1. A comparative legal history of international policing

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INTRODUCTION

The boundaries of policing are diverse and encompass globally common factors, such as law, politics, financial and human resources, bureaucracy, society and geography. The boundary to policing that this chapter is mainly concerned with is the physical or 'legal' border of the nation state. Borders delimit the legal-constitutional realm of a state and thereby the extent of their sovereignty. In a globalized world, borders might remain in place, but the law on and within them are constantly on the move, in particular with regard to the relationship with other state entities beyond those borders, requiring new and adapting norms on transnational policing. However, focusing on one specific boundary does not mean that all other restraints within the nation state can be disregarded. On the contrary, international policing is shaped prominently by these national limitations. The research of international policing can hence never be conducted in isolation, but has to consider various domestic policing contexts.

Police powers traditionally do not extend beyond their jurisdictional borders. Public policing is a national competence and, as has often been claimed, the 'expression of state sovereignty in its pure form'.¹ However, this has not prevented cooperation between police around the world from occurring, and research in this area has been prominent since the 1980s, the advent of the abolition of border controls in the European Union (EU). It is hence not surprising that a lot of cross-border policing research can be considered rather 'Eurocentric'.²

The subdivision of the world into different regions with, as in the EU, specific cross-border policing arrangements, has rarely been investigated by researchers from a comparative perspective, but shall not be the focus of this chapter.³ The EU could, for example, be compared to North America with a view to cross-border police cooperation to discover the differences of international policing within and between these regions.⁴ Federal systems by now also have a lot in common with the EU as regards police cooperation. One could even claim that the EU law enforcement cooperation system has more similarities with a federal system than with international police cooperation between neighbouring states (such as Mexico, Canada and the

¹ M Anderson, *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford University Press 1989) 1.

² P Andreas and E Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press 2006) 59.

³ Exceptions include, for example, J Occhipinti, *The Politics of EU Police Cooperation: Toward a European FBI?* (Lynn Rienner Publishers 2003); S Hufnagel, *Policing Cooperation Across Borders – Comparative Perspectives on Law Enforcement within the EU and Australia* (Ashgate 2013); or R Mawby, *Comparative Policing Issues: An International Perspective* (Routledge 1990).

⁴ As investigated by C Giacomantonio, *Policing Integration: The Sociology of Police Coordination Work* (Palgrave Macmillan 2015).

United States of America).⁵ However, the present chapter will focus on international cooperation and the cooperation between all states of the world, rather than between specific regions of the world. A further challenge in delimiting this chapter is the question of academic disciplines. Just looking at the few studies referenced so far, the question arises as to how we could compare international policing and from which disciplinary perspective(s). While there are by now numerous studies in the field, within each discipline international policing scholars – and even transnational policing scholars – remain a small minority.

Generally, the research conducted in the area of international policing can be said to be as diverse as the (national) boundaries to policing. It encompasses a variety of prominent disciplines, such as law, sociology, political sciences, policing studies, criminology, etc. The theoretical frameworks attached differ accordingly with regard to the relevant disciplines. Bowling and Sheptycki attempted to create a ‘theory of global policing’, and encountered too vast a multiplicity of approaches.⁶ They did include a number of different disciplines under the heading of ‘criminology’, which itself can be regarded as an integrated and interdisciplinary approach to crime and law enforcement. However, in many studies on international policing, it is hard to distinguish a singular discipline, as the descriptions necessarily encompass legal, historical, social and political aspects.

This chapter, which primarily seeks to adopt a criminal law focus, first outlines the various definitions pertaining to international policing and gives a brief overview of the literature, including various approaches to studying police cooperation and relevant theories. Next, international policing practice and regulation are discussed and distinguished from local, federal and regional policing strategies. Applicable areas of substantive criminal law are highlighted next. This includes a legal analysis of the different types of crime usually policed internationally and how the ideas of such ‘common legal values’ were gradually formed. Lastly, this chapter assesses international policing from the perspective of accountability and human rights jurisprudence.

DEFINITIONS AND THEORETICAL APPROACHES

Theories on international policing start with the debates on terminology. What is ‘international policing’? At a basic level it might be perceived as the police-to-police cooperation of individual officers in cross-border cases, for example answering requests for information from another (national) police. Such activities could be embedded in local operational work. International policing can also be perceived as cooperation within established international policing forums, such as Interpol and Europol, which facilitate the police-to-police tasks mentioned above. These two levels of ‘international’ cooperation are the focus of policing studies and criminological research. Political scientist and lawyers are more interested in the ‘level above’ operational policing. They focus on governmental transnational policies, political structures and legal treaties and agreements that proscribe how international policing is to be conducted. More specifically, law and political science focuses on the limitation of cross-border operational police powers and interventions through international law and policies. Taking these

⁵ See Hufnagel (n 3).

⁶ B Bowling and J Sheptycki, *Global Policing* (Sage 2012).

levels into account, Benyon et al. developed a theory on the different levels of police cooperation and their potential interplay, discussed below.⁷ Sheptycki takes these differences into account by differentiating the two levels in his terminology. He uses the term 'transnational policing' for the operational, day-to-day cooperation across borders and the term 'international policing' for the high-level political interaction influencing cross-border policing.⁸

Multilateral cooperation within regions and between two or more neighbouring states or jurisdictions (such as BeNeLux,⁹ Cross-Channel¹⁰ or Greater China cooperation) has more often been termed 'cross-border policing', perhaps because the regular and relatively uncomplicated work 'across the border' applies more to neighbouring states with long-established cooperation practice than the term 'international'.¹¹ This type of cooperation could be distinguished within the international arena as it is facilitated (usually) by a long history of political cooperation (trade, immigration, etc.), a common cultural background, similarities in language or long-fostered ability to speak the language of the nation state across the border and a necessity to cooperate distinct from cooperation at the central government level. In the three above-mentioned examples, the cooperating regions have developed some level of discretion rather independent from the central government or the federal police.

⁷ J Benyon, L Turnbull, A Willis, R Woodward and A Beck, *Police Cooperation in Europe: An Investigation* (University of Leicester 1993).

⁸ J Sheptycki, 'Introduction' in J Sheptycki (ed), *Issues in Transnational Policing* (Routledge 2000) 1.

⁹ Treaty Concerning Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands (signed 27 June 1962, entered into force 11 December 1967), as amended by the Protocol Supplementing and Amending the Benelux Treaty Concerning Extradition and Mutual Assistance in Criminal Matters (signed 11 May 1974, entered into force 1 March 1982).

¹⁰ A multiplicity of treaties regulate the cross-channel region, such as the Protocol Between the United Kingdom of Great Britain and Northern Ireland and the French Republic, Concerning Frontier Controls and Policing, Cooperation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link (signed 25 November 1991) [1993] CM 2366 (entered into force 2 August 1993); the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Making Amendments to the Additional Protocol to the Sangatte Protocol on the Establishment of Bureaux Responsible for Controls on Persons Travelling by Train between the United Kingdom and France, and to the Agreement Concerning the Carrying of Service Weapons by French Officers on the Territory of the United Kingdom of Great Britain and Northern Ireland, [2007] CM 7219 (signed and entered into force on 18 June 2007); the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of both Countries on the Channel and North Sea, signed 4 February 2003 (entered into force 1 February 2004); henceforth also 'Le Touquet Treaty'; and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning the Carrying of Service Weapons by French Officers on the Territory of the United Kingdom of Great Britain and Northern Ireland, signed 4 February 2003, [2005] CM 6444 (entered into force on 10 March 2005).

¹¹ See, for example, T Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion' in E Guild and F Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate 2008) 225; Gallagher F, *European Police Co-operation: Its Development and Impact Between 1967–1997 in an Anglo/French Trans-frontier Setting* (Unpublished doctoral dissertation, University of Southampton 1998); S Hufnagel, 'Strategies of Police Cooperation: Comparing the Southern Chinese Seaboard with the European Union' (2014) 61 *Crime L & Soc Change* 377.

Historically, both judicial and police cooperation agreements developed in areas with close economic cooperation, which, as can also be seen in the EU, brought with them the perceived necessity for increased cooperation in the area of criminal law. These types of regional cooperation influenced – after the establishment of the ‘Schengen Area’ (see below) – the establishment of conventions and frameworks on police cooperation at the EU level, a legal development that cannot be observed in other parts of the world with close regional police cooperation strategies.¹²

Another term that should be defined is ‘policing’. Depending on the jurisdictions involved, policing encompasses various actors beyond the police, such as other government agencies with law enforcement powers, customs etc. However, the literature rarely problematizes this term. What is often distinguished – though not clearly – is policing and judicial cooperation, which obviously have much in common. Should extradition be seen as a policing or a judicial process, seeing that both police and criminal justice authorities are involved in it? As discussed below, rather than the question of ‘Who is policing?’, international law enforcement is often defined by ‘what is policed’. International police cooperation focuses on international crimes, such as crimes defined by the United Nations (UN) as particularly serious and warranting international collaboration efforts, such as corruption, trafficking in human beings, trafficking of narcotic substances, and organized crime more generally. This definition would, however, push the ordinary cross-border burglary investigation out of the international policing equation. We will keep the ‘who’ (polices) and ‘what’ (is policed) distinction in mind for the purpose of this chapter as it might help to identify the different theoretical approaches.¹³

According to Block,¹⁴ we need to be critical with regard to the more general, traditional distinction in the literature of three broad categories of police cooperation: technical assistance, upholding public order and cooperation in criminal investigations.¹⁵ The EU police cooperation techniques Block focuses on in his research have gone above and beyond these three categories. However, can what is happening in the EU today still be called ‘international policing’, or has it moved further towards being ‘cross-border policing’, as we have here an example of very close and by now historically established cooperation that does not relate to transnational or international definitions any more? The traditional distinction is not fitting for EU police cooperation, and might not even be a valid framework for other types of international cooperation. Today, international police cooperation is far more complex than Koers’ three categories and further divides into formal and informal, legal and compensatory measures, to name just a few.¹⁶ Information exchange, for example, is not a purely technical cross-border police affair, but relies on trust between agencies, established communication channels, legal similarities

¹² Hufnagel (n 4) and S Hufnagel, ‘Transnational Policing and Regulation: The Effect of Shared Fundamental Rights on the Formalisation of Cross-Border Police Cooperation’ (2015) 3 Eur J Policing St 204.

