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### From Empire to Europe: evolving British policy in respect of cross-border crime

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## From Empire to Europe: evolving British policy in respect of cross-border crime

### Abstract

The second half of the twentieth century witnessed the metamorphosis of Britain from a global, imperial power to a full (if sometimes ambivalent) member of the modern regional partnership that is the European Union (EU). During the same period, transnational criminal activity was transformed from an arena in which criminal fugitives sought merely to evade domestic justice through self-imposed exile to an environment in which improved travel and communication facilities enabled criminals to commute between national jurisdictions to commit crime or to participate in global criminal enterprises run along modern business lines. This development is so serious that it is considered in some quarters a threat to national security and the very fabric of society.

### Keywords

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## From Empire to Europe: Evolving British Policy in Respect of Cross-Border Crime

The second half of the twentieth century witnessed the metamorphosis of Britain from a global, imperial power to a full (if sometimes ambivalent) member of the modern regional partnership that is the European Union (EU). During the same period, transnational criminal activity was transformed from an arena in which criminal fugitives sought merely to evade domestic justice through self-imposed exile to an environment in which improved travel and communication facilities enabled criminals to commute between national jurisdictions to commit crime or to participate in global criminal enterprises run along modern business lines. This development is so serious that it is considered in some quarters a threat to national security and the very fabric of society.<sup>1</sup>

British political attitudes to international law-enforcement cooperation during this period were characterized by diffidence until deliberate nonengagement eventually gave way to active participation. Progress was not smooth, and in the absence of a coherent proactive strategy external forces drove a reactive policy. This is evident in the documented policy toward practitioner cooperation as well-international policy development. Having become more actively engaged in the EU, Britain is now seeking to drive the EU criminal policy agenda. This article documents British policy evolution from imperial diffidence to aspiring European driving force and considers how the post 9/11 U.S. policy of aggressive external intervention now influences EU crime policy.

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## The Empire and Interpol

On December 24, 1952, the governor of Gibraltar, a British colony, received a telegram from an organization of which he had never heard, requesting the arrest of named suspects on suspicion of piracy. The request identified neither the country nor jurisdiction seeking the arrests. Three days later the request was withdrawn. The organization was the International Criminal Police Commission (ICPC), known today as Interpol following its reconstitution in 1956.<sup>2</sup>

Notwithstanding the rescinding of the request, the governor sought advice from the Colonial Office in London about the ICPC, its authority to request arrests, and how any future requests should be handled. For the staff at the Colonial Office, the governor's letter raised "several questions of some nicety."<sup>3</sup>

These delicate issues are key to any discussion of international police cooperation. Police functions differ from state to state: Who might properly seek assistance? For what? How best might assistance be given? Within any given state, there may be more than one policing function undertaken by more than one policing agency.<sup>4</sup> Policing is a sovereign issue for a state, couched in domestic political sensitivities that only become more complicated by intervention on behalf of another state. These were issues with which Britain had declined to engage officially when the first International Criminal Police Congress was held in Monaco in April 1914, a forerunner to the ICPC, which was formed in 1923. Indeed, at that conference there was no police representation in the British delegation, which comprised instead a magistrate from the south-coast seaside town of Hove and a barrister and two solicitors from London.<sup>5</sup>

For British authorities, forced to consider such issues in order to respond to the governor's letter, there was the additional issue of the relationship between the British colonies and third parties such as Interpol, and how, in an imperial context, this relationship could best be managed. At the time, of all the colonies, only Singapore was a member of the ICPC. The Colonial Office consulted the Foreign Office and the Home Office. In a briefing to the attorney general, it was explained that "the United Kingdom is a member of the Commission and the [British] representative is Mr R. Howe," assistant commissioner, Metropolitan Police.<sup>6</sup> Howe was in charge of all Metropolitan Police detectives. In the absence of a national police service, national police functions (such as they were in 1953) and representation abroad fell by default to the Metropolitan Police Service, which otherwise had geographical responsibility for policing in

London.<sup>7</sup> The Metropolitan Police Service was, and remains, the largest single police force in Britain, and its proximity to the seat of domestic and imperial government made it the obvious choice to represent Britain in relations with the ICPC.<sup>8</sup>

The response was eventually formulated. Because “the International Criminal Police Commission is not generally known but some of its activities may affect the Commissioners of Colonial Police Forces,”<sup>9</sup> it was deemed “desirable to furnish” the colonial police commissioners with some information as to the constitution and purposes of the ICPC.<sup>10</sup> Colonial Office Circular 345/53 announced this to the colonies together with the decision that Howe was to act as their representative at Interpol as well as representing British forces.

In 1956 the ICPC was reconstituted with the aim “to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the ‘Universal Declaration of Human Rights.’”<sup>11</sup> In its aspiration to achieve a global network as a foundation for the widest possible mutual assistance, there was much attraction to Interpol in establishing Britain, its imperial colonies, and the embryonic Commonwealth as members. To do so would be to achieve a significant network over a quarter of the world.<sup>12</sup>

The British government monitored the reinvention of Interpol closely, wondering precisely what status might be conferred upon the colonies as a consequence.<sup>13</sup> On April 1, 1957, Interpol wrote to Colonel Muller,<sup>14</sup> the inspector general of Colonial Police, based in London, advising him that Britain and all its colonies could be members of Interpol for the cost of just one national subscription, but that for voting purposes in the General Assembly, Britain would have only one vote to represent itself and its colonies. On June 20, 1957, in a letter to Mr. R. Jackson (Howe’s successor), Interpol confirmed that Interpol offices situated in the colonies would have the status of sub-bureaus of the British National Central Bureau (NCB)<sup>15</sup> and as such would not be expected to pay regular subscriptions. (Voluntary contributions, Interpol noted, would nevertheless be very welcome.)

Announcing this offer in Circular 694/58 (June 20, 1958), the Colonial Office let it be known to the various colonial police commissioners that in principle there was no British government objection to any of the colonies establishing their own sub-bureau, but it was expected that the colonial police commissioner would pay voluntarily a full national subscription to Interpol and would fund his own representation at Interpol conferences, where it had been agreed he would have no vote.

Alternatively, at no cost to the colonies, London was prepared to continue representing them at Interpol. Unanimously, the (relatively impoverished) colonial police commissioners voted to retain the status quo of being represented by London. Likewise, any communication from Interpol to any of the colonies would have to be via London. The vexatious issue of the relationship between the Empire and third-party international policing organizations was sidestepped once more: London remained firmly in control.

No sooner had this matter been laid to rest than the relationship between Interpol and British provincial forces became an issue. The Interpol General Assembly met in London in September 1958. In addition to the formal British delegation, consisting of the assistant commissioner of the Metropolitan Police and the representative from the inspector general of Colonial Police, six Chief Constables from among the myriad local police forces in England and Wales were invited as observers to the conference.<sup>16</sup> After such a tantalizing introduction to the international arena, a number of Chief Constables had had their appetite whetted.

