosecuting transnational organised criminality.

A literature review of primary and secondary sources is being undertaken and the purpose of the interview programme is to supplement the literature review with practitioners' expert opinion, experience and case study data.

The researcher has DV security clearance, however the final document may be deposited in the university library for public access, and the researcher may wish to publish certain aspects of the research. Therefore if the interviewee volunteers information that is of a sensitive nature or is sub judice (for background information purposes for instance), it is requested that he or she make this fact explicit so that such material may be excluded from the final product. Should they wish it, interviewees will be given the opportunity to examine the final draft in which their data has been cited to verify accuracy prior to submission to the examiners.

Permission will be sought to tape record interviews. It is recognised that this will not be universally acceptable and in this event it is proposed to record data by means of contemporaneous hand-written notes. In either case the interview will be based on the attached questions. An anonymous citation system has been arranged so that interviewees can, if they wish, be referred to by role rather than by true identity with their data presented in a sanitised form.

It remains only to thank you in advance for your participation. If you have any questions prior to the interview or subsequently please contact me on 07831 622905 or via cliveharfield@hotmail.com.

Clive Harfield,
Post-graduate research student,
Dept of Politics,
University of Southampton.

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[1] *The Civil Law system is also sometimes referred to as the Roman Law system or the Napoleonic Code system*

Semi-structured interview template:

The following (Home Office) definitions are applied:
***Mutual legal assistance** = any assistance provided in response to a formal request between judicial/prosecuting authorities. In UK terms, anything for which a com.rog. was issued either by the CPS or a court under the Criminal Justice (International Co-operation) Act 1990.*
***Mutual assistance** = any assistance provided as a result of direct agency-to-agency contact for which a com.rog. was not generated at the time or previously.*

Some questions have a number of possible answers. If more than one answer is applicable, all relevant options should be identified. The options may be supplemented with general comments.

Introduction

1. Briefly, what are the facts of this operation? (Type of criminality, number of suspects, number of UK officers deployed, length of time for the whole operation?)

2. Was mutual legal assistance required during this operation?

3. Was mutual assistance required during this operation?

4. How many requests of each type of assistance were made? (If exact figures were not kept or cannot easily be quantified, what was the approximate proportion of mutual legal assistance requests to mutual assistance requests?)

Mutual legal assistance

5. To what purpose was mutual legal assistance put?
   a) To arrange meetings between investigators?
   b) To obtain intelligence/information with which to plan further investigative action?
   c) To arrest suspects?
   d) To obtain statements from witnesses located outside England & Wales?
   e) To seize physical/electronic evidence located outside England & Wales?
   f) For any other purpose (please specify).

6. What did mutual legal assistance achieve in this operation that could not otherwise have been achieved?

7. From how many foreign authorities was mutual legal assistance requested? (Assuming there is no danger of compromise, the identity of the judicial and investigative authorities is also sought.)

8. Was all requested assistance provided? (If not, why not? What were the grounds for refusal if any?)

9. Who issued the com.rogs. in England & Wales? (Was it always the same source and if not, why?)

10. Was a UK officer ever present when a com.rog request was executed? (If yes, how often, where and why?)

11. Was a request to have an observer present ever refused, and if so why?

12. Were the 'defence' ever offered the opportunity to be present when a com.rog request was executed? (If there were instances when the defence was not offered such an opportunity, why was it denied to them?)

13. Was there assistance that could be provided by formal mutual legal assistance that could not have been provided by informal mutual assistance?

14. On what basis were com.rogs issued and accepted?
    a) A separate com.rog. for every individual request?
    b) A com.rog. to each relevant foreign authority covering a list of requests?
    c) A com.rog. issued in a general terms that a foreign authority was happy to accept as the basis for all subsequent requests?

Mutual assistance

15. To what purpose was mutual assistance put?
    a) To arrange meetings between investigators?
    b) To obtain intelligence/information with which to plan further investigative action?
    c) To prepare information/contacts to support/execute a formal mutual legal assistance request?
    d) To arrest suspects?
    e) To obtain statements from witnesses located outside England & Wales?
    f) To seize physical/electronic evidence located outside England & Wales?
    g) For any other purpose (please specify).

16. What did mutual assistance achieve in this operation that could not otherwise have been achieved, even by formal mutual legal assistance request?

17. What criteria determined whether mutual assistance was preferred to mutual legal assistance?

18. From how many foreign authorities was mutual assistance requested? (Assuming there is no danger of compromise, the identity of the judicial and investigative authorities is also sought.)