¹³ See for overviews of theoretical approaches, e.g. D Bayley, *Patterns of Policing: A Comparative International Perspective* (Rutgers University Press 1985); T Newburn (ed), *Handbook of Policing* (Willan Publishing 1999); Mawby (n 3) and R Mawby (ed), *Policing Across the World: Issues for the Twenty-first Century* (UCL Press 1999).

¹⁴ L Block, *From Politics to Policing – The Rationality Gap in EU Council Decision Making* (Eleven International Publishers 2011) 29.

¹⁵ J Koers, *Nederland als verzoekende staat bij wederzijdse rechtshulp in strafzaken: achtergronden, grenzen en mogelijkheden* (Wolf Legal Publishers 2001) 189.

¹⁶ See, for example, Hufnagel (n 4).

regarding procedural rights and data protection and many other details. It therefore requires, among other measures, training and trust-building through common seminars and conferences, access to each other's or common databases, legal harmonization and the setting of common or supranational norms.¹⁷ Information is also exchanged not only for concrete public order policing or investigations. With a view to international terrorism and organized crime, for example, information is provided to prevent crimes, which is not anticipated in the above model.

Moving on with regard to definitions in the field, most disciplines concerned with police cooperation have grappled with the distinction between 'formal' and 'informal' international police cooperation.¹⁸ While particularly acute for legal and socio-legal scholars in this area, this distinction has also been linked to police subculture theories in criminological research and legitimacy and accountability debates in political science and policing studies publications on the topic. Until the 1980s, European police cooperation was mainly based on informal networks.¹⁹ Even Interpol, while considered to be an international police organization, cannot be categorized a 'formal' institution as membership and behaviour within it cannot be legally enforced.²⁰ While regional police cooperation before the 1980s was frequently based on bi- and multilateral treaties and agreements, most were aimed at judicial and not police cooperation. Exceptions include treaties concerning the Nordic countries, the BeNeLux and the Cross-Channel region.²¹

The definition of 'formal' and 'informal' police cooperation remains unclear despite the prominence of the debate in the field. Lawyers often perceive the 'formal'/'informal' divide as the difference between the 'law in the books' and the 'law in action'.²² As a consequence, even cooperation under a formal legal agreement can be largely 'informal' in action. This makes purely legal research on the topic of police cooperation close to impossible. A socio-legal approach is necessary to understand the 'implementation gaps'. Leaning towards the legal definition are also Den Boer et al., but instead of defining formality as 'legal' they measure it according to the degree of democratic, legal and social 'legitimacy'.²³ While it is commonly understood that 'legitimacy' is the trust of the citizens in an agency and the more legitimate an authority is believed to be, the more cooperation with this authority will ensue,²⁴ Den Boer et al. distinguish between 'vertical' and 'horizontal' arrangements. Vertical (described by other authors as 'top down')²⁵ cooperation strategies follow a hierarchy of accountability and can therefore be rated as more legitimate than horizontal (police-to-police or agency-to-agency) cooperation mechanisms. This legitimacy definition relies heavily on the accountability rather

¹⁷ See generally S Hufnagel S and C McCartney (eds), *Trust in International Police and Justice Cooperation* (Hart 2017).

¹⁸ See, for example, M Anderson et al., *Policing the European Union: Theory Law and Practice* (Clarendon Press 1995); F Lemieux (ed), *International Police Cooperation. Emerging Issues, Theory and Practice* (Willan Publishing 2010).

¹⁹ Block (n 14) 30.

²⁰ Hufnagel (n 12) 208.

²¹ Hufnagel (n 4); F Gallagher, 'Sheer Necessity: The Kent Experience of Regional Transfrontier Police Cooperation' (2002) 12 Reg & Fed St 111, 132.

²² D McBarnet, 'Arrest: The Legal Context of Policing' in S Holdaway (ed), *The British Police* (Edward Arnold 1979) 39.

²³ M den Boer, C Hillebrand and A Nölke, 'Legitimacy under Pressure: The European Web of Counter-Terrorism Networks' (2008) 46 J Comm Mar St 105.

²⁴ TR Tyler, *Why People Obey the Law* (Princeton University Press 2006).

²⁵ See Hufnagel (n 4).

than the trust component and potentially leads to vastly different outcomes than the legal approach. Under the legal approach agreements between agencies would be a form of legal or formal cooperation while under the social legitimacy approach these would be viewed as horizontal, hence leaning towards the informal. However, in previous observations Den Boer argued that the many different international police cooperation mechanisms are all on a spectrum between formality and informality and a clear characterization is consequently not feasible.²⁶

Other views on formality and informality focus on bureaucratic processes and would hence see an organization like Interpol as a 'formal' institution.²⁷ Socio-legal scholars might not agree with this definition, as the Interpol constitution cannot be legally enforced and therefore cannot be considered a 'formal' legal agreement.²⁸ The latter definition relies on the premise that 'formality' is a level of legality rather than bureaucracy. Criminologists and sociologists more frequently rely on the types of police contacts and communications to describe formality and informality as well as degrees of accountability in relation to them.²⁹ Boiling down the different definitions to their essence, it could be agreed that 'formal' strategies are usually based on a (legal) bilateral or multilateral agreement, and bring with them a certain accountability structure and a certain bureaucratic process that need to be adhered to. 'Informal' strategies on the other hand do not necessitate any of these requirements and can consist of an action as simple as picking up a phone and calling a colleague (on a more or less regular basis).

When it comes to the critiques of international policing, the informal strategies are the ones that have mainly been contested in the literature.³⁰ However, formal strategies equally have their opponents, in particular from a security rather than legitimacy/accountability/human rights perspective. In particular, (former) police practitioners writing on the topic have described formal cooperation mechanisms as slow, cumbersome, bureaucratic and ineffective.³¹ There seems to be a clear preference among police for informal practices of international police cooperation.³² This shows that the value of formal and informal cooperation strategies is dependent on the type of analysis conducted. Studies in the field that have tried to consolidate democratic, social and human rights values as well as pressing security concerns can hardly be found.³³

Moving on to theories and approaches in the international police cooperation literature, a recent overview has been provided by Bowling and Sheptycki.³⁴ Theory and approaches to studying international police cooperation have to be distinguished. Both can be divided into different disciplines, as outlined above. This also affects methodologies used to study police

²⁶ M den Boer, 'Towards an Accountability Regime for an Emerging European Policing Governance' (2002) 12 *Policing & Socy* 275.

²⁷ M Bayer, *The Blue Planet: Informal International Police Networks and National Intelligence* (National Defense Intelligence College 2010); Den Boer et al. (n 23).

²⁸ See S Hufnagel 'Counter-terrorism Policing and Security Arrangements' in C Walker and G Lennon *Routledge Handbook of Law and Terrorism* (Routledge 2015).

²⁹ J Sheptycki, *In Search of Transnational Policing. Towards a Sociology of Global Policing* (Ashgate 2002).

³⁰ See, for example, Bowling and Sheptycki (n 6) 26; Den Boer et al. (n 23) 103.

³¹ Block (n 14) 31; Gallagher (n 21) 111; Bayer (n 27) 19.

³² Hufnagel (n 4); Hufnagel (n 11); Bowling and Sheptycki (n 6).

³³ A notable exception is M den Boer, 'Human Rights and Police Cooperation in the European Union: Recent Developments in Accountability and Oversight' (2013) 2 *Cahiers Politiestudies* 28.

³⁴ Bowling and Sheptycki (n 6).

cooperation. As previously stated, literature on police cooperation appeared more prominently in the 1980s with the abolition of border checks in the EU and was unsurprisingly rather Eurocentric.³⁵ Policing theory was not a particular focus of those publications and they could be described as a historical and legal 'stock-take' of the existing or evolving mechanisms.³⁶ However, the start of the 21st century has seen many more publications enter the arena and a number of different approaches and theories developed or were applied to police cooperation.

The sociological approach focuses predominantly on police cooperation practice.³⁷ It assesses international police strategies or agencies (similarly to the legal and criminological strands), but adds a theoretical level to the assessment to find out about organizational characteristics, cooperation culture and subculture.³⁸ The subcultural theory focuses on the impact of different police cultures on problem-solving. The theory was further developed by Bowling and Sheptycki,³⁹ who divide the 'global cops' into eight categories: technician, diplomat, entrepreneur, public-relations expert, legal ace, spy, field-operator and enforcer. Discussions exist on the link between culture and accountability, culture in the local, transnational and international spheres and within the various international liaison tasks. Sociological theory in this field also takes into account political pressures impacting on police decision-making.

Political science and in particular the international relations or public administration approach focuses on the influence of national and international politics on institutions responsible for law enforcement cooperation. Studies investigating political relationships impacting on police cooperation investigate mainly specific regions or the intervention of one state/region in another. A number of publications do, for example, examine critically the motives and consequences of US law enforcement cooperation, both generally⁴⁰ and with regard to weaker states or regions more specifically.⁴¹ Many scholars have addressed the intricate development of law enforcement cooperation strategies in the EU.⁴² Some studies focus only on bilateral or limited

³⁵ Anderson (n 1); C Fijnaut, 'The Limits of District Police Cooperation in Western Europe' (1982) 5 *Police St* 12.

³⁶ Anderson (n 1) 8.