The matter was vigorously debated among the Home Office, ACPO, local forces, and the Metropolitan Police Service for five years between 1959 and 1964 (NA HO/287/453). The Home Office did all that it could to deter the participation of British provincial police forces in the relationship with Interpol, employing a variety of tactics. A minute sheet of the voluminous file of correspondence and memos reveals that the file was temporarily mislaid, leading to delays in decision-making. Two diversionary third-party debates were ignited: the first between English senior police officers and their Scottish counterparts about whether additional British representation should in fact come from the Scottish jurisdiction rather than the English jurisdiction already represented by the Metropolitan Police; and once that was settled in favor of the English, a second debate was instigated between HM Treasury and the County Councils Association about who would bear the costs of additional representation. Eventually a non-MPS officer was allowed to attend an Interpol conference outside Britain. On the June 25, 1964, Colonel Young, commissioner (chief officer) of the City of London Police, attended the Interpol General Assembly in Venezuela, at the expense of the Corporation of London. London was still dominant. This was not, in fact, the partial success it might at first appear. The Home Affairs Committee of the House of Commons, in reviewing European police cooperation in 1990, found that for nearly forty years "Britain's involvement in Interpol was completely dominated by the Metropolitan Police"

with the British representative at Interpol always being an assistant commissioner from the MPS, and the head of the NCB also always being drawn from the MPS: arrangements that the Members of Parliament found to be unsatisfactory.<sup>17</sup>

The files on the relationship between Britain and Interpol reveal as much about the internal relationships within British and imperial/Commonwealth policing as they do about the relationship with between Britain and its empire and Interpol itself. The provincial forces never appear to have advanced a substantiated business case for provincial delegates or if they did, it is not recorded in available files. Nor did the Home Office ever present a convincing argument against such representation. Little thought appears to have been given to the nature and purpose of interaction between British law enforcement and Interpol or how the imperial colonies and Commonwealth might work with Interpol. The lack of hard evidence allows the deduction that, in fact, there was probably little significant demand at this time for transnational police cooperation either because there was little significant transnational criminality or because the concept of transnational law enforcement had yet to take root. Records reveal a government that wanted strict and central control over third-party relationships both in Britain and throughout the Empire and Commonwealth, notwithstanding the prevailing philosophical emphasis in British policing on policing services locally delivered and locally accountable.<sup>18</sup> It was a position that did not serve the interests of key British provincial forces, as will be seen, but it was a position consistent with the diffidence demonstrated toward other contemporary initiatives in transnational law-enforcement cooperation.

### The Council of Europe's Regional Initiative

The postwar period in Europe witnessed the birth of the European cooperative and integration movements as a concerted effort to ensure that the horrors of world war were never revisited. This was reflected in the formation of the Council of Europe in 1949 (through which regional diplomatic harmony was to be enhanced) and the creation of the European Economic Community in 1957, which subsequently became the EU (through which economic integration was to be achieved).<sup>19</sup> Following the negotiation of the Council of Europe Extradition Treaty (1957), to ensure there was no safe haven for criminal fugitives, the next logical step was to address mutual legal-assistance issues such as assistance in gathering evidence. This was encapsulated in the Council of Europe

Convention on Mutual Legal Assistance in Criminal Matters 1959 [ECMA].

Although commentators have noted that Britain took no part on negotiations concerning the drafting of the Convention,<sup>20</sup> such negotiations were monitored in Whitehall. Invited to respond to specific German proposals, for instance, the Foreign Office at least declared that it had no objection to them, while the Home Office chose not to comment at all.<sup>21</sup>

Samuel Knox Cunningham (later Sir), the Ulster Unionist MP for South Antrim 1955–70, was part of the British delegation to the Council of Europe between 1956 and 1959.<sup>22</sup> It was he who gave the formal explanation of the British position to the Council of Europe Consultative Assembly on January 22, 1959:

In the United Kingdom we have three different systems of law. In England and Wales there is one system; in Scotland there is another which is fundamentally different. Again, in Northern Ireland the system is very similar to that of England and Wales, but differs with regard to land law, and there are also other statutory differences. On the other hand, there is a marked difference between all these three systems and the main system of law existing in Europe across the Channel.

May I give you an example from the draft Convention? There is a provision for evidence to be taken in one country for use in another under “letters rogatory.” Such evidence can be taken in the United Kingdom, but *our rules of evidence do not permit the use in criminal matters of evidence taken in another country under “letters rogatory.”* There are other fundamental differences and I do not believe that it will be possible for the United Kingdom to ratify this Convention. That is not to say that my country is not deeply interested in giving assistance in criminal matters to other countries. The United Kingdom is a member of Interpol, the organization through which police forces render mutual assistance in criminal matters, and it plays its part fully in that work.<sup>23</sup>

Had the brief given by government officials to Cunningham been available, it would have enabled comparison with his formal statement, and between these sources and the brief officials compiled one month later for a Written Answer to a Parliamentary Question tabled by Cunningham.<sup>24</sup> The brief for the Written Answer is unequivocal:



The United Kingdom have been against this Convention from the start. UK experts did not take part in its preparation. We have indicated that we are unlikely to sign it.

The main reason for our opposition is that it would require a change in our law to permit us to enter into agreements whereby witnesses in this country could be compelled to give evidence at a foreign trial. We should be unlikely to be willing to permit foreign police forces to come and pursue their enquiries here, and especially to interview witnesses.

On the other hand, our Extradition Acts of 1870 and 1873 and our agreements with Interpol already cover some of the activities dealt with by this draft Convention.<sup>25</sup>

Leaving aside the issue that the second paragraph does not accurately reflect the provisions of Articles 1 and 4, ECMA, concerning the role of authorities from the requesting state, none of this candor was reflected in the reply to Cunningham's invitation by Written Question to the Foreign Secretary to make a statement. "In the circumstance," came the formal answer, "it would be premature to make a statement now."<sup>26</sup>

Why Cunningham felt the need to table such a question and why the Government was so reluctant to reveal its position in public is not apparent from the records, but a briefing note for officials attending the Council of Europe meeting in March 1959 details further the belief that Britain was already in a position to respond positively to requests for assistance from other states. The issue of whether British authorities might need foreign assistance seems not to have been a consideration: it is a matter not mentioned.

We have been against the draft convention from its inception . . . the purposes of any such convention are to a great extent achieved as far as the United Kingdom is concerned:

- a) by our Extradition Acts of 1870 and 1873 which provide means whereby evidence may be taken in this country to be used in criminal proceedings pending before foreign tribunals;
- b) by the use of Interpol by our police authorities to pass on information and histories of criminal antecedents to foreign police forces.

. . . It is most unlikely that we should agree to permit officers of foreign police forces to come and pursue their enquiries here, and especially to interview witnesses."<sup>27</sup>

If Britain had no interest in contributing to the development of regional cooperative mechanisms to tackle crime more effectively, it was, by default, actively setting the agenda in defining the most pressing crime problems facing Europe in the late 1950s. A European Committee of Experts on Crime Problems [ECCP] had been founded, established at the suggestion of the Committee of Experts that drafted the European Convention on Extradition 1957 rather than at the instigation of the Council of Europe itself. The Council of Europe allowed the ECCP to draw up its own program of work.<sup>28</sup> Sir Lionel Fox, chairman of the Prison Commission in London, was the British representative and was elected chairman of the ECCP.<sup>29</sup> The program of work decided upon by these experts certainly incorporates Fox's professional interests, but to what extent it accurately reflects the most pressing contemporary crime problems in Europe is less clear.

The program of work identified by the ECCP (1959) included: punishment of motoring offenses; prison wages and related questions; civil and political rights of detained and released persons; mutual assistance in after-care or postpenitentiary treatment, including repatriation after sentence or probation; abolition of the death penalty; and juvenile delinquency.

Despite Fox's concern to avoid both an "ambitious, general and costly programme" and any duplication of effort with the UN in this area (*ibid.*), it was precisely these issues that Foreign Office officials cited as reasons to treat the ECCP with caution.<sup>30</sup> The note also reveals that Home Office officials were "a little unhappy" about the budget proposals for the ECCP.

The 1959 ECCP program focuses on postconviction issues.<sup>31</sup> Nowhere did it consider pretrial mutual assistance and cooperation or any particular type of criminality. Both the Foreign Office and the Home Office held the view that, in any case, all these issues were properly the remit of the UN, not a regional body in Europe.<sup>32</sup> In a context in which Britain had recently declined an invitation to join the "Common Market," such an attitude may be interpreted as wanting to limit the influence of European neighbors rather than as a policy to enhance the role of the UN.<sup>33</sup>

### Cross-Channel Police Initiatives and Development of Cross-Border Cooperation

But such an attitude to the ECMA, coupled with the desire closely to regulate interaction with Interpol, did not necessarily best serve the interests of British policing. The first police force to encounter regular problems was Kent County Constabulary.