19. Was all requested assistance provided? (If not, why not? What were the grounds for refusal if any?)

Pre-trial & trial process issues

20. What challenges were made, if any, to the processes by which evidence was secured from outside England & Wales? (As distinct from challenges about whether or not the witness was telling the truth.)

21. How many witnesses located outside England & Wales were required to attend a UK court in person?

22. How many witnesses located outside England & Wales were permitted to give evidence by telephone or video link?

23. For how many witnesses located outside England & Wales were statements or other documents adduced in evidence thus negating the need for the witness to give oral testimony?

24. Was any type of evidence adduced from a location outside England & Wales as a result of mutual assistance rather than mutual legal assistance (i.e, without a com.rog.)? (If so, what?)

Post-trial & summarising questions

25. Has the operation been debriefed with the foreign agencies involved?

26. Have the mutual legal assistance issues been debriefed with the CPS or the Home Office?

27. Is either mutual assistance or mutual legal assistance still required in this operation? (e.g. concerning victim/witness support issues, or as a result of generating new enquiries by foreign agencies within their own domestic jurisdictions?)

28. What were the unforeseen issues concerning mutual legal assistance and mutual assistance that developed during the operation?

29. What worked and what didn't in relation to mutual legal assistance and mutual assistance in this operation?

30. How was the mutual legal assistance/mutual assistance arranged and effected?
    a) Face-to-face meetings with foreign prosecutors/investigators?
    b) Video-conferencing?
    c) Telephone?
    d) Fax?
    e) Email?
    f) Ordinary letters?

31. What improvements would you like to see in the process of obtaining and adducing evidence located outside England & Wales for trial in England & Wales?

Appendix G

Interview template used for case study prosecutor interviews

This basic template was the foundation for all the prosecutor case study interviews. It was adapted on a case-by-case basis with supplementary questions relevant to the case in question. This appendix supports Chapter 7. The questions were sent to the interviewee in advance accompanied by the same letter reproduced in Appendix F above.

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1. Facts of the case (type/extent of criminality, number of defendants, number of jurisdictions engaged)

2. At what stage of the investigation did CPS become involved?

3. How many formal mutual legal assistance requests were made?
   How were these structured (multiple requests in an ILOR or one request per ILOR)?
   What sort of assistance was requested?
   What was the process by which requests were made (from SIO policy to return of product)?

4. Was everything that was requested actually provided?

5. Were any of the requests refused, and if so, on what grounds?

6. Was evidence from abroad acquired and adduced without a formal mutual legal assistance ILOR?

7. What challenges at trial were made against the admissibility of foreign evidence?

8. What mutual legal assistance issues / learning points arose from this case?

9. What mutual legal assistance issues / learning points have arisen from other cases prosecuted by this CPS office?

Appendix II

Comparison of research findings between the EU peer reviews and this study

This appendix, supporting chapter 8, tabulates for easy comparison the principal findings of the EU peer evaluation of mutual legal assistance (UK and Final Reports) and the two original research exercises conducted for the present study.

● = correspondence
o = partial correspondence

Finding	EU surveys (UK & Final Reports)	SCQ (Chap 6)	SIO interviews (Chap 7)
Habitual criticism of mutual legal assistance is that it is slow & inefficient ...	●	●	●
... but it does not operate as badly as it reputed to do	●		
Outdated practices and pointless bureaucracy	●	●	o
Loss of evidence / timeliness	o	●	●
There is a lack of sufficient & suitable management data	●	●	●
Policies vary between UKCA & agencies as to what management data is collected	●	●	●
Different use of / attitudes towards ILORs	o	●	●
Different attitudes towards international law enforcement co-operation	o	●	●
Working relationships with foreign colleagues	●	●	●
Different procedural laws	o	●	●
Increase in mutual legal assistance activity	●		
Most UK mutual legal assistance activity is within EU	●		
Resources are insufficient [central authority]	●		
Insufficient language knowledge	●		
Need to train mutual legal assistance specialists	●	●	
Major discrepancies between MS in the application of conventions	●		

Finding (cont'd)	*EU surveys (UK & Final Reports)*	*SCQ (Chap 6)*	*SIO interviews (Chap 7)*
Tax offences are problematic	•		
Conventions take longer to ratify than is justified	•		
Double criminality is still cited as a reason for refusal	•		
Rights of appeal are abused to delay process	•		
Good practice should be implemented by MS & monitored by EJN	•		
Resources to execute ILORs received are competing with demands for local policing	•		
Statutes of limitation should no longer frustrate requests	•		
Unlike other MS, the UK reserves mutual legal assistance mainly for serious crime	•	•	
Disparity in mutual legal assistance training between UK police & customs	•	•	
Domestic agency rivalry			•
Different attitudes towards testimony			•
Different attitudes towards intelligence handling			•
Disclosure issues			•
Forced spontaneous tactical changes during ongoing operation			•

Appendix I

English mutual legal assistance legislation relating to evidence-gathering

This appendix, supporting the thesis as a whole but specifically Appendix A, summarises key mutual legal assistance legislation in England in relation to evidence-gathering.