³⁷ See, for example, M Deflem, *Policing World Society. Historical Foundations of International Police Cooperation* (Oxford University Press 2002); M Deflem, 'Global Rule of Law or Global Rule of Law Enforcement: International Police Cooperation and Counter-terrorism' (2006) 603 *The Annals of the American Academy of Political and Social Science* 240; D Bigo, 'Liaison Officers in Europe: New Officers in the European Security Field' in J Sheptycki (ed) *Issues in Transnational Policing* (Routledge 2000); F Lemieux, 'Coopération policière internationale et renseignement criminel: une évaluation des retombées opérationnelles de la Drug Enforcement Administration' (2009) 62 *Revue internationale de criminologie et de police technique et scientifique* 231; Sheptycki (n 29); J Sheptycki 'Brand Interpol' in S Hufnagel and C McCartney (eds), *Trust in International Police and Justice Cooperation* (Hart 2017).

³⁸ See, for example on Interpol, Sheptycki (n 37).

³⁹ Bowling and Sheptycki (n 6).

⁴⁰ E Nadelmann, *Cops Across Borders: The Internationalisation of US Criminal Law Enforcement* (Pennsylvania State University Press 1993).

⁴¹ B Bowling, 'Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda' (2009) 3 *Policing: J Pol Pract* 149; B Bowling, *Policing the Caribbean: Transnational Security Cooperation in Practice* (Oxford University Press 2010); M Huggins, *Political Policing: the United States and Latin America* (Duke University Press 1998).

⁴² B Heberton and T Thomas, *Policing Europe. Co-operation, Conflicts and Control* (St. Martin's Press 1995); J Monar 'The Problems of Balance in EU Justice and Home Affairs and the Impact of 11 September' in M Anderson and J Apap (eds), *Police and Justice Co-operation and the New European Borders* (Kluwer 2002); Den Boer (n 26); Occhipinti (n 3).

multilateral relationships.⁴³ Methodologically, political science literature on police cooperation remains predominantly desktop research, but there is a growing body of empirical studies to support relevant claims.⁴⁴

Policing studies within criminology devote a number of publications to the (mere) description or stock-taking of strategies in the field. Again, theoretical explanations do not rate high in this type of ‘functionalist’ approach, often found in studies by (former) practitioners and policy-makers. Important representatives of the last decade within this strand include, for example, Bayer⁴⁵ and the earlier work by Block.⁴⁶ A frequently debated topic among the first scholars in this strand was the genesis of and motivation for police cooperation, and the explanation was often found in globalization and consequently changing crime trends or increasing transnational crime. While partly valid in the beginning of cooperation research, this approach often fails to explain the complexities that ensue in various cooperation scenarios.

Legal literature on police cooperation can be divided into legal, socio-legal and legal-historical contributions. Scholars in these fields have used either legal or a combination of legal and empirical analysis to describe international police cooperation and have not contributed principally at the theoretical level. Exceptions to this rule can be found in the works of Andreas and Nadelmann,⁴⁷ Nadelmann,⁴⁸ Boister⁴⁹ and Hufnagel.⁵⁰ These – more or less – theoretical legal approaches focus on the dynamics of law-making in the area of transnational and international policing. More common are legal and legal-historical approaches. In the last decade these included, for example, Hufnagel,⁵¹ Rijken,⁵² Rijken and Vermeulen,⁵³ Spapens⁵⁴ and Vermeulen.⁵⁵ Within those legal studies, two main findings can be distinguished. First, that law and formalized structures foster police cooperation practice, and second that the largely informal

⁴³ D Nogala, ‘Policing Across a Dimorphous Border: Challenge and Innovation at the French-German Border’ (2001) 9 Eur J Crime Cr L Cr J 130; Spapens (n 11); O Felsen, ‘European Police Cooperation: The Example of the German–French Centre for Police and Customs Cooperation Kehl (GZ Kehl)’ in S Hufnagel, S Bronitt and C Harfield (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation—European, Australian and Asia-Pacific Perspectives* (Routledge 2012); S Ugelvik *Inside on the Outside: Norway and Police Cooperation in the EU* (PhD thesis, University of Oslo, Faculty of Law 2014).

⁴⁴ Lemieux (n 18) 362.

⁴⁵ Bayer (n 27).

⁴⁶ L Block, ‘International Policing in Russia: Police Cooperation Between the European Union Member States and the Russian Federation’ (2007) 17 Policing & Socy 367.

⁴⁷ Andreas and Nadelmann (n 2).

⁴⁸ Nadelmann (n 40).

⁴⁹ N Boister, ‘Transnational Criminal Law?’ (2003) 14 EJIL 935; N Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press 2012); N Boister, ‘Further Reflections on the Concept of Transnational Criminal Law’ (2015) 6 TLT 9.

⁵⁰ Hufnagel (n 3).

⁵¹ Hufnagel (n 11).

⁵² C Rijken, ‘Joint Investigation Teams: Principles, Practice, and Problems: Lessons Learnt from the First Efforts to Establish a JIT’ (2006) 2 Utrecht L Rev 99.

⁵³ C Rijken and G Vermeulen, *Joint Investigation Teams in the European Union: From Theory to Practice* (TMC Asser Press 2006).

⁵⁴ Spapens (n 11).

⁵⁵ G Vermeulen ‘EU Conventions Enhancing and Updating Traditional Mechanisms for Judicial Cooperation in Criminal Matters’ (2006) 77 Revue internationale de droit penal 59; G Vermeulen, *Mutual Recognition in Practice: Gathering and Using Foreign Evidence* (Paper presented at the Summer Course on European Criminal Justice, 7 July 2009, Trier (ERA 2010)).

police-to-police cooperation strategies have led to the establishment of legal frameworks and formalized structures. Another important stream within legal research on the topic focuses on legal harmonization and the importance of conformity of criminal law and procedure in order to successfully cooperate across jurisdictions. Several authors have investigated very specific legal instruments on police cooperation, such as the European Arrest Warrant,⁵⁶ EU Mutual Legal Assistance in Criminal Matters,⁵⁷ Europol⁵⁸ and many more. Without going further into the debate as to how much the law influences policing and specifically international law enforcement cooperation, it can be concluded that publications on this issue form the gist of relevant academic literature.

INTERNATIONAL PROHIBITION REGIMES

At the international level, a number of prohibition regimes were established, most prominently in the 20th century, banning crimes such as piracy, slavery, drug and arms trafficking and many more. The UN created a number of Conventions outlawing transnational crimes that included specific police cooperation objectives. While it is difficult to assess the impact of such international regulation on police cooperation practice, certain mechanisms, such as Joint Investigation Teams (JITs), cross-border information exchange and mutual legal assistance, are specified in these Conventions and led to policing initiatives to fight transnational crimes. Mutual assistance in criminal matters between parties is, for example, required by the 1929 International Convention for the Suppression of the Counterfeiting of Currency; Article 18 of the United Nations Convention against Corruption (UNCAC); the United Nations Convention against Transnational Organized Crime (UNTOC); and the 1988 Drug Trafficking Convention.

As outlined in detail by Andreas and Nadelmann,⁵⁹ the reasons for the establishment of international prohibitions and ensuing joint law enforcement efforts vary and the first international initiatives in this area concerned piracy and the slave trade. Despite the differences in triggers, the pattern of establishment of international prohibition regimes is broadly similar. Andreas and Nadelmann distinguish four stages: in the first stage an activity is considered normal and possibly even endorsed by governments; in the second stage the activity is redefined as a problem and/or evil by moral entrepreneurs and government involvement is delegitimized; in the third stage, governments and transnational moral entrepreneurs start to agitate for the criminalization of prescribed conduct; if successful, the fourth stage ensues, which is the international prohibition of the conduct through, mainly, conventions and international

⁵⁶ M Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law Policy and Practice* (Intersentia 2009).

⁵⁷ G Vermeulen, *Mutual Recognition in Practice: Gathering and Using Foreign Evidence* (Paper presented at the Summer Course on European Criminal Justice, 7 July 2009, Trier) (ERA 2010); G Vermeulen, W De Bondt and C Ryckman, *Rethinking International Cooperation in Criminal Matters in the EU. Moving Beyond Actors, Bringing Logic Back, Footed in Reality* (Maklu 2012).

⁵⁸ A De Moor, *Europol, Quo Vadis? Critical Analysis and Evaluation of the Development of the European Police Office* (Maklu 2009); L Guille, *Police and Judicial Cooperation in Europe: Europol, Eurojust and the European Judicial Network: Master Pieces of the European Union's Puzzle in Justice and Home Affairs* (PhD thesis, University of Sheffield 2009).

⁵⁹ Andreas and Nadelmann (n 2) 22–37.

institutions.⁶⁰ One could add a fifth stage, implementation, which adds another opportunity for success and failure as countries may ratify, but not, or only partly, implement the supranational law.

However, the model has been rather successful in a number of instances. Piracy, as mentioned above, and privateering (the running of private warships) were outlawed mainly in the 19th century. Until then, governments had taken part in and supported this activity rather enthusiastically. With an increasing global order and a changed view of the high seas as no-man's-land, privateering was banished completely as it lacked the needed government support. Piracy continued (and continues) to live on, but was decreased most significantly by the introduction of faster and more expensive steam vessels, which pirates themselves could not afford.⁶¹ International institutions responding to piracy are the World Customs Organisation and the International Maritime Organisation. A criminal prohibition of piracy was, however, only codified in the 1958 Convention on the High Seas.⁶² This is interesting insofar as it reflects the common consensus of the international community and enforcement of a moral value long before formalization.

Another very broad set of prohibitions was triggered by slavery and more generally what today would be referred to as trafficking in human beings. Slavery was banned by British Parliament in 1807 and throughout the colonies in 1833. While Britain's impact on other governments to ban slavery was limited, anti-slavery societies started spreading around the globe fighting for abolition in countries not acceding to the international trend.⁶³ The UN Slavery Convention was signed in 1926, banning slavery in the signatory states. However, until today slavery remains an issue in terms of human trafficking and severe exploitation in most countries around the world, while the ban is close to universal. The difference made by the prohibition regime could cynically be viewed as one that forced traders from an open market into a concealed activity.⁶⁴ While the 1926 Slavery Convention is the currently applied standard, slavery, unlike piracy, was prohibited since the 19th century in a number of international treaties and agreements. It was also the first prohibition of an important international commercial 'good' or 'commodity'. While the international community seemed to agree on the ban and formalization of this agreement was achieved immediately, the enforcement seemed to encounter vastly more problems than piracy.