Kent is the historical gateway to the British Isles. It occupies the southeast corner of mainland Britain and as such has often been the first landfall for invading armies, missionaries, tourists, and immigrants. Long before the Channel Tunnel was opened, Kent had major cross-Channel ferry ports at Dover, Ramsgate, Folkestone, and Sheerness. In the late 1960s, faced with problems arising from illegal immigration, and also lacking any serious interest or assistance from domestic government, the then chief constable of Kent, Sir Dawnay Lemon, launched his own initiative—the Cross-Channel Intelligence Conference [CCIC], the history of which is comprehensively chronicled by Frank Gallagher, who himself contributed greatly to its development.<sup>34</sup>

The CCIC addressed the real need for Kent police to liaise closely with their European counterparts just across the aquatic border, for whom illegal immigration was also an issue. In the absence of any formal government support, Lemon proceeded on the basis of his own authority as chief constable. The purpose of the CCIC was to exchange information and promote mutual understanding. It filled a void when there was no appetite within government for any national policy or initiatives in this arena, or to sign and ratify the ECMA.

The latter was a significant disadvantage because even the relative autonomy of British chief constables is limited when it comes to participation in international agreements. An individual police agency can enter into a (unenforceable) Memorandum of Understanding, but no more. Formal assistance, including the provision of evidence, was achieved through diplomatic channels by way of a *Commission Rogatoire* (Letter Rogatory). At least the improved cross-border contact achieved through the CCIC enhanced understanding about how the *Commission Rogatoire* process could best be utilized.

Kent County Constabulary tailored its own solution to the problems it faced in international cooperation. There was no constitutional bar to its doing so, although possible solutions were necessarily constrained. When a ferry could cross the Channel in little more than an hour, a mechanism that required Kent officers to contact the liaison desk at New Scotland Yard in order to contact Interpol in Lyon so that Interpol could then contact the authorities in the Nord/Pas-de-Calais or in Belgium or the Netherlands was a mechanism that failed to address everyday realities.

Nor was the Kent situation unique. In the Mass-Rhine region (the region comprising the mutual borders of Belgium, Germany, and the Netherlands), for instance, similar cross-border issues existed, the practicalities of which defied the speed of mutual legal assistance bureaucracy.<sup>35</sup>

The CCIC prevails and the police cooperation family has expanded. To the informal CCIC and the international association that is Interpol has been added Europol, now established as an institution within the framework of the EU, which, although it does not itself have an operational investigative role, serves as a conduit for the exchange of operational intelligence between law-enforcement agencies and the development of strategic intelligence profiles to facilitate joint operations between Member States.<sup>36</sup> The Schengen Acquis abolishing border checks within the EU also contains instrumental provisions for both planned and spontaneous cross-border police cooperation, including, *inter alia*, cross-border surveillance and hot pursuit of escaped felons or suspects fleeing the scene of the crime.<sup>37</sup> While Britain has entered into the provisions concerning cross-border surveillance, it has derogated from those provisions relating to hot pursuit (which can be conducted only by personnel wearing uniform or other visible police insignia, in marked vehicles across land borders) as has Eire, the only EU Member State with which Britain shares a land border, not least because of the special working relationship already established between the authorities in Eire and Northern Ireland arising from the terrorist troubles of the 1960s to the present day.

The Schengen Agreement of 1985 became the Schengen Convention in 1990.<sup>38</sup> Every EU state except Britain and Eire became signatory parties. Norway and Iceland acceded to the Convention as Third Parties. British disinclination to join was based on a number of factors. The advantages in free movement across internal EU land borders presented to other Member States were not immediately apparent for Britain, whose only EU land border is with Eire and whose other borders were simultaneously internal and external within the EU context.<sup>39</sup> A second important consideration for Britain focused on Schengen provisions for law enforcement hot pursuit across national borders. The issue here for Britain was one of firearms. With the minority exception of specialist response units, airport police, and diplomatic protection officers, all British police are unarmed. In continental Europe, like the United States, unarmed officers are the exception rather than the rule. Britain did not want armed foreign police officers operating in Britain, where unarmed policing is still the norm, notwithstanding the terrorist bombings of July 2005.

But there were influential opinions in favor of British participation in Schengen. In the British Parliament, the House of Lords Select Committee on the European Union reviewed the practical question of costs and benefits of Britain's opt-out of the Schengen system and concluded that in the three main areas of Schengen—border controls, police

cooperation, and immigration policy—participation was strongly preferable to continuing to opt out.<sup>40</sup> On May 20, 1999, Britain formally requested to participate in certain mechanisms of the Schengen Acquis.<sup>41</sup> Britain began participating in the Schengen judicial cooperation provisions in December 2004, fourteen years after the original Agreement had become a formal Convention.

These developments, and those in connection with enhanced mutual legal assistance discussed below, notwithstanding, Kent County Constabulary has continued to develop its own cross-border expertise and has a permanent European Liaison Unit staffed by bilingual officers as well as staff dedicated to policing the Channel Tunnel. These are formalized responses to police practitioner need. In the absence of formal structures, the police in Kent developed their own mechanism for cooperation in order to address their own organizational objectives. This also occurred in the Mass-Rhine region, where, rather earlier than for Britain, the Schengen Agreement and subsequent Convention provided the formal structures that replaced ad hoc cooperation. To this extent it can be argued that the formalization of police cooperation was a response to peer and practitioner pressure, a bottom-up driver. But the cross-border operational cooperation between law-enforcement agencies could not operate in isolation. It had to be paralleled with developments in judicial cooperation (mutual legal assistance) to enable evidence to be secured in one jurisdiction to be adduced at trial in another.

### Mutual Legal Assistance in the Commonwealth

If the British government was reluctant to become too involved with Interpol and the ECMA, it could not avoid being involved with the British Commonwealth. As former colonies achieved independence, so there was a need to establish a criminal code that could operate in the absence of direct British administration. Lawyers from Britain were deployed to the colonies to assist in the drafting of such laws, one such lawyer being Frances Bennion, who was posted to Ghana. There, his work was locally so well regarded that it prompted two suggestions in 1961 from the then Ghanaian prime minister, Dr. Kwame Nkrumah. The first was that Bennion's time in Ghana should be extended; the second was that the work undertaken in Ghana could serve as a model to be rolled out across all former African colonies.<sup>42</sup>

The British government's considered response is outlined in a letter from the Commonwealth Relations Office, London, to Sir Arthur

Snelling, then British high commissioner in Ghana: "The original proposal by Dr Nkrumah had obvious drawbacks. It was essentially a scheme for extending Ghanaian influence in other parts of Africa, and in the light of recent events, it is decidedly doubtful whether Ghanaian legal arrangements are to be commended as a model for others to follow. Nevertheless the letter seemed to contain the germ of a good idea."<sup>43</sup>

The germ of a good idea grew into the Commonwealth Technical Legal Assistance Scheme, intended "to disseminate information on new developments of special interest in law," which was to be administered by the British Institute of International and Comparative Law. Thus the British government diverted (and diluted) the original suggestion making it pan-Commonwealth rather than just pan-African. In his official reply, Prime Minister Harold MacMillan sought to present the idea to Nkrumah without causing offense, but in such a way that the latter would be denied any opportunity to veto the "carefully elaborated proposals."<sup>44</sup> MacMillan's letter, sent to Nkrumah on December 30, 1961, and to other Commonwealth Heads of Government a day later, sought to develop Nkrumah's original thinking: "What seems to be required therefore is an all-embracing scheme to which each Commonwealth country in a position to do so can contribute, and the benefits of which will be available to all emergent countries."<sup>45</sup>

In seeking to influence the development of legal assistance measures within the Commonwealth, the British government found itself, ironically, promoting precisely the sort of synchronization and consensus that the ECMA sought to achieve and that the British authorities had already decided was not for them. The seeds had been sown.