Law	Purpose
Extradition Act 1870 § 24 - Power of foreign state to obtain evidence in United Kingdom *Repealed by CJ(IC)A 1990*	"The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the Act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, chapter 113, intitled "*An Act to provide for taking evidence in Her Majesty's Dominions in relation to civil and commercial matters pending before foreign tribunals*;" and all that provisions of that Act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal: Provided that nothing in this section shall apply in the case of any criminal matter of a political character."
Extradition Act 1873 § 5 – Power of taking evidence in UK for foreign criminal matters *Repealed by CJ(IC)A 1990*	"A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign state; and the police magistrate or justice of the peace, upon receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evidence was taken before him, and shall transmit the same to the Secretary of State; such evidence may be taken in the presence of or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition." ... "Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury. Provided that nothing in this section shall apply in the case of any criminal matter of a political character."
Evidence (Colonial Statutes) Act 1907	Proof of statutes of British Possessions [Halsbury's Statutes (4th Edn) vol 17, p.154]
Evidence (Foreign, Dominion & Colonial Documents) Act 1933	Proof of effect of foreign, dominion and colonial registers and certain official certificates [Halsbury's Statutes (4th Edn) vol 17, p.157]

Evidence (Proceedings in Other Jurisdictions) Act 1975	Mutual legal assistance provisions for incoming requests in civil proceedings and in ICJ proceedings. [Halsbury's Statutes (4th Edn) vol 17, p.212]
Criminal Justice (International Co-operation) Act 1990 Part 1 *§1-4, 7 & 8 repealed by C(IC)A 2003*	Established permissive mutual legal assistance regime for UK authorities to request and provide evidential assistance whether or not a MLAT was in effect, and in most cases without dual criminality. Also enabled the service of process, and the transfer of prisoners to give evidence at trials.
Criminal Justice & Public Order Act 1994 Part X	Provides for cross-border arrest powers, reciprocal powers of arrest and warrant execution with the UK, thus allowing police officers from England & Wales, for instance, to use either their powers of arrest in Scotland and Northern Ireland for the first time, or to use those powers of arrest that apply within the relevant jurisdiction.
Police Act 1996 § 26	English & Welsh police forces *may* provide advice and assistance to non-UK law enforcement agencies if requested to do so. This is intended to cover training and non-operational support as much as operational support.
[Human Rights Act 1998]	Gives domestic effect to UK obligations under the 1958 Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms*. In essence, adopts with UK law, the multilateral human rights norms adopted throughout western Europe. Provides protection for suspects against procedural abuse by public authorities.
Regulation of Investigatory Powers Act 2000 Part 1	Gives domestic effect to UK obligations under *EUCMA* to provide mutual legal assistance in respect of telephone interception. Relevant sections came into force 2004 enabling foreign authorities to request interception of communications within the UK for evidential purposes even though UK authorities cannot use the product of interception in evidence. Also allows UK investigators to be authorised under RIPA to conduct covert investigations abroad, subject to additional permission from the foreign authorities.

Anti-Terrorism, Crime & Security Act 2001 Part 13 § 111 *[Time-scale not met by Parliament and so no provisions made.]*	At any time before July 1st 2002 an authorised Minister (Home Secretary, Lord Chancellor, Treasury Ministers) may, by regulation, make provision for implementing any UK obligation arising from *The Simplified Extradition Procedure* (1995 Convention under Article K.3 of the Treaty); Extradition between the MS of the EU (under the 1996 Convention); freezing orders, JITs or combating terrorism under Article 34 of the Treaty; and the *EUCMA*.
Police Reform Act 2002 § 103-4	Amends the 1996 and 1997 Police Acts to address legal liability issues in relation to Joint Investigation Teams and to incorporate non-UK team members who are assaulted whilst on duty with the JIT.
Crime (International Co-operation) Act 2003	Gives domestic effect to those provisions of the *EUCMA* not already in UK statute, *inter alia* allowing direct transmission of requests and process; creating freezing orders enabling evidence to be preserved pending the issuing of an ILOR; permitting the hearing of evidence by TV links; and allowing for the exchange of information about banking transactions.

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