Another type of slavery, or what used to be called the 'white slave trade' was the trafficking of people for the purpose of prostitution. An abolitionist movement started in the 1870s and culminated in the 1904 Agreement for the Suppression of the White Slave Trade. The increasing trafficking in women after WWII was immediately countered by the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Similar to other types of slavery, the enforcement remained challenging despite legal regulation and the ban of the international trafficking did not change prostitution regimes within nation states. The fall of the Iron Curtain and globalization more generally have increased

⁶⁰ Andreas and Nadelmann (n 2) 20–21.

⁶¹ RT Ward, *Pirates in History* (York Press 1974) 158–159.

⁶² Convention on the High Seas (done at Geneva on 29 April 1958, entered into force on 30 September 1962). UN Treaty Series vol 450, 11, 82.

⁶³ Andreas and Nadelmann (n 2) 30–31.

⁶⁴ NC Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge University Press 2002) 186, 200.

traffic flows from Eastern European and Asian countries today. The 'white slave trade' simply changed its operations from open to concealed activities with the introduction of the prohibition regime.⁶⁵

Today probably most the well-known prohibition regime is directed against the international trafficking in narcotic substances or drugs. The prominent current international legislation in this area encompasses the 1961 Single Convention on Narcotic Drugs as amended by its 1972 Protocol, the 1971 Convention on Psychotropic Substances and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Rather than Britain (until the early 20th century itself heavily involved in the opium trade), the flagbearer of the international anti-drug trafficking campaign was now the US.⁶⁶ A number of drugs have not been criminalized so far, such as alcohol and nicotine, as they are too embedded in several – mostly Western – societies. Drugs that were socially accepted in non-Western societies, such as opium, khat and marihuana, were, however, subject to international prohibitions. This shows a trend towards an imposition of values on 'other' societies that could not be observed in the prohibition regimes discussed previously. Hence, the international ban on drugs seems to be the least effective of the three, also because the victims are not likely to inform law enforcement authorities.⁶⁷

In the first half of the 20th century two other international trade prohibitions began to surface. One was on wildlife trade and the other on cultural goods. While often directed at different types of goods, the problems arising are vastly similar. A prominent challenge is the inability of law enforcement authorities to detect these kinds of international crimes and their reluctance to take them seriously.⁶⁸ While first directed at a number of species, such as whales, elephants or rhinoceroses, the 1989 Convention on International Trade in Endangered Species (CITES) created a broad ban for animal products and live animals trafficked across international borders. The trade has therefore gone underground, but not ceased significantly.⁶⁹ With regard to cultural heritage offences, the picture is very similar. A number of international conventions prohibit the illicit trafficking in cultural heritage, such as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol of 1954 and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. The latter two are now reinforced by provisions in other international agreements such as treaties of mutual legal assistance, by improved extradition treaties and by enforcement through international criminal courts, and, in the case of the Hague Convention 1954, improved by a significant and detailed Second Protocol. UNESCO, as an international institution, is responsible for the protection of cultural heritage. However,

⁶⁵ Andreas and Nadelmann (n 2) 35–37.

⁶⁶ Andreas and Nadelmann (n 2) 41–42.

⁶⁷ Andreas and Nadelmann (n 2) 45–46.

⁶⁸ See, for example, D Chappell and S Hufnagel, 'Law Enforcement's Still Evolving Role in Art Crime: Some Introductory Remarks' in D Chappell and S Hufnagel (eds), *Contemporary Perspectives on the Detection, Investigation and Prosecution of Art Crime* (Ashgate 2014); RWY Wong, 'The Organisation of the Illegal Tiger Parts Trade in China' (2016) 56 *Brit J Criminol* 995; RWY Wong, 'The Role of Reputation in the Illegal Purchase of Protected Wildlife in China' (2016) published online in *Deviant Behaviour* 1–13.

⁶⁹ RWY Wong, 'The Organisation of the Illegal Tiger Parts Trade in China' (2016) 56 *Brit J Criminol* 995.

while there seems to be international agreement on its protection, trafficking goes on uninhibited and is, like the wildlife trade, still even partly sponsored by governments.

Other regimes found their way more successfully into the international law enforcement arena, such as the anti-money laundering, terrorist financing and anti-corruption regimes. All are more or less related to the financial market and it might hence be instrumental for governments to enforce them. The anti-money laundering regime is a clear example of the spreading of a Western value to the rest of the world. The 1989 Financial Action Task Force (FATF) created a list of '40 Recommendations' that states were expected to implement. However, the FATF was created by the Group of 7 (Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and a representative of the European Union) and the standards created for this group were implemented in 1996 through a sanctioning regime and since 2000 through public 'naming and shaming' of deviant states.⁷⁰ After September 11 a list of '8 Special Recommendations' was added with regard to terrorist financing. The regime was enforced by the World Bank and the International Monetary Fund and boosted the implementation of the 1999 International Convention for the Suppression of Terrorist Financing.

Another initiative mainly led by the USA was the anti-corruption campaign. In 1997 the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions established an international regime to fight bribery. The World Bank and a number of NGOs supported the initiative successfully and in 1994 Transparency International had already started to publish the 'Corruption Perception Index', naming and shaming badly performing countries. This was expanded in 1999 to the 'Bribe Payers Index'. These efforts culminated in 2003 in the creation of the UN Convention against Corruption.⁷¹ Similar to the anti-money laundering regime and drugs, a clear imposition of these regimes by first-world nations can be detected, though here a grass-roots movement has been established through NGOs that provides this international regime with more democratic legitimacy.

The most relevant Convention with regard to cooperation practice is probably UNTOC. Provided an offence presents as an instance of organized crime, Article 18 prescribes that 'the Parties are required to afford another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the Convention'. Mutual legal assistance can then be requested for the taking of evidence or statements; service of official documents; searches seizures; freezing of assets; examining objects and sites; and providing information and evidence (Article 18(a)–(e) UNTOC). However, limitations exist with regard to the domestic law of the requested state party (Article 18(g) UNTOC). This means that any law enforcement action that is not provided for in police procedure of the requested party, or prohibited under privacy laws of the requested party, cannot be asked for.

With regard to the implementation of the UN Conventions in policing practice, it can be assumed that the assessment of such is rather difficult, if not impossible. However, the UN issues implementation reports on its conventions outlining numerous examples of where police cooperation initiatives exist in relation to them (see, for example UNODC 2015, 209–210). It becomes nevertheless apparent that – while numerous initiatives exist – it is difficult to retrace their development to a specific legal (UN) document. It furthermore needs to be noted that the

⁷⁰ M Levi, *Controlling the International Money Trail: A Multi-level Cross-national Public Policy Review*, ESRC Full Research Report, L216252037 (ESRC 2005).

⁷¹ Andreas and Nadelmann (n 2) 54–56.

ways in which transnational crimes are committed are constantly changing, necessitating an adaptation of police cooperation regulation in response. To achieve such a response in the legal sphere, lawmakers need to take into account specialized and international expertise from practitioners. This is all the more important as we observe an accumulation of legal requirements failing to respond to transnational policing needs in practice.

LEGAL REGULATION AND PRACTICE

This part of the chapter provides an overview of the distinction between international, regional and federal police cooperation practice and regulation. A review of previous studies conducted indicates that there is a link between the types of political systems involved and the choice or mere possibility of cooperation practice.⁷² From a legal perspective, the types of systems also determine the level of formalization concerning cooperation mechanisms. The highest level of formalization might be an international treaty or agreement. At the other end of the spectrum are informal cooperation strategies, such as customary cooperation between individuals, departments and agencies.

The first documented cooperation that took place between sovereign nation states was mainly bilateral, secretive and purely informal (not legally binding).⁷³ The earliest ‘international’ cooperation mechanism, involving more than a select number of states – and today open for all states of the world to join – is Interpol.⁷⁴ Interpol is not based on a ‘formal’ legal framework as its constitution is not binding and its members are not states but police forces. It was, however, the first permanent international body of security cooperation. Established in Vienna as the International Criminal Police Commission (ICPC) in 1923, Interpol was the result of a long history of negotiations that had started after the assassination of the Empress Elizabeth in 1898 in Geneva.⁷⁵ The aim of the ICPC was the prevention of terrorism, in particular in the aftermath of the effects of WWI and the Russian Revolution.⁷⁶ In 1946, following the Nazification of the ICPC, the organization was re-established in Paris and emerged, in its current form, after 1989 in Lyon.⁷⁷ Since then, Article 3 of the Interpol constitution excluded political crimes from Interpol’s competences and a focus is put on ‘ordinary crimes’. However, as priorities shifted after the events of 9/11 in the US, so have the competences of Interpol, although Article 3 has not been amended.

A reinterpretation of Article 3 has taken place that allows the use of Interpol mechanisms in the fight against terrorism. This was specifically recognized in the United Nations Security Council Resolution 2178 (2014) and highlights the use of INTERPOL’s I-24/7 secure police communications network, global databases and system of advisory notices, in addition to its

⁷² Andreas and Nadelmann (n 2); Occhipinti (n 3); Hufnagel (n 3); S S-H Lo, *The Politics of Cross-Border Crime in Greater China – Case Studies of Mainland China, Hong Kong, and Macao* (ME Sharpe 2009).

⁷³ M Deflem, *Policing World Society. Historical Foundations of International Police Cooperation* (Oxford University Press 2002) 47; Andreas and Nadelmann (n 2) 59–87.

⁷⁴ Heberton and Thomas (n 42) 64–69.