Twenty years after the Nkrumah project, Commonwealth leaders met in London to finalize the arrangements for mutual legal assistance within the Commonwealth (January 27 to February 7, 1986). This was the culmination of a long gestation that had begun in 1975 at one of the triennial meetings between Commonwealth law ministers when the enhancement of mutual legal assistance within the Commonwealth was discussed. At a similar meeting in 1983, the law ministers formally commissioned the Commonwealth Secretariat to draw up proposals for a mutual legal assistance scheme.<sup>46</sup>

At the 1986 conference there was a reluctance to enter into a formal treaty: "Senior officials opened their deliberations with a discussion of a suggestion that the new arrangements take the form of a multi-lateral treaty, but concluded that the non-treaty, informal 'scheme' approach (under which countries adopting the scheme enact similar legislation) still offered the most appropriate approach to mutual judicial assistance within the Commonwealth."<sup>47</sup>

The conference recommended to law ministers the adoption of two schemes: the first to enhance mutual assistance in the investigation and prosecution of criminal matters;<sup>48</sup> and the second to permit the transfer of prisoners convicted abroad to their home state to serve their sentence. A third scheme concerning the protection of cultural heritage was referred for further policy guidance from ministers.

In calling for the harmonization of domestic laws and the criminalization of agreed behavior, the Harare Scheme, as the first of these two recommended schemes came to be known, adopted a formula that was to be echoed in subsequent UN treaties such as the 1988 Vienna Treaty on Drugs and the 2000 Convention against Transnational Organized Crime.

The Harare Scheme provided an additional impetus for the British government to review its stance on mutual legal assistance. It represented an effort to catch up with the ECMA.<sup>49</sup> The call for change was becoming irresistible and the impetus provided by the Harare Scheme came within the context of other cooperative developments.

Police cooperation has already been considered. At the intergovernmental level, the 1970s witnessed European nations facing the common enemy of terrorism, a fact that gave rise to the Trevi initiative and its various working groups.<sup>50</sup> The Schengen Agreement was concluded between Belgium, France, Germany, Luxembourg, and the Netherlands in 1985 and became a full convention in 1990, to which all EU Member States have acceded in whole or in part.

Outside the European arena, Britain was entering into other cooperation treaties. In transatlantic relations, in 1986, Britain signed a bilateral Mutual Legal Assistance Treaty [MLAT] with the United States concerning the Cayman Islands.<sup>51</sup> Two years later, Britain entered into the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), which included provisions on international cooperation between authorities.<sup>52</sup> The Home Office had accepted that its reliance on the 1870 Extradition Act (as amended in 1873) as a vehicle for international judicial and police cooperation was no longer sustainable. British policy in respect of mutual legal assistance had to be reviewed.

### The 1990s: Review and Modernization

Following the considerations of a working group, a 1988 internal discussion paper was circulated within the Home Office and other government circles.<sup>53</sup> Given that the discussion paper is unpublished, it is worth quoting from it more fully than might normally be expected:

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

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

Following on from this expression of *mea culpa* came two statutory initiatives: a new Extradition Act (1989) and the Criminal Justice (International Cooperation) Act 1990 [CJICA]. The latter sought to achieve two things in particular. In Part II it gave domestic effect to British international obligations under the 1988 UN Drugs Treaty. It was in Part I, however, that the real progress was to be found.

Part I, CJICA established in British statute the principle that mutual legal assistance will be given in response to a *bona fide* request from a proper authority regardless of whether or not a treaty exists between Britain and the requesting state, regardless of reciprocity and, save in requests for search and seizure and certain fiscal offenses, regardless of dual criminality. This gave effect to British obligations under the ECMA, which Britain ratified finally in 1990, thirty-two years after it was opened for signature and the British government had dismissed it as being of little relevance to Britain. Assistance is provided in service of process, interviewing witnesses, search and seizure, and the transfer of prisoners.



Bilateral MLATs to which Britain is party, and multilateral conventions, are supplementary to the basic foundation provided in the CJICA.

The 1990s witnessed increasing recognition on the part of British authorities that international cooperation was growing in importance. Within Europe there were two particularly persuasive arguments. The first was that there was considerable overlap between the Schengen Acquis and the EU objective of establishing an area of freedom, security, and justice as described in Article 2, Treaty of the European Union, 1992, to which Britain was a signatory party. The second lay in the Tampere summit on justice and home affairs (October 15–16, 1999), issues out of which arose a number of initiatives to which Britain contributed, such as the European Police College and the European Chief Police Officers Task Force.<sup>54</sup>

Britain played an active part in the negotiation of both the UN Convention Against Transnational Organized Crime (2000) and the Council of Europe Convention on Cyber Crime (2001). In 1998 the National Criminal Intelligence Service (NCIS) and the National Crime Squad (NCS) were created, in part to address the issue of transnational criminality. Realization that the performance management culture imposed on British law enforcement had pitted agency against agency rather than law enforcement against criminals led the British government to abolish NCIS and NCS on April 1, 2006, merging their remains with particular elements of the former HM Customs and Excise (HM Revenue and Customs since 2005), HM Immigration Service and MI5 to form the Serious Organized Crime Agency, which has 140 staff deployed overseas.<sup>55</sup> Britain also plays an active part in the Lyon Group of the G8: law-enforcement specialists advising governments on issues of judicial and police cooperation and hi-tech crime.<sup>56</sup> Although not a treaty-based or treaty-making body, G8 is a vehicle for influencing consensus and cooperation.

### Mutual Recognition: The Way Forward?

The next stage of progress was to bring Britain in line with other European nations in the human rights arena as a foundation for further cooperative conceptual development. Although the first nation to sign the 1958 European Convention on Human Rights and Fundamental Freedoms [ECHR], Britain has been among the last to give domestic effect to the obligations created therein.<sup>57</sup> Having done so, Britain has now joined other major European nations in asserting the standards by

which state authorities are measured in the protection of civil liberties. Human rights provide a crucial foundation for legitimate law enforcement both within individual nations and in the context of increasing international law-enforcement cooperation because of the shared values expressed in the ECHR and similar instruments.

Common standards underpin the academic proposition of a European public prosecutor with particular reference to trying frauds committed against the EU budget. Fraud against the EU budget has been of particular and growing concern in recent years.<sup>58</sup> Ideas as how best to tackle this problem have included the controversial concept of the *Corpus Juris*, a suggestion proposed by eight academic lawyers in April 1997 intended "to provide a uniform code of criminal offences to deal with fraud on the Community finances."<sup>59</sup> Although it has attracted much hostile attention in the British media, the idea remains essentially an academic suggestion and has not been formally adopted as an EC proposal.

Political reaction is equally mixed toward the notion of a single European criminal code, a proposal to achieve full harmonization of domestic laws within the various Member States that is unlikely ever to find much concerted support. And yet there is recognition that even the postwar mutual legal assistance mechanisms do not provide the complete solution to improving effective international law-enforcement cooperation within Europe in the modern era.<sup>60</sup> Seeking a way around the hurdles, Britain initiated debate around the concept of mutual recognition. In a speech to a seminar of European justice and home affairs ministers at Avignon, France, then British home secretary, Jack Straw, argued that "law enforcement is still using 19th century [mutual legal assistance] mechanisms to fight 21st century crime."<sup>61</sup> Other obstacles to progress Straw cited were disparity in criminal laws; the administrative burden of mutual legal assistance; the difficulty of finding a jurisdiction in which to mount a prosecution; and the problems arising when the investigation was founded within one state but the suspect was located in another.

Besides supporting initiatives such as the European Judicial Network, the Joint Action on Good Practice in Mutual Legal Assistance, and mutual evaluation as means to improving mutual legal assistance mechanisms, Straw advocated exploring "new ways in which the different national systems of criminal law can be made to work compatibly to achieve the desired results."<sup>62</sup> Mutual recognition of judicial decisions and orders from other states was proposed as a way of cooperating between states as if "there were no legal boundaries."<sup>63</sup>

Mutual recognition is presented as the politically acceptable alternative to full harmonization.<sup>64</sup> It depends upon the implementation of

common human rights norms and the consequential development of trust in another nation's criminal justice system, a trust that enables the requested state to accept and execute the court order of the requesting state without protracted scrutiny or review. Within the EU context, this radical concept has already found expression in the European Arrest Warrant (EAW) and the proposed European Evidence Warrant (EEW).<sup>65</sup> The EAW, a form of fast-track extradition, is already in force. The EEW is still being negotiated and neither is uncontroversial.