⁷⁵ C Fijnaut, ‘International Policing in Europe: Its Present Situation and Future’ in JP Brodeur (ed), *Comparisons in Policing: An International Perspective* (Aldershot 1995); Anderson (n 1).

⁷⁶ Occhipinti (n 3).

⁷⁷ Deflem (n 73) 124–125.

counter-terrorism efforts and procedures to track stolen and forged identity papers and travel documents. Interpol mechanisms preventing the international travel of foreign fighters include its Stolen and Lost Travel Documents (SLTD) database, as well as I-Checkit.⁷⁸

The other international police cooperation mechanism (applied between all nations of the world) is the liaison officer strategy.⁷⁹ Liaison officers ('LOs') are, on the one hand, subject to the national legislation of their home country and, on the other hand, bound by the legislation of the host state. They are not part of the police of the receiving state, hence they cannot exercise enforcement powers on foreign territory, but their main task is to exchange information and coordinate investigation efforts.⁸⁰ Their deployment can be based on specific bilateral or multilateral treaties and agreements, depending on whether the liaison is deployed to one or more countries or is derived from more general bilateral agreements on diplomatic relations.⁸¹ In addition to the national legislation, binding international legal frameworks, where they are specific, can determine the scope of the deployment and can either limit or broaden the liaison officer's tasks.

With a view to the establishment of regulation, several authors have highlighted the establishment of bilateral or multilateral regulation through LOs by, for example, being involved in the establishment of, or even driving the creation of, informal inter-agency agreements (often Memoranda of Understanding – MOUs), but also transnational (formal and informal) treaties and agreements obligating nation states. The officers themselves thereby both broaden and restrict their competences in international deployment.⁸² Liaison officers are conferred with extensive professional discretion to enable them to adapt to situational factors in different systems. A major advantage of their employment is considered to be the informality with which they can cooperate with other jurisdictions.⁸³ However, the establishment of legal regulation seems to be important to shape their deployment situation, irrespective of whether these rules widen or limit their competences. This shows that police might not randomly use a legal void to broaden their powers in the international context, as has often been suggested. Examples include MOUs that are created both between governments and police agencies to enable cooperation, but also the use of international norms, such as UN Conventions, to justify cross-border action plans and initiatives in the fight against transnational crime.⁸⁴

The oldest known formalized police cooperation strategy in Europe is the Nordic countries' police cooperation. The Nordic countries – Denmark, Finland, Norway, Sweden and Iceland – concluded the Nordic Passport Control Agreement (NPCA) in 1957, through which the participating countries abolished passport controls at their common borders. It developed from a long pre-existing history of bilateral and multilateral agreements between these states on the

⁷⁸ Interpol (2014), 'INTERPOL Global Role Against Foreign Terrorist Fighters Recognized in UN Resolution' <www.interpol.int/News-and-media/News/2014/N2014-183> accessed 21 May 2017.

⁷⁹ See for different countries and functions M den Boer and L Block (eds), *Liaison Officers: An Analysis of Transnational Policing* (Eleven International Publishing 2013); Nadelmann (n 40).

⁸⁰ Block (n 14) 166–167.

⁸¹ Bigo (n 37) 67; B Bowling, 'Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda' (2009) 3 Policing: J Pol Pract 149.

⁸² Bowling and Sheptycki (n 6) 38–39; Bigo (n 37) 67; Bowling (n 81).

⁸³ Block (n 14) 168–169.

⁸⁴ S Hufnagel, 'Australian Liaison Officers – Connecting the World Down Under' in M den Boer and L Block (eds), *Liaison Officers: Essential Actors in Transnational Policing* 49–70 (Eleven International Publishing 2013).

subject of police cooperation. The NPCA established a system similar to the Schengen framework long before other European states initiated closer cooperation. Against the background of highly converging national legal systems, Nordic cooperation relies predominantly on personal contacts, informal networks and informal modes of cooperation, which has been claimed as the recipe for its success. Notwithstanding the emphasis on informal methods, Nordic cooperation has even been labelled ‘best practice’ within the EU. It has also influenced the shape of harmonized legal frameworks within the EU. The establishment of the Schengen Convention, has, for example, partly been triggered by the success of the Nordic cooperation model.⁸⁵

A significant number of bilateral and multilateral cooperation strategies exist between the Member States of the EU.⁸⁶ Bilateral and multilateral cooperation initiatives influenced EU-wide formalization, some of them, spread throughout the Member States of the EU, leading to a de facto approximation of policing cooperation mechanisms.⁸⁷ Others started at a multilateral level and were then taken up at EU level, such as the Schengen acquis.

EU-level legislation in the area of policing and security is extensive. The most prominent formalized cooperation mechanism so far is the ‘Europol Convention’ (signed by the then 15 EU Member States on 26 July 1995), which came into effect on 1 July 1999 and has since 2010 been replaced by a Council Decision and since 2016 by a Regulation.⁸⁸ This framework established a common data-exchange mechanism for the entire EU and the Europol liaison officer network. The creation of Europol was the result of several movements towards a common European security policy since the 1970s. The first move towards Europol was the establishment of the TREVI Group of Ministers in 1975.⁸⁹ It has been claimed that the establishment of the TREVI group was the manifestation of a ‘federal’ European spirit, which was then confirmed by the signing of the Single European Act in 1985.⁹⁰ A more practical reason for the ad hoc establishment of TREVI was Interpol’s lack of competences in the field of terrorism and, more generally, political crimes.⁹¹ TREVI’s four working parties covered terrorism, general police affairs, organized crime and drugs (since 1985) and the temporary ‘TREVI 1992’.⁹² Despite the existence of a so-called ‘TREVI Acquis’,⁹³ the initiative was not based on a formal legal

⁸⁵ M Kleiven, ‘Nordic Police Cooperation’ in S Hufnagel, S Bronitt & C Harfield (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (Routledge 2012); P Larsson, ‘International Police Co-operation: A Norwegian Perspective’ (2006) 13 JFC 456; P Gammelgård, ‘International Police Cooperation from a Norwegian Perspective’ in DJ Koenig and DK Das (eds), *International Police Cooperation: A World Perspective* (Lexington Books 2001); H Takala, ‘Nordic Cooperation in Criminal Policy and Crime Prevention’ (2005) 5 J Scand St Criminol Crime 131.

⁸⁶ Hufnagel (n 3).

⁸⁷ Felsen (n 43).

⁸⁸ Council Decision of 6 April 2009 Establishing the European Police Office (Europol) [2009] OJ L 121/37; also ‘Europol Decision’, previously Europol Convention: Council Act of 26 July 1995 Drawing up the Convention based on Art K.3 of the Treaty on European Union on the Establishment of a European Police Office (Europol Convention) [1995] OJ C316/2, since 2016 Europol Regulation.

⁸⁹ Occhipinti (n 3) 33.

⁹⁰ Occhipinti (n 3) 33.

⁹¹ M den Boer and N Walker, ‘European Policing after 1992’ (1993) 31 J Comm Mar St 4, 6.

⁹² J Klosek, ‘The Development of International Police Cooperation Within the EU and Between the EU and Third Party States: A Discussion of the Legal Bases of such Cooperation and the Problems and Promises Resulting Thereof’ (1999) 14 Am U Intl L Rev 599, 615.

⁹³ C Rijken, ‘Legal and Technical Aspects of Co-operation between Europol, Third States and

arrangement and was operating outside the European Community legal framework.⁹⁴ However, its structure, as established by the 'TREVI Acquis', and the documents enacted by the TREVI Group, were integrated into Title VI of the Treaty on European Union in late 1993.⁹⁵ The first initiative was the European Drugs Unit (EDU), which displayed a similar structure to the later Europol.⁹⁶ Its establishment was agreed during the Luxembourg European Council in June 1991, but only allowed the first step of the proposal, EDU information exchange, not an operational European Police Office.⁹⁷ However, an ad hoc working group concerning Europol started its work in 1991 and the establishment of Europol was initially formalized in the 1992 Maastricht Treaty, ahead of a detailed separate Convention. As it was understood that the establishment could take some time, the Europol Drugs Unit was proposed to run in the meantime, gathering and exchanging intelligence related to drug trafficking. It was based on an intergovernmental agreement between the TREVI ministers but not a European legal framework.⁹⁸

In the form of the EDU, Europol started limited information-gathering and exchange on 3 January 1994.⁹⁹ Its tasks were the analysis of information on drug trafficking, money laundering and criminal organizations involved, as well as facilitating the exchange of intelligence between law enforcement agencies in the Member States.¹⁰⁰ The Europol Convention was signed on 26 July 1995, but its entry into force was significantly delayed, as it, being a third pillar instrument, required ratification by all Member States.¹⁰¹ The Europol Convention has since then been amended by a number of protocols, mostly extending the agency's competences and, in particular, giving it the opportunity to participate in Joint Investigation Teams and request the initiation of criminal proceedings.¹⁰² Today, Europol is governed as an EU agency by the Europol Regulation 2016/794.¹⁰³

Another important strategy is the 2000 EU Convention on Mutual Assistance in Criminal Matters, which has been replaced by the European Investigation Order (EIO).¹⁰⁴ Apart from other aims, it established JITs in the EU, which are today governed by the Council Framework Decision 2002/465/JHA on Joint Investigation Teams. JITs were included in the Convention

Interpol' in V Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (Asser Press/Kluwer Law International 2001) 579.

⁹⁴ V Mitsilegas, *EU Criminal Law* (Hart 2009) 162.

⁹⁵ J Benyon, 'The Politics of Police Co-operation in the European Union' (1996) 24 Intl J Sociol L 361.

⁹⁶ Occhipinti (n 3) 34.

⁹⁷ Occhipinti (n 3) 35.

⁹⁸ Occhipinti (n 3) 35.

⁹⁹ Benyon (n 95) 367.

¹⁰⁰ Benyon (n 95) 367.

¹⁰¹ Mitsilegas (n 94) 164.

¹⁰² Protocol Amending the Convention on the Establishment of a European Police Office (Europol Convention) and the Protocol on the Privileges and Immunities of Europol, the Members of its Organs, the Deputy Directors and the Employees of Europol [2002] OJ C312/2.

¹⁰³ Regulation (EU) No 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol).

¹⁰⁴ EU Council Act of 29 May 2000 Establishing in Accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2005] OJ C 197/3 (entered into force 23 August 2005); replaced by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1–36), entered into force 22 May 2017.

as a new mechanism to coordinate cross-border investigations, which aims to change the established practice of parallel investigations. While initially a resisted mechanism by practitioners, they are now a commonly used strategy to investigate cross-border crime.¹⁰⁵ JITs are furthermore assisted by Eurojust, which is legally based on the Eurojust Decision.¹⁰⁶ Eurojust national members can, for example, assist in the setting up of JITs, provide resources and help determine under which rules of procedure evidence needs to be gathered to be applicable in the relevant trial jurisdiction. Eurojust has further competences in the area of judicial cooperation.¹⁰⁷ Eurojust was established by Council Decision of 28 February 2002, amended by Council Decision of 15 July 2009. Its objectives are stated in Article 3 as:

- (a) to stimulate and improve the *coordination*, between the competent authorities of the Member States, of investigations and prosecutions in the Member States;
- (b) to improve *cooperation* between the competent authorities of the Member States;
- (c) to *support* otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.

A further European development in the making is the European Public Prosecutors Office (EPPO) – another indicator that the EU might become closer in political understanding to a federal entity. With regard to the setting up of EPPO, Article 86 para 1 of the TFEU determines that the Council may establish an EPPO ‘from’ Eurojust to combat crimes affecting the financial interests of the EU. The word ‘from’ has already led to many discussions.¹⁰⁸ An initial idea of having EPPO ‘in the place of’ Eurojust would have taken away from the proven practical advantages of Eurojust.¹⁰⁹ Several studies conducted on the working of Eurojust, including number of cases worked and number of practitioners using the agency on a daily basis, concluded that the work and the use of the agency increased significantly between 2002 and 2011 and that compared to the Organisation for the Fight Against Fraud (OLAF) and Europol, it was the most used agency.¹¹⁰ This is particularly noteworthy as Eurojust, as well as other important police and justice cooperation mechanisms within the EU, such as Europol and the Schengen Information System (SIS), were not initially greeted with much enthusiasm by practitioners.¹¹¹ Research studies conducted over the period roughly encompassing 2003–2013 concluded that the acceptance in relation to the EU agencies and other cooperation measures have grown significantly over a ten-year time period.¹¹² Today the existence of the agencies is not questioned

¹⁰⁵ S Hufnagel, “‘Third Party’ Status in EU Policing and Security – Comparing the Position of Norway with the UK before and after the “Brexit”” (2016) 3 Nord J Policing St 169.

¹⁰⁶ Council Decision of 15 July 2009 on the Strengthening of Eurojust and amending Council Decision 2002/187/JHA Setting up Eurojust with a View to Reinforcing the Fight Against Serious Crime (2009) OJ L 138/14.

¹⁰⁷ J Vlastnik, ‘Eurojust – A Cornerstone of the Federal Criminal Justice System in the EU’ in E Guild and F Geyer (eds), *Security Versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate 2008).

¹⁰⁸ L Hamran and E Szabova, ‘European Public Prosecutor’s Office – *Cui Bono?*’ (2013) 4 NJECL 46.

¹⁰⁹ *ibid.*

¹¹⁰ Hamran and Szabova (n 108) 48.

¹¹¹ See for example in relation to Europol, Hufnagel (n 3).

¹¹² *Ibid.*, see also Block (n 14).

any more. This may also be the starting point to think about the EPPO. While debates have been heated and the problems related to it seem to be overwhelming, these problems could be overcome in future practice and it could well be a well-functioning agency within ten years.

Another indicator for the future success of EPPO is the growing acceptance of the initiative by the Member States. By now, Member States have ceded to block initiatives to create an EPPO and to deny the existence of an underlying problem, which had already been tackled unsuccessfully with the *Corpus Juris* project.¹¹³

Establishing an EPPO next to the existing Eurojust agency is furthermore justified as the EPPO would have different powers. While Eurojust is limited when it comes to the initiation of investigations or ‘obtaining’ that an investigation or prosecution be undertaken by a Member State authority, this lacuna in competence would be filled by EPPO.¹¹⁴ Article 86 para 2 TFEU prescribes the competences as wider as Eurojust’s; namely to investigate, prosecute and bring to justice the perpetrators of crimes against the financial interests of the EU.

A point that is still highly debated is that the European Public Prosecutors (EPPs) would be integrated into the national criminal justice systems, although their instructions would come from the EPPO, not the national Departments of Public Prosecution.¹¹⁵ This has frequently been called the ‘double hat’ position of EPPs. The downside of this approach is that the independence of these prosecutors and therefore of the organization as a whole could be questioned from a constitutional point of view.¹¹⁶ This is an equally relevant issue when discussing the judicial review process for the EPPO, as national acts are subject to national review, while EU acts should be subject to the jurisdiction of the Court of Justice of the European Union.

Furthermore, the question arises as to which crimes will be falling within EPPO competence. The essence of crimes falling within the competence of the EPPO can already be found going back to the *Corpus Juris*. The PIF Directive on the fight against fraud to the Union’s financial interests by means of criminal law¹¹⁷ proposes only the crimes of fraud (against EU financial interests) and fraud-related offences (e.g. money laundering) as crimes against the EU’s financial interests. This is much narrower again than the *Corpus Juris* proposal and it is questionable whether this narrow competence on its own should justify the establishment of a new agency.

Another formalized initiative that is worth mentioning here is CEPOL, the European Police College, which was founded in order to create a network of police officials from all Member States and harmonize European policing standards through training. On 1 July 2016, CEPOL transformed officially into the ‘The European Union Agency for Law Enforcement Training’. Its new legal mandate is established in the Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015.¹¹⁸

¹¹³ Hamran and Szabova (n 108) 21.

¹¹⁴ See for an analysis of Eurojust work in this field M Zwiers, *The European Public Prosecutor’s Office: Analysis of a Multi-Level Justice System* (Intersentia 2011).

¹¹⁵ JAE Vervaele, *European Enforcement Agencies in the Area of Freedom, Security and Justice: The Eurojust European Public Prosecutor Binominal* (Proceedings of the 5th European Jurist Forum, Budapest 2009) 117.

¹¹⁶ K Ligeti and M Simonato, ‘The European Public Prosecutor’s Office: Towards a Truly European Prosecution Service?’ (2013) 4 NJECL 15.

¹¹⁷ Directive of the European Parliament and of the Council on the Fight Against Fraud to the Union’s Financial Interests by Means of Criminal Law, COM (2012)363/2.

¹¹⁸ European Police College (2016) *About CEPOL* <<https://www.cepola.europa.eu/who-we-are/>>

REGIONAL POLICE CO-OPERATION

Except for these clear-cut forms of regional cooperation between sovereign states in Europe, there are also more complicated political situations that afford police cooperation. One example of regional but not international cooperation is Greater China. This region includes four distinctly different jurisdictions – Hong Kong, Macao, Taiwan and Mainland China – within only one country. The Mainland Chinese system draws heavily on foreign legal models and borrows from both the Soviet and German civil systems.¹¹⁹ Hong Kong, as a former British colony, is governed by the common law system, which continues even after reversion to the PRC in 1997.¹²⁰ Macau, the other special administrative region (SAR) in Greater China and until 1999 under Portuguese rule, has a ‘potpourri’ system similar to the mainland, mainly based on Portuguese law, which in turn borrowed from German law.¹²¹ Macau, like Hong Kong, does not apply the death penalty, which distinguishes the two administrative regions from the Mainland and has the potential to complicate police and justice cooperation between these jurisdictions.¹²² Taiwan, like Mainland China and Macau, is a civil law (inquisitorial) system.¹²³ It contains a mixture of Imperial Chinese law, contemporary Chinese law, and principles and concepts of civil law systems, such as Germany and Japan, as well as the United States. These differences in systems and legal heritage also have an impact on the regulation and practice of policing within them.

The interesting observation that can be made by comparing this region to the international and regional cooperation discussed above is that this country’s strategies of police cooperation resemble more international cooperation than regional, e.g. EU or Nordic countries cooperation. One example for this finding is the ‘1994 Agreement’ established between Hong Kong and Mainland China. It confirmed the principle established between Hong Kong and the Mainland on three different channels for mutual legal assistance. The first was Interpol, the second a direct link between the Hong Kong and the Guangdong province, and the third were liaison officers of the Ministry of Public Security (MPS) stationed in Hong Kong.¹²⁴ Cooperation through Interpol had been the long-established practice of operational police cooperation between the two parties during the 99-year British lease on Hong Kong, and the 1984 Sino-British Joint Liaison Group decided in 1989 that cooperation through Interpol should persist even after the return of Hong Kong to Chinese sovereignty in 1997.¹²⁵ International cooperation mechanisms can hence be applicable within one country in complicated political situations.

europa-union-agency-law-enforcement-training/about-us>.

¹¹⁹ PB Potter, ‘The Chinese Legal System: Continuing Commitment to the Primacy of State Power’ (1999) 159 *China Q* 673.

¹²⁰ Y Ghai, ‘The Intersection of Chinese Law and Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?’ in J Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution* (Springer 2009).

¹²¹ FM Luke, ‘The Imminent Threat to China’s Intervention in Macau’s Autonomy: Using Hong Kong’s Past to Secure Macau’s Future’ (2000) 15 *Am U Intl L Rev* 731.

¹²² *ibid.*

¹²³ H Chiu and J-P Fa, ‘Taiwan’s Legal System and Legal Profession’ in MA Silk (ed), *Taiwan Trade and Investment Law* (Oxford University Press 1994).