The EEW applies only to evidence already in existence and will provide powers of search, production, and seizure of physical objects, documents, and data but will not apply to the questioning of suspects or the interviewing of witnesses. The courts in the Requesting State issue an appropriate domestic order and the authorities in the Requested State will execute it in a manner consistent with their own domestic jurisdiction. There is no discretion to refuse. This has given rise to concerns that authorities may use the process to facilitate process laundering as different procedural laws provide different protections. Material that might be protected in a Requested State and so would not be available to investigators in that state could enter the public domain as a result of an EEW issued by authorities in the Requesting State.

If this concept is proving difficult to implement within the EU, in which values and norms are largely shared among Member States, such an idea may be even more difficult to implement with Third Parties (particularly outside the European milieu) in the absence of a documented and institutional framework of shared values such as that of the EU.

### Beyond Europe? The 9/11 Factor

The increasing interaction between the Western European nations has extended beyond economic relations into areas of social policy. The new challenge facing Britain, and its European partners, now lies in relationships formed with non-European states. Applicant states to the EU need to meet not only the economic criteria to become members but must also accede to those initiatives intended to promote the area of freedom and justice.<sup>66</sup>

The precedent of inviting non-EU or non-European states to accede to European international instruments as Third Parties is established. Iceland and Norway have acceded to the Schengen Acquis, for instance. Numerous non-European states, including the United States, participated in the drafting of the Council of Europe Cybercrime Convention, opened for signature in November 2001.

The unique socioeconomic and geopolitical context of Western Europe has driven integration and European cooperation to levels unprecedented in international relations, but there exists the danger that relations with Third Party states could be inhibited because they either cannot or choose not to adopt measures that coincide with those utilized in Europe. In the face of practitioner practicalities and political peer pressure, British authorities came to recognize that Britain needed to engage actively in developments in European justice and home affairs (JHA). Looking from the outside in, from the perspective of the western hemisphere for instance, there may be little attraction in the European developments. European developments are based on lengthy negotiations leading eventually to varying degrees of consensus. That is the nature of European regional relations: no one state is dominant. This consensus model of international law-enforcement cooperation is very different from the imperial isolationist model initially adopted by Britain. It is also different from the mutual legal assistance model adopted by the United States in which control rather than consensus is the aim.<sup>67</sup> The United States sits at the hub of a bicycle wheel, the spokes of which are represented by the individual, bilateral MLATs that the United States negotiates to suit its own purposes.<sup>68</sup> Such an approach is a consequence of a strategic perspective that regards transnational organized crime as a national security issue rather than a regional social policy issue.<sup>69</sup> The United States sought active participation as a Third Party in the negotiation of the Council of Europe Cyber Crime Convention (2001) in order to influence its drafting in a manner that best suited U.S. interests,<sup>70</sup> yet it has declined the opportunity to accede to the ECMA. To do so would establish basic mutual legal assistance with many nations with which the United States currently does not have bilateral MLATs in place. But equally, to do so would arguably undermine, from the U.S. perspective, the bilateral MLATs that the United States already has in place with other European nations. Since these MLATs are ultimately seen as delivering a mechanism for protecting U.S. national security, there is a danger that developments in European law-enforcement cooperation may come to be viewed as threatening toward U.S. national security and the mechanisms intended to protect that. Here the British lessons seem salutary. Self-interest can be self-defeating.

For Britain and Europe, as the twenty-first-century generation of mutual legal assistance instruments evolve, there will be lessons to be learned from the U.S. experience. Issues that characterize the relationships between local, state, and federal authorities in the United States may well emerge within the European context in the event that Europol

ever assumes a more operational function and the customs services continue to police an increasingly complex European economic market while at the same time attempting to secure the external borders against the importation of drugs and the trafficking of people from the western hemisphere and elsewhere.<sup>71</sup>

With the flying of U.S. planes carrying U.S. passengers into buildings located within U.S. territory on September 11, 2001, a new dimension was introduced into the transatlantic mutual legal assistance debate. These episodes were crimes of a magnitude, politicians argued, that overrode the obvious criminal jurisdiction (in this case U.S. federal or New York State jurisdictions). Hence a “war” was embarked upon against the alleged perpetrator and his political movement, leading to the invasion of two sovereign states.<sup>72</sup>

It is the response to those events in the years since that has done much to redefine mutual legal assistance in a process that is continuing at the time of writing. The EU and the United States have engaged in post-9/11 discussions on enhanced transatlantic cooperation in the war against terrorism and organized crime (the two phenomena, it seems, are now inseparable in mutual legal assistance debates).<sup>73</sup> It has emerged that these discussions in fact were building on similar discussions before September 2001, which had been kept secret at U.S. insistence. In the first half of 2002, the then EU presidency, Spain, was authorized to engage in discussions with a view to establishing an EU/U.S. treaty on this issue.<sup>74</sup> Subsequently, the EU and the United States have agreed to two mutual-assistance treaties.<sup>75</sup>

Swiftly drafted legislation has been enacted on both sides of the Atlantic to promote mutual legal assistance and give effect to treaty obligations. Britain undertook to implement its new obligations under the EU Convention on Mutual Assistance in Criminal Matters (signed May 29, 2000) by December 2002 and sought, in the Anti-Terrorism, Crime and Security Act 2001 (section 111), to devise a method of doing this without resorting to primary legislation.<sup>76</sup> Such an initiative met with fierce political opposition in the House of Lords, not least because it was regarded as knee-jerk in character and ill-thought-through.<sup>77</sup> In the event the enabling clause in section 111 ATCS was given a time limit of June 30, 2002, a deadline that was not met and which meant the December 2002 deadline was also not met. British obligations under the 2000 Convention were eventually given effect in the Crime (International Cooperation) Act 2003, most of which came into force in 2005.

Whatever the variety of urgent policy and legislative responses put in place since September 2001, whether they are effective or not, the most

significant change is that the European mutual legal assistance agenda, and therefore Britain's mutual legal assistance agenda, now is being influenced strongly not by European priorities (focusing on organized crime against and within the EU) but by priorities set by the United States (focusing on the war on terror).<sup>78</sup> In the face of both international and domestic political opposition, Prime Minister Tony Blair has positioned himself as a staunch ally of President George W. Bush in this regard. In the name of American national security, it appears to many outside the United States that mutual legal assistance is being redefined across the world with the emphasis not so much on aspects of *mutual* assistance as on the one-way provision of assistance to the United States and enhanced extraterritorial jurisdiction for the U.S. authorities. From a U.S. perspective, such an interpretation may seem surprising, even harsh, yet such a policy is consistent with historical unilateral U.S. proactive approaches to international cooperation critically reviewed by U.S. legal experts such as Bruce Zagaris and advocated by politicians such as John Kerry.<sup>79</sup>

The United States has demonstrated adroit political maneuvering in these matters as is illustrated by the post-9/11 changes to extradition arrangements between the United States and Britain. During research conducted as part of a Fulbright Fellowship at Georgetown University, Washington, D.C., May–August 2001, at a time when the first mutual recognition instrument (the EAW) was being actively considered, not one U.S. criminal justice professional or administration member I interviewed regarded mutual recognition as a viable proposition in the United States. Among the interviewees it was universally held that non-U.S. standards of criminal justice would never be viewed with the trust and confidence necessary to enable mutual recognition to work. Not one of these professionals could envisage the United States detaining and surrendering for extradition a fugitive simply on the basis of a warrant issued by a European judge. Yet the thought of being able to secure the extradition from European Union states of persons wanted by the United States simply on the basis of a U.S. judicial warrant was greatly appealing.