¹²⁴ DW Choy and H Fu, ‘Cross-Border Relations in Criminal Matters’ in MS Gaylord, D Gittings and H Traver (eds), *Introduction to Crime, Law and Justice in Hong Kong* (Hong Kong University Press 2009) 228.

¹²⁵ Lo (n 72) 177).

In a federal context such formalization can rarely be found, although this differs significantly between federal states. The situations in the United States, Germany and Australia, for example, diverge prominently within their distinct political contexts. While Germany established a number of federal strategies that were later even used for regional/international cooperation at EU level,¹²⁶ there is absolutely no legal formalization of strategies in Australia.¹²⁷ It can generally be said that the need for formalization in federal systems, despite the differences between criminal law jurisdictions, is not prominent due to the consistency in underlying common constitutional values.¹²⁸

It could be concluded that formalization of police cooperation mechanisms seems inhibited when the entities cooperating abide by very different human rights standards. Cooperation should then not be fostered through legally binding regulation, but give states the option to decide whether to cooperate (or not) on a case-by-case basis, for example by cooperating through Interpol or International Liaison Officers. This opens the debate here again on actual practice in law enforcement cooperation. As long as it follows legal agreements, outlining the agreements is similar to outlining practice – but what is practice when there are no agreements or where the practice differs from them? Here, informal cooperation needs to be addressed.

As mentioned above with regard to the bureaucratization theory, international police cooperation also became more independent from state authority as the ‘police may gain some autonomy of action in the international domain’.¹²⁹ This can potentially lead to breaches of sovereignty in international policing scenarios. In some areas of police cooperation, such as information-sharing on terrorism offences, this has, however, even been promoted as a strategy by governments.¹³⁰

HUMAN RIGHTS BREACHES IN INTERNATIONAL POLICE CO-OPERATION

Researching human rights infringements in the area of international police cooperation is a tricky task. Unfortunately, due to the hazy legal situation, the cases rarely reach the court system and if they do, the outcomes are usually based on broad legal arguments, such as ‘fairness’ or ‘common values’. In the following part of this chapter a couple of examples will be provided that were tried in various courts and/or were brought to the attention of the media.

While generally a legitimate system of law enforcement cooperation, there are instances where Interpol Red Notices can lead to human rights infringements. In January 2003, for example, the 72-year-old United Kingdom (UK) national Derek Bond was arrested in South Africa and held in custody for 17 days while on a wine-tasting tour. After being questioned by immigration authorities at Cape Town airport, he was arrested on the basis of an Interpol Red Notice.¹³¹ The Red Notice had been issued by the US Federal Bureau of Investigation (FBI)

¹²⁶ Block (n 14) 151–152.

¹²⁷ Hufnagel (n 3) 280–281.

¹²⁸ Hufnagel (n 12) 219–220.

¹²⁹ Anderson (n 1) 175.

¹³⁰ See Chapter 8 in this volume.

¹³¹ T Butcher and S Pook, ‘Wine Tasting Pensioner Finds Himself in Jail and Wanted by the FBI’ *Daily Telegraph* (London, 26 February 2003).

and executed by the South African Police upon a British citizen. As was later discovered, Mr Bond was the victim of mistaken identity as the details of his passport matched those of a wanted criminal called 'Derek Lloyd Sykes', who had used the name 'Derek Bond' as an alias. Mr Sykes had been on the FBI's 'most wanted list' for a multi-million dollar telemarketing fraud. According to media reports, South African police were convinced of the innocence of Mr Bond, but US authorities insisted that he was to be extradited to the US.¹³² After he was eventually released, Mr Bond considered suing the US government for damages, but his lawyers advised against it.¹³³ In this situation, the question can be raised whether responsibility would lie with the states involved and with Interpol, for instance in the light of the fact that no correct or readable photographs or fingerprints had been attached to the Notice, otherwise correct identification would have occurred. It is furthermore remarkable that the South African police kept Mr Bond in custody even though they reported to the media they were convinced of his innocence. This could have been the effect of the powerful Red Notice from Interpol, but is more likely the result of US pressure on South African authorities not to let him go despite the protest of the British High Commission.¹³⁴

More in-depth research into cases of mistaken identity and human rights violations by states using the Interpol platform for information exchange could not reveal further cases of similar significance. This does not mean, however, that they do not exist. The fact that Bond's lawyers recommended against suing for damages indicates that complaints in this field are rarely crowned by success, nor do many suspects or fugitives have the ability and means to assert their rights in front of national or international courts. Victims of human rights abuses in the area of international policing are often not even aware of them – nor are their lawyers. Furthermore, there are a number of cases known and discussed in the media where Interpol has been abused for political purposes.¹³⁵ In these cases, Interpol Red Notices had been used by a number of countries to effectively place political opponents under house arrest. This can be seen as a significant abuse on an international police cooperation instrument, leading to the restriction of the right to free movement. However, these incidents have not been subject to court cases.

The examples nonetheless show that Interpol, while providing a valuable tool for the practice of law enforcement cooperation, can result in identity confusions for innocent persons with suspects and convicted offenders. Also, while a number of states might be to blame for the creation of a situation that violates human rights (in the Bond case, for example, South Africa and the US), states involved in such infringements have so far not been challenged.

The potential for breaches of procedural right arising out of the activities of Europol and Eurojust can be illustrated by a case involving the Netherlands and the United Kingdom.¹³⁶ The Dutch and the UK national crime squads had set up a JIT under the 2000 EU Mutual Assistance Convention. The team was established because a UK investigation was linked to a major drugs find in the Netherlands. The joint investigation was determined to take place in the Netherlands, while the investigation in the UK would be purely investigated by UK law enforcement. The JIT was then conducted over three months, several suspects on both sides were

¹³² *ibid.*

¹³³ Bowling and Sheptycki (n 6) 8–11.

¹³⁴ *ibid.*

¹³⁵ *The Economist* 409(8862) (16 November 2013) 68.

¹³⁶ Block (n 14) 161.

arrested and proceeds of crime were confiscated in the Netherlands.¹³⁷ Part of the UK evidence to be included in the JIT and to enable prosecution in the Netherlands included 'sensitive information', and the source of the information had to be protected. Under UK law, sensitive information about police operations, such as the identity of informants or operational technique, can be withheld from disclosure to the defence under UK Criminal Procedure and Investigations Act 1996, Part I, ss 1–21 and the UK Criminal Justice Act 2003, sections 32–39. Dutch practitioners are bound to potentially disclose all information in criminal proceedings.¹³⁸ If information is therefore classified as 'sensitive', it cannot be disclosed by the UK to the JIT. Faced with this major impediment, the UK authorities used the Europol channel to provide sensitive information to the JIT. The source of the information remained thereby protected.¹³⁹ This case is interesting in the present context as it can be construed in two opposing ways. First, one could claim that here ad hoc cooperation efforts, as well as the use of the Europol and Eurojust channels for information exchange, facilitated the successful conduct of this major cross-border drug investigation, and helped to protect the procedural right to anonymity of the informant under UK law. At the same time it could be argued that by 'laundering' the informant's information through Europol, the Dutch suspect and later defendant is deprived of his right to defend himself in full knowledge of the evidence under Dutch procedural law. The differences in legal procedure thereby create a situation where one state's laws are protected and the other state's laws are infringed.

We now consider a regional, but nevertheless transnational example, the EU. Despite the existence of the Schengen Convention (providing for the abolition of internal border controls between Schengen signatories; Van der Woude in Chapter 12), national laws of EU Member States do not become invalid. Police cooperation still has to follow the procedural rules of the individual Member States, unless the states apply mutual recognition. Nevertheless, the case law in Member States indicates that within the EU, different procedural rules are already interchangeable. There are, for example, many Belgian cases that deal with the admissibility of telephone intercepts from the 1980s and 90s.¹⁴⁰ Under Article 314bis of the Belgian Criminal Code it is illegal to record a telephone conversation as a non-participant. Belgian police had nevertheless requested telephone taps to be conducted in the Netherlands, and these were used as evidence before Belgian courts. Similarly, French and Swedish telephone taps resulting from investigations within these countries, but with links to Belgian cases, were used before Belgian courts in both criminal trials and extradition procedures. In all of these cases the courts argued that the evidence was admissible, as it had been gathered in an EU Member State where the practice of telephone tapping was consistent with Article 8 of the ECHR and did not breach the defendant's right to privacy. Interestingly here, the existence of a human rights framework enabled the 'laundering' of foreign evidence to become admissible under national law.

It could be concluded that when a breach of procedure does involve a non-EU Member State, the outcome would be different. One of the most prominent cases in this area is the *Chinoy* case (*R v Governor of Pentonville Prison, ex p Chinoy* [1992] 1 All ER 317), which

¹³⁷ Rijken (n 52) 108–109.

¹³⁸ *ibid* 113.

¹³⁹ *ibid* 114.

¹⁴⁰ See Cour de Cassation (24me ch., sect. néerl.) 26 January 1993 (en cause de Co. D.), *Revue de droit pénal*, 1993, 768; Cour de Cassation (2me ch., sect. néerl.) 12 October 1993 (en cause de D.), *Revue de droit pénal*, 1994, 792; Cour de Cassation (2me ch., sect. néerl.) 19 February 1985.

involves not only EU countries, but most prominently the US. In this case US agents had illegally obtained telephone and other voice recordings of Chinoy in France. As they knew that these would never be admitted as evidence in a French trial or extradition procedure, they took advantage of a visit by Chinoy in the United Kingdom and let him be arrested there. In the extradition procedure the evidence illegally obtained in France was considered admissible by the UK court. To be inadmissible, evidence would have had to represent abuse of process before this court.¹⁴¹ Furthermore, the court stressed that it lies within the judge's discretion to allow illegally obtained evidence gathered in the UK and abroad. This case can be constructed as a human rights breach. Following an invasion of French sovereignty by gathering evidence without the permission of the French authorities and in breach of French law, France could be considered the first victim of US-UK cooperation. The UK court had the ability to remedy the breach and acknowledge French sovereignty by declaring the evidence inadmissible. It could have sent a clear message to the US that their practices are unacceptable. Furthermore, the rights of the suspect were infringed in several ways. He could have relied on the inadmissibility of the evidence in France and the acknowledgement of this breach in the UK. Article 8 of the ECHR did not cover this breach, but the UK decision relied predominantly on the discretion of the judge under common law. There are a number of cases where the US behaved in similar ways in other countries. It is surprising how little public and/or judicial outcry these cases have triggered.

A high-profile case where the consequences of international police cooperation were far more severe is the Australian-Indonesian *Bali 9* case. Here, there was no supranational framework available and also no common human rights framework to justify breaches of national rules. The Australian Federal Police (AFP) Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations explicitly states that assistance can be provided 'irrespective of whether the investigation may later result in charges being laid which may attract the death penalty'. In 2006, the AFP released the Revised Death Penalty Guidelines.¹⁴² However, whether a country applying the death penalty will be assisted by the AFP should always be decided on a case-by-case basis and mirror government policy.¹⁴³ In the *Bali 9* case, nine Australian citizens were arrested in Bali for attempting to smuggle 8.2 kilograms of heroin from Indonesia to Australia. Four of the nine were arrested by the Indonesian National Police (INP) when boarding a flight from Bali to Sydney with the drugs strapped to their bodies on 17 April 2005. Four other offenders were arrested at a hotel in Bali and 350 grams of heroin were found in their room, and one was arrested at the airport not carrying any drugs. They were charged with trafficking heroin, which carries the death penalty under Indonesian law. In the first instance two were convicted to death and all others to life imprisonment by the Denpasar District Court (Sentencing Decisions of 13, 14 and 15 February 2006). After several appeals by the defence, three were convicted to death, six to life imprisonment and one to 20 years' imprisonment.¹⁴⁴ The AFP had provided information to the Indonesian Police through

¹⁴¹ *Chinoy case (R v Governor of Pentonville Prison, ex parte Chinoy [1992] 1 All ER 317, 330.*

¹⁴² L Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 Syd L Rev 95.

¹⁴³ M Phelan (AFP) interview with ABC Australian Story (13 February 2006) <www.abc.net.au/au-story/content/2006/sl568894.htm> accessed 21 February 2017.

¹⁴⁴ S Bronitt, 'Directing Traffic and the Death Penalty: Policing the Borders of Drug Law Enforcement' (2006) 30 Crim LJ 270.

a letter written by the AFP senior liaison officer in Bali.¹⁴⁵ Assurances for a non-application of the death penalty in case of apprehension by Indonesian law enforcement had not explicitly been sought.¹⁴⁶ In the pre-trial phase, the AFP provided the Indonesian National Police (INP) with further evidence gathered in Australia to assist the Indonesian prosecution on a 'police-to-police' basis.¹⁴⁷ In the *Bali 9* case the cooperating countries have significantly different human rights regimes. There is no transnational law governing their police cooperation, only an MOU between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation.¹⁴⁸ MOUs are no 'binding' legal frameworks, as was outlined in the EU examples, but a form of 'gentlemen's agreement'. There was hence no security given that the Bali 9 would be extradited to Australia or not convicted to death. The court in *Rush v Commissioner of Police* held that the AFP had also not breached Australian national legislation, such as the Mutual Assistance in Criminal Matters Act 1987 (Commonwealth), by not seeking explicit assurances that the death penalty would not be applied. The only immediate government response was the changing of police guidelines in death penalty matters.

The high risks of international law enforcement cooperation without clear rules and guidelines become very apparent in this case. Between countries with very similar value and human rights systems the creation of informal cooperation and judicial decisions relying on 'fairness' principles do not carry with them immediate dangers of human rights infringements, as can be seen in the EU cases on telephone taps or the use of informants discussed above. In cooperation scenarios with very different systems, the absence of any binding legal framework can lead to significant harm.

CONCLUSION

A chapter with such an array of issues addressed should conclude not only with a review of the current situation, but also with a look forward to future problems, advancements and general developments in the field of international policing. These can, of course, not generally be foreseen, but where new legislation has entered the scene or political developments have occurred, a tentative prognosis can be attempted.

With a view to the (not very new, but currently debated) problem of international police cooperation in the area of counter-terrorism (Den Boer, Mankinen and Virta in Chapter 8), the lack of cooperation during the 2016/2017 attacks in Europe has been blamed on the various European police forces involved. A need for change seems apparent, but 'more surveillance' is difficult, expensive and contentious from a human rights perspective and will probably also not lead to better communication between police forces. A further issue is that today, in the fight against ISIS and Islamic terrorism more specifically, Western democratic nations are relying on cooperation with non-democratic states with very different human rights requirements. These players have to 'trust' each other to communicate effectively. On the one hand, this represents a threat to human rights. On the other hand, this could start a development

¹⁴⁵ Finlay (n 142) 98.

¹⁴⁶ *Rush v Commissioner of Police* (2006) 150 FCR 165 [22] (Finn J).

¹⁴⁷ Finlay (n 142) 99.

¹⁴⁸ *Rush* (n 146) 25, 43.

towards more cooperation and trust-building beneficial to the development of a higher common human rights standard. At the practical level, as seen during the recent European attacks, it is not lack of trust or lack of cooperation that seems to be the major problem, but lack of capacity to process information received. The perpetrators were known before all recent European attacks and/or information had been transferred by both democratic and non-democratic regimes, alerting to their dangerousness. Furthermore, information was available from the local population that was simply not followed up. A way forward would therefore not be 'more cooperation' but better analysis and targeted action with a view to the data received.

With regard to other areas, such as art and wildlife crime, the problems are apparent at a different level, as these crimes are not even considered serious enough to be a focus of police action. Not only the lack of law enforcement attention but also the failure to implement international legislation in many countries leads to these crimes remaining widespread.¹⁴⁹ As wildlife and art crime are used to finance terrorism and organized crime more generally, these need to receive far more attention and expertise in the future to prevent transnational crime in a wider context.

With regard to policing practice and regulation, there are true international policing initiatives, such as Interpol and LOs, but most international cooperation remains bilateral or regional. With a view to regional cooperation, many complexities are currently emerging in the EU context. A major issue in this respect is, of course, Brexit. With the exiting of the UK from the EU policing and security regulations, a number of memberships in agencies like Europol, Eurojust, CEPOL etc. can be questioned. Furthermore, mechanisms that were used in support of mutual legal assistance, such as the European Arrest Warrant (EAW), the European Evidence Warrant (EEW), the European Freezing Order, JITs and many others are no longer applicable in the UK context. While the agencies can still be joint with third states and JITs can be participated in even by non-EU Member States, the involvement in other instruments will not be possible to the same extent and depend on the negotiation of new treaties. This puts not only the UK but also the rest of the EU in a rather difficult position, as the UK is a frequent and reliable provider of important information in the security field.¹⁵⁰

A specific problem that is very visible in the context of police cooperation is the renegotiation of the Le Touquet Treaty with France. While the policing of the UK (tunnel) border has so far been the duty of the French police and customs representatives in Calais and laden with significant problems due to masses of asylum seekers trying to travel through the tunnel from France to the UK, renegotiations are now under way to move the border back to the UK. This would create a massive burden on the UK police and customs services policing both the tunnel and St Pancras station in London, where the 'Eurostar' train ends.

In the European context generally, it can be said that there are a number of major advancements in the area of police cooperation. Agencies such as Europol and Eurojust work successfully, and according to practitioners working in the agencies, the initial reluctance towards EU agencies has faded away significantly in the last five years. With regard to Europol, practitioners remarked that expertise in specialized areas was a very welcomed development, leading

¹⁴⁹ See, for example with regard to art and antiquities crime, Chappell and Hufnagel (n 68).

¹⁵⁰ See on Brexit and EU security S Hufnagel, "'Third Party' Status in EU Policing and Security – Comparing the Position of Norway with the UK Before and After the 'Brexit'" (2016) 3 Nord J Policing St 163; S Hufnagel, 'EU Integrated and Re-Integrated Security: The Position of the UK after the Opt-Out – or Brexit' (2016) 4 Eur J Policing St 63.

to higher acceptance of the agency. In particular the European Cybercrime Centre (EC3), the European Migrant Smuggling Centre (EMSC) and the European Counter-Terrorism Centre (ECTC) were highlighted as major developments in the usefulness of the agencies for EU Member State practitioners.

One last development that should be mentioned here is the European Investigation Order (EIO), which entered into force on 22 May 2017. Its aim is to create a single comprehensive instrument, amalgamating the 2003 European Freezing Order and the 2008 European Evidence Warrant (EEW). It thereby replaces the existing fragmented legal framework, including collecting evidence, freezing of evidence and transfer of existing evidence. It will include stricter deadlines than the EEW: 30 days to decide upon a request and a 90-day deadline to conduct the requested investigative measure. However, this is 30 days longer than was required for the EEW. Delay is reported to the EU country issuing the investigation order. Reasons justifying the refusing of requests were vast in the EEW and are considerably limited in the EIO. The receiving authority can only refuse under certain circumstances, e.g. if the request is against the country's fundamental principles of law or harms national security interests. The EIO also introduces a single standard form, which is translated into official language of the executing State for authorities to request help when seeking evidence.

A major advancement of the EOI is that it protects fundamental rights of the defence. Issuing authorities must assess the necessity and proportionality of measure requested, the EIO has to be issued or validated by a judicial authority, and the issuing of the order may be requested by a suspected or accused person, or by a lawyer in line with defence rights and national criminal procedures. The Member States must ensure legal remedies equivalent to those available in a similar domestic case and ensure persons concerned are properly informed. The fact that there is now such a stress on human rights requirements for the suspect is a strong indication regarding future EU instruments on cross-border police cooperation. Until now, the EU seems to be the only region where international police cooperation rests on substantial legal convergence.

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