The U.S. administration took the opportunity presented by the restructuring of extradition among EU states to renegotiate its extradition arrangements with individual countries, including Britain. The Extradition Act of 2003 created a new extradition regime in Britain, giving effect to the mutual-recognition concept articulated in the EAW and at the same time conferring upon certain favored non-EU states, the United States among these, the privilege of fast-track extradition arrangements. Britain signed the bilateral treaty negotiated with the U.S. administration and established the United States as such a favored state by

secondary legislation supporting the Extradition Act. The arrangements in favor of the United States took immediate effect notwithstanding that the United States had not yet ratified the treaty. At the time of writing, it is understood that the United States is unlikely to ratify the bilateral treaty in the foreseeable future because of congressional concerns about extraditing suspects to Britain pursuant to the new arrangements. The outcome of this is that the extradition arrangements between the United States and Britain are asymmetrical: the United States may use the fast-track system to seek extradition from Britain, whereas Britain has to use the lengthy and bureaucratic traditional process of having to prove a *prima facie* case in order to achieve extradition from the United States. While this might be perceived as clever maneuvering by some, it also illustrates how vulnerable the concept of mutual recognition is to political self-interest. Comity and cooperation underpin international collaborative efforts against transnational threats. Equally, the absence of such a foundation undermines such efforts.<sup>80</sup>

## Conclusion

During the last fifty years, Britain has learned the lessons both of isolation and imperial arrogance. Distancing itself from the international community in the mutual legal assistance arena and trying to follow its own agenda proved ultimately to be counterproductive to British interests in that police investigators operating in an increasingly transnational context were impeded by official disengagement. To the extent that they could, practitioners formulated their own *ad hoc* arrangements, which, together with international peer pressure, eventually persuaded the British government to alter its stance.

Government attitudes toward international police cooperation and Interpol initially denied the growing reality that policing is a sovereignty issue in which assistance from overseas is increasingly relevant and unavoidable. Consequently, the sovereignty characteristic of policing has changed to the extent that national law-enforcement agencies no longer can rely exclusively upon themselves to protect their national criminal jurisdictions. The confident reliance on domestic legislation to the exclusion of international assistance instruments betrayed the perception of superiority with which British criminal justice professionals viewed their own legal system, a confidence that proved misplaced when it was found so wanting by those seeking to undertake cross-border investigations. Such lessons are not for Britain alone but serve as a warning to any

nation. It is equally important for the authorities in any given state to understand how differently their strategies might appear to foreign eyes, no matter the “obvious” logic from the perspective of the originating state. Even in the historically cosmopolitan Maas-Rhine region, cultural differences between neighboring states complicated cooperation.<sup>81</sup>

The harmonization of domestic laws or an EU-wide criminal code could be perceived as threats to national sovereignty, so it is through the cooperative concept of mutual recognition both within and outside the EU that British administrations now seek to preserve the new policing sovereignty. Fundamentally different philosophical approaches that I have identified elsewhere beg questions about whether the extension of EU approaches to non-EU states can really be successful or whether the EU will eventually adapt its own policies and strategies and adopt those of non-EU jurisdictions.<sup>82</sup> Whatever other legacies the administration of President George W. Bush leaves, it has provided a catalyst for change in transatlantic and European mutual legal assistance, the likely outcome of which is far from certain.

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## Notes

1. European Union, “Action Plan to Combat Organized Crime,” *Official Journal* 1997/C 251/01, para. 1; see also Jonathan Winer, “The US New International Crime Control Strategy,” *Trends in Organized Crime* 4, no.1 (1998): 63–70; Clive Harfield, “A Review Essay on Models of Mutual Legal Assistance: Political Perspectives on International Law Enforcement Co-operation Treaties,” *International Journal of Comparative and Applied Criminal Justice* 27, no. 2 (2003): 221–41.

2. Governor of Gibraltar to the Secretary of State for the Colonies, 24 December 1952, National Archives [NA] CO/968/268.

3. Internal Colonial Office memo, 26 January 1953, in *ibid.*

4. For instance, state security, criminal investigation, and frontier control: Malcolm Anderson, *Policing the World: Interpol and the Politics of International Police Co-operation* (Oxford, 1989).

5. Fenton Bresler, *Interpol* (London, 1992), 14.

6. Internal Colonial Office memo, 16 March 1953, NA CO/968/268.

7. London comprises two cities (Westminster and the City of London) and thirty-four Boroughs. The Metropolitan Police Service polices the City of Westminster and the thirty-four Boroughs. The square mile of the City of London (governed by the Corporation of London rather than the Greater London Authority) is policed by the City of London Police, the smallest public police force in Britain.

8. This in part contributed to the widely held misconception that New Scotland Yard, the headquarters of the Metropolitan Police Service, is the headquarters of all policing in Britain, an erroneous assumption that persists to this day. During a Fulbright Fellowship in May–August 2001 in Washington, D.C., I encountered in every federal law



enforcement agency I met with the perception that New Scotland Yard is responsible for policing throughout Britain. As the D.C. Metropolitan Police Department serves only the District of Columbia, so the MPS serves only London. A few specialist national functions are coordinated through New Scotland Yard, for instance, diplomatic protection and terrorism investigation. At present, there are forty-three provincial police forces in England and Wales, eight in Scotland (which has its own unique jurisdiction and laws), and one in Northern Ireland, where the jurisdiction shares features with that in England and Wales, but that also has its own unique characteristics.

9. File minutes, 27 March 1953, NA CO/968/268.
10. Colonial Office to Assistant Commissioner Howe, 20 March 1953, in *ibid.*
11. Article 2.1 *Interpol Constitution*, available at [www.interpol.int](http://www.interpol.int).
12. Interpol enjoyed a rapid growth in postwar membership as a consequence of European decolonization. Anderson, *Policing the World*, 43 n. 3.
13. NA CO/1037/93.
14. "Colonel" in Britain signifies an army rank and has no relevance for the British police service other than the fact that, until 1964, it was not uncommon for ex-military senior officers to be appointed as chief officers of police forces and some (as they were entitled to do) retained their military title. Direct entry at chief officer level is a policy no longer pursued in British policing, all officers being eligible to seek promotion, only having first served two years in the rank of Constable.
15. In each member country, Interpol has established a NCB as its base. In Britain, the NCB relocated from the National Criminal Intelligence Service to the Serious Organized Crime Agency on 1 April 2006.
16. During the late 1960s and early 1970s, an extensive program of amalgamation and rationalization reduced over a hundred county and borough police forces to just forty-three, each covering between one and three administrative counties.
17. Home Affairs Committee, *Practical Police Co-operation in the European Community*, 7th Report, House of Commons Paper 363, Session 1989-90, para. 80-81.
18. The idea of a national police force has historically been anathema to the British public. Not until 1998 were the first national law enforcement agencies established: the National Crime Squad (NCS) and the National Criminal Intelligence Service (NCIS). The former has a closely defined operational remit that addresses specifically organized crime. The latter provided an intelligence support function to all law enforcement agencies and is prohibited from conducting independent operational investigations and bringing prosecutions. On 1 April 2006 the NCS and NCIS merged with the investigation branches of HM Customs and HM Immigration into the Serious Organized Crime Agency. See Anderson, *Policing the World*, chap. 2, n. 3; Thomas Critchley, *A History of Police in England and Wales, 900-1966* (London, 1967); Robert Reiner, *The Politics of the Police*, 2d ed. (London, 1992); Clive Harfield, "SOCA: A Paradigm Shift in British Policing," *British Journal of Criminology* 46, no. 4 (2006): 743-71.
19. A. Brunet, "Policing the New Europe," in *Crime and Criminal Justice in Europe* (Strasbourg, 2000), 76; Laura Cram, "Integration Theory and the Study of the European Policy Process," in *European Union: Power and Policy-Making*, ed. J. Richardson (London, 1996), 40-58, 40.
20. Alistair Brown, "Towards a Prosecutorial Model for Mutual Assistance in Criminal Matters," in *Crimes Sans Frontières: International and European Legal Approaches*, ed. Peter Cullen and William Gilmore (Edinburgh, 1998), 50-57, 50.
21. Minute 20 July 1959, NA FO71/146282:WUC 1651/2.
22. I am grateful to the staff at the House of Commons Information Office for supplying the career details of Sir Samuel Knox Cunningham MP.
23. Report of the Council of Europe Consultative Assembly, 10th Ordinary Session, 30th Sitting, NA FO371/146282: WUC 1651/6 (emphasis added).
24. Parliamentary Debates, Commons, 5th ser., vol. 600, col. 92W, 19 February 1959.

25. File minute, 12 February 1959, NA FO 371/146282:WUC 1651/7.
26. Parliamentary Debates, Commons, 5th ser., vol. 600, col. 92W, 19 February 1959.
27. File minute, 2 March 1959, NA FO371/146282:WUC 1651/9. Again this illustrates apparent misunderstanding of the proposed mechanisms for the provision of assistance.
28. Briefing note, 21 January 1959, NA FO371/146282:WUC 1651/10.
29. Report of the First Meeting of the [ECCP], NA FO371/146282:WUC 1651.
30. Briefing note, 21 January 1959, NA FO371/146282:WUC 1651/10.
31. The ECCP now has a much broader brief and regularly reports on all aspects of criminal law enforcement in Europe.
32. Briefing note, 21 January 1959, NA FO371/146282:WUC 1651/10.
33. Dick Leonard, *Guide to the European Union* (London, 1996), 6.
34. Derek Gallagher, "European Police Co-operation: Its Development and Impact between 1967 and 1997 in an Anglo-French Trans-Frontier Setting" (Ph.D. diss., University of Southampton, 1998). See also James Sheptycki, "Police Co-operation in the English Channel Region, 1968-1996," *European Journal of Crime, Criminal Law and Criminal Justice* 6, no. 3 (1998): 216-35, which draws upon the research undertaken by Gallagher and develops the discussion.
35. Joseph Soeters et al., "Culture's Consequences and the Police: Cross-Border Cooperation Between Police Forces in Germany, Belgium, and the Netherlands," *Policing and Society* 5 (1995): 1-14.
36. Council Act of 26 July drawing up the Convention based on Article K.3 of the Treaty of the European Union, on the Establishment of a European Police Office, *Official Journal* 1995/C 316/1, 27 November 1995; see also Treaty on European Union (1992) as amended at Amsterdam (1997) and Nice (2001), Articles 29-30, *Official Journal* 1992/C 191/1 29 July 1992; 1997/C 340/1 10 November 1997; and 2001/C 80/1 10 March 2001.
37. Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985, *International Legal Materials*, 1991, 84 (see, in particular, Title III, chaps. 1 and 2). For Britain's developing policy in relation to Schengen, see Select Committee on the European Union, *UK Participation in the Schengen Acquis*, 5th Report, House of Lords Paper 34, Session 1999-2000.
38. Roland Genson, "The Schengen Agreements—Police Co-operation and Security Aspects," in *Crimes Sans Frontières: International and European Legal Approaches*, ed. Peter Cullen and William Gilmore (Edinburgh, 1998), 133-40, 133 n. 32.
39. Neither Britain nor France regards the Channel Tunnel as a land border, therefore cross-border cooperation arrangements in relation to the Tunnel have been addressed separately in a specific bilateral treaty: The Protocol concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance relating to the Channel Fixed Link, signed 25 November 1991.
40. Select Committee on the European Union, *Schengen and the United Kingdom's Border Controls*, 7th Report, House of Lords Paper 37, Session 1998-99.
41. Select Committee on the European Union, *UK Participation in the Schengen Acquis*, 5th Report, House of Lords Paper 34, Session 1999-2000.
42. Dr. Kwame Nkrumah, Prime Minister of Ghana, to Harold MacMillan, British Prime Minister, 14 April 1961, NA LCO2/8472. The code introduced in Ghana was one that had previously been rejected by Jamaica, briefing note, 17 April 1961, NA LCO2/8472.
43. Commonwealth Relations Office, London, to Sir Arthur Snelling, British High Commissioner in Ghana, 29 November 1961, LCO2/8472. Dr. Kwame Nkrumah created the radical Convention People's Party in 1949, campaigning for the immediate independence from colonial rule of what was then Britain's Gold Coast Colony. Independence came in 1957, when the colony merged with British Togoland to form Ghana, a name recalling the original Ghana Empire, which lasted from the eighth to the twelfth centuries. In 1960, Ghana became a republic with Nkrumah as executive president, autocratic in style and unsuccessful in economic reform and development.

44. Ibid.
45. Ibid. To the evident satisfaction of all government officials who annotated the file minute sheets, MacMillan's letter made no mention either of extending Bennon's secondment or replacing him. Nevertheless, a successor was sent.
46. The proposals for such a scheme were drawn up by David McClean. A brief history is recounted, and the resultant Harare Scheme discussed, in David McClean, *International Judicial Assistance* (Oxford, 1992), 149–64.
47. Commonwealth Secretariat, *Mutual Assistance in the Administration of Justice: Meeting of Senior Officers to Consider Draft Schemes, 27th January to 7th February 1986*, Marlborough House, London (Summary Record), 6.
48. Christopher Murray and Lorna Harris, *Mutual Assistance in Criminal Matters: International Co-operation in the Investigation and Prosecution of Crime* (London, 2000), 264.
49. William Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, Cambridge International Documents Series, vol. 8 (Cambridge, 1995), xvii.
50. Malcolm Anderson et al., *Policing the European Union: Theory, Law, and Practice* (Oxford, 1995), 53; see also John Benyon, "The Developing System of Police Cooperation in the European Union," in *Crime and Law Enforcement in the Global Village*, ed. William MacDonald (Cincinnati, 1997), 103–21.
51. Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, xx; see Harfield, "A Review Essay on Models of Mutual Legal Assistance," for discussion about the political strategies behind the U.S. preference for bilateral rather than multilateral treaties.
52. *International Legal Materials*, 1989, 493.
53. *International Mutual Assistance in Criminal Matters: A Discussion Paper*, Home Office, 1988. I am grateful to the Home Office for supplying me with a copy of this unpublished paper.
54. The Conclusions of the Tampere Summit, 15–16 October 1999, can be accessed at [http://europe.eu.int/council/off/conclu/oct99/oct99\\_en.htm](http://europe.eu.int/council/off/conclu/oct99/oct99_en.htm)). Britain's position leading up to the conference is outlined in Select Committee for the European Communities, *Prospects for the Tampere Special European Counsel*, 19th Report, House of Lords Paper 101, Session 1998–99.
55. Harfield, "SOCA: A Paradigm Shift in British Policing"; "FBI-style Agency to Target Mr Bigs," *The Independent*, 4 April 2006, 14 (although the British media have dubbed SOCA the UK's FBI, there is nothing in the constitutional status, powers, administration, or structure of SOCA that resembles the FBI).
56. Michael Sussman, "The Critical Challenges from International High-Tech and Computer-Related Crime at the Millennium," *Duke Journal of Comparative and International Law* 9, no. 2 <DATE?> 451–89. The present author served on the Hi-Tech Crime Sub-Group for G8 2002–3.
57. John Wadham and Helen Mountfield, *Blackstone's Guide to the Human Rights Act* (London, 1999), 4. The Human Rights Act 1998 came into force in Britain in October 2000.
58. *International Police Review*, May/June 2000, 16; see also S. White, *Protection of the Financial Interests of the European Communities: The Fight Against Fraud and Corruption* (The Hague, 1998).
59. Select Committee on European Communities, *Prosecuting Fraud on the Communities' Finances—The Corpus Juris*, 9th Report, House of Lords Paper 62, Session 1998–99). For the text of the *Corpus Juris* proposal, see Christine Van den Wyngaert, ed., *International Criminal Law: A Collection of International and European Instruments*, 3d rev. ed. (Leiden, 2005), 339–52.
60. Between 1999 and 2001, the EU conducted a peer evaluation of mutual legal assistance between member states: European Union (Multidisciplinary Group on Organized Crime), *Joint Action on Mutual Evaluation*, 10972/1/99 CRIMORG 131, 6 October 1999. The evaluation identified a number of key areas for improvement both within individual states and across the EU: European Union, *Final Report on the First Evaluation Exercise—Mutual Legal Assistance in Criminal Matters*, 8648/01 CRIMORG 55, 10 May 2001.

61. Rt. Hon. Jack Straw MP, Secretary of State for Home Affairs, "Remarks on Judicial Co-operation in Criminal Cases," at the Justice and Home Affairs seminar, Avignon, France, 16 October 1998, para. 9. I am grateful to the Home Office for supplying a transcript of the speech.

62. *Ibid.*, para. 23.

63. *Ibid.*, para. 24.

64. This principle was repeated many times during parliamentary debates on new mutual legal assistance legislation to update and replace the CJICA provisions: *Parliamentary Debates*, Lords, 5th ser., vol. 641, col. 973, 2 December 2002; Lords, 5th ser., vol. 643, col. GC210-1, 29 January 2003; Lords, 5th ser., vol. 644, col. GC23, 3 February 2003; Lords, 5th ser., vol. 645, col. 648, 3 March 2003; Lords, 5th ser., vol. 646, col. 44, 17 March 2003; Commons, 5th ser., vol. 402, cols. 802 and 853, 1 April 2003; Commons, Standing Committee A, col. 88, 12 June 2003.

65. European Union, "Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States," *Official Journal* 2002/L 190/01 (2002/584/JHA), 18 July 2002; European Commission, *Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, COM (2003) 688 Final, 14 November 2003. For critical review of the EAW, now in force, see "European Arrest Warrant Limp into Force" at <http://statewatch.org/news/2004/jan/01euro-arrest-warrant.htm>, accessed 5 April 2006; Rob Blekxtoon and Wouter van Ballegooij, eds., *Handbook of the European Arrest Warrant* (Cambridge, 2004).

66. "Pre-accession pact on organized crime between the member states of the European Union and the applicant countries of central and eastern Europe and Cyprus," *Official Journal* 1998/C 220/01, 15 July 1998.

67. Harfield, "A Review Essay on Models of Mutual Legal Assistance," 230–33. The consensus and control models of mutual legal assistance were first explored by the author in a seminar delivered to the National Institute of Justice, Washington, D.C., 31 July 2001, following research conducted at Georgetown University as a Fulbright Fellow. I am grateful to seminar participants for comments received during and after the seminar.

68. Lance Emory, FBI legal attaché, interview by the author, London, 22 February 2001. Unilateral treaty benefits have even extended to nonreciprocal obligations in favor of the United States: Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters*, xxi n. 55.

69. Title VI, "Treaty of the European Union," *Official Journal* 1997/C 340/01, 10 November 1997; see also Cyrille Fijnaut, "Transnational Organised Crime and Institutional Reform in the European Union: The Case for Judicial Co-operation," *Transnational Organised Crime* 4 (1998): 276–301. President Clinton proclaimed transnational organized crime to be a national security issue in Presidential Decision Directive 42, 21 October 1995, Executive Order 12978. See White House, *International Crime Control Strategy* (Washington, D.C., 1998) for a structured response that (at the time of writing, 2005) has yet to be adopted formally by the Bush administration.

70. Michael Sussman, Computer Crime and Intellectual Property Section, U.S. Department of Justice, interview by the author, Washington, D.C., 14 June 2001.

71. EU Member States are divided on the issue of whether Europol should be given autonomous operational authority. Britain is among those states strongly opposed to such a development, preferring Europol to provide a supporting intelligence role for domestic and transnational investigations controlled by national jurisdictions.

72. In international law war can be declared only against a territorial state, and not a political movement; see Malcolm Shaw, *International Law*, 5th ed. (Cambridge, 2003). A particular difficulty arising with individuals detained as a result of these interventions is that they have been afforded neither the status of prisoners of war (because not all have been detained during combat), nor have they been afforded the status of criminal suspects. They thus currently reside in various internment camps in legal limbo, unprotected by rights legislation. British detainees in Guantanamo Bay who have been repatriated have

been released from custody upon arrival in the UK because their detention and interrogations in Guantanamo Bay were contrary to due process and so no criminal trial could be supported on the basis of information obtained during their detention.

73. Andrew Ashworth, *Human Rights, Serious Crime, and Criminal Procedure* (London, 2002), 96–107.

74. “Creation of a Northern Axis?” *Statewatch* 12 (January–February 2002): 1; “EU-US Secret Agreement in the Making,” *Statewatch* 12 (March–April 2002): 1–2.

75. “Agreement on Extradition Between the European Union and the USA, Washington, D.C., 25 June 2003,” *Official Journal* 2003/L 181/27, 19 July 2003; “Agreement on Mutual Legal Assistance Between the European Union and the USA, Washington, D.C., 25 June 2003,” *Official Journal* 2003/L 181/34, 19 July 2003. Any bilateral treaties between the United States and EU states will take precedence over these multilateral treaties.

76. Britain applies a dualist approach to international treaty obligations. In order for Britain’s international obligations to be given effect, domestic primary legislation must be enacted. Attempts to give effect to international obligations through secondary legislation were as unprecedented as they were ultimately unsuccessful. The EU Convention on Mutual Assistance in Criminal Matters was negotiated in order to supplement the provisions of the 1959 ECMA by catering for techniques and tactics (such as covert investigation) that were not specifically provided for under the 1959 treaty.

77. Second reading debate on the Anti-Terrorism, Crime and Security Bill, *Parliamentary Debates*, Lords, 5th ser., vol. 629, cols. 142–62 and 183–290, 27 November 2001.

78. See, for instance, “Creation of a Northern Axis?” *Statewatch* 12, no. 1 (2002): 1, “How the Northern Axis Is Taking Shape,” *Statewatch* 12, no. 1 (2002): 13–16; “EU-US Secret Agreement in the Making,” *Statewatch* 12, no. 2 (2002): 1–2; “G8 Pushing for Preparatory Terrorist Offences, Secret Trials, and Secret Evidence,” *Statewatch* 14, no. 1 (2004): 1–2; “EU: The Principle of Availability Takes over from the Notion of Privacy—What Price Data Protection?” *Statewatch* 14, no. 6 (2004): 1–2.

79. Bruce Zagaris, “U.S. International Cooperation Against Transnational Organized Crime,” *Wayne Law Review* 44, no. 3 (1999): 1401–64; John Kerry, *The New War: The Web of Crime That Threatens America’s Security* (New York, 1997).

80. Equally, public support is necessary for mutual legal assistance mechanisms to enjoy legitimacy. So often assumed that it is taken for granted without any consultation, when the public becomes aware of perceived injustice, support for measures taken by government quickly erodes and with it, their legitimacy. A number of suspects have now been extradited from Britain to the United States using this mechanism, sometimes in notorious circumstances that have provoked significant public outcry. The extradition to Texas of David Bermingham, Giles Darby, and Gary Mulgrew (13 July 2006) using the fast-track extradition procedures has aroused particular opposition in Britain, not least because the crime of which they stand accused was allegedly committed contrary to British law against British financial institutions in Britain. A formal extradition procedure may well have refused extradition and insisted on their being tried in a British court. The matter at issue is tangential to the Enron scandal, hence U.S. authorities claimed extraterritorial jurisdiction that was not resisted by the Blair government. “Lords Vote Against Extradition of NatWest 3,” *The Independent* 12 July 2006, 17; “NatWest 3 Flown to Uncertain Fate in Texas,” *The Independent*, 14 July 2006, 13. Public mistrust arising from the perceived misuse of mutual recognition mechanisms (possibly for primarily political rather than judicial purposes) ultimately will undermine international law enforcement cooperation efforts and mutual legal assistance.

81. Soeters et al., “Culture’s Consequences and the Police: Cross-Border Cooperation Between Police Forces in Germany, Belgium, and the Netherlands.”

82. Harfield, “A Review Essay on Models of Mutual Legal Assistance.”