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## Issues in transatlantic police cooperation

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## Issues in transatlantic police cooperation

### Abstract

Research from a Fulbright Police Fellowship conducted in summer 2001 studying US attitudes and policies to inter- national law enforcement cooperation is presented. Differences between UK police and the multitude of US federal agencies in approaches to investigating transnational organised crime are identified, along with the implications for conducting evidence- gathering abroad and joint operations. No one approach is either right or wrong: the key to successful investigations lies in accommodating, rather than bemoaning, political and cultural differences in attitudes to law enforcement. This article alerts investigators to some of the issues they may encounter in transatlantic cooperation. Although researched and largely written prior to 11 September 2001, the aftermath of those events has not materially affected the conclusions drawn here. Positive attitudes to cooperation have been promoted, but some differences in approach have also been enhanced.

### Keywords

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## **ISSUES IN TRANSATLANTIC POLICE COOPERATION**

Research from a Fulbright Police Fellowship conducted in summer 2001 studying US attitudes and policies to international law enforcement cooperation is presented. Differences between UK police and the multitude of US federal agencies in approaches to investigating transnational organised crime are identified, along with the implications for conducting evidence-gathering abroad and joint operations. No one approach is either right or wrong: the key to successful investigations lies in accommodating, rather than bemoaning, political and cultural differences in attitudes to law enforcement. This article alerts investigators to some of the issues they may encounter in transatlantic cooperation. Although researched and largely written prior to 11 September 2001, the aftermath of those events has not materially affected the conclusions drawn here. Positive attitudes to cooperation have been promoted, but some differences in approach have also been enhanced.

### **Introduction**

At the start of the twenty-first century it is a rhetorical truism that the world is becoming 'smaller' through 'globalisation', and that this is true of criminal activity as much as it is true of lawful interaction (Buckley, 1998; Fiorentini & Peltzman, 1997). Consequently contact between UK police agencies and their foreign counterparts has increased as both individual investigations and systemic criminality more frequently assume transnational proportions. The geographical focus of this increased contact lies within the EU. Between 1997 and 1999 65.6% of formal mutual legal assistance requests to foreign judicial or investigative authorities made via the United Kingdom Central Authority (UKCA) were to EU member-states; 6.9% were to the United States (Home Office, 2000b). What these figures do not capture is the extent of informal contact between UK investigators and foreign agencies. The UK focus will always primarily be with its European neighbours and there are a great many Justice and Home Affairs (JHA) initiatives being promoted in the EU (for instance, Europol, Eurojust, the European Judicial Network and the European Police College). US participation in EU initiatives

is limited both by EU community law and US foreign policy. By force of circumstance, UK authorities are acquiring greater familiarity with and understanding of their European neighbours. With the US such understanding is often assumed because of perceived cultural ties, the so-called 'special relationship',<sup>1</sup> linguistic similarities and a superficial familiarity born of media entertainment such as *Hill Street Blues* and *The X Files*. In fact, the US criminal justice system differs significantly from that in the UK and in some respects the role of the prosecutor, for instance, bears closer resemblance to models extant in continental Europe. JHA assistance within Europe has already achieved a greater level of sophistication than will ever be possible in transatlantic cooperation. Recognising such limitations reduces the frustration inherent in transnational, and in particular transatlantic, cooperation.

The present author was awarded a Fulbright Police Fellowship<sup>2</sup> in May 2000 which was undertaken as personal research in Washington DC between May and August 2001.<sup>3</sup> This article highlights key issues identified during that research in order to alert UK investigators to the context within which US authorities operate<sup>4</sup>: issues that may influence the way in which US authorities respond to UK requests, and the way in which requests from US authorities are made to the UK (which between 1997 and 1999 accounted for just 2.18% of formal requests received via the UKCA, whereas EU partners generated 80.83% of such requests; see Home Office, 2000a).

### **Types of Assistance**

Practical investigative assistance between law enforcement agencies in different nations may be categorised simply into informal and formal.<sup>5</sup> Informal assistance, often colloquially referred to as cop-to-cop, describes all forms of assistance for which no form of compulsion or court process is required. Typically it involves the sharing of information, and as such may be controlled by data protection legislation. Different standards in data protection are currently a source of friction between policy makers on either side of the Atlantic since the EU has set standards in data protection that it may be impossible for the US ever to attain (with consequent constraints on what can be shared with US authorities).<sup>6</sup>

The extent to which informal assistance can be a vehicle by which evidence for use in court is secured depends upon court procedures in the requesting state and domestic law in the requested state. There are few barriers to a witness voluntarily

making a statement, particularly if the witness, for instance, is a UK national resident in the US and it is UK investigators who are seeking evidence for use in the UK (interviews, Sussex Police CID, Brighton, 20 July 1999; 3 August 1999). There may be no objection on the part of US authorities to UK officers attending the US to take such a statement but at the very least the UK officer so deployed will require a work visa prior to arriving in the US and should seek permission from the US authorities to take the statement (interviews, FBI Legal Attaché, US Embassy, London, 22 February 2001; 22 March 2001). Officers investigating without permission or a work visa are liable to immediate deportation.

Informal assistance is often a precursor to formal assistance: a means by which investigators explore whether or not evidence is available before requesting it formally. A formal request will always be necessary where any element of compulsion to provide evidence is required, for instance the subpoena of a witness or the warranted search and seizure of physical evidence.

Aside from practical investigative assistance there also exists policymaking assistance in what have been described as 'quasi-secret international fora' (Statewatch, 2001: 18). Such assistance takes place in multinational working groups such as those established under the auspices of the G8 Lyon Group (Sussman, 1999: 482; Godson & Williams, 2001: 333–4), in which investigators agree common positions to adopt when consulting with law makers. The G8 cyber crime '24/7 single points of contact' scheme, an initiative arising from such a working group, is an attempt to formalise an informal network of precursor or preparatory liaison. Even so, some US agencies will continue to prefer their own personal contacts to the quasi-official 24/7 scheme (interview, US Customs, Fairfax, Virginia, 3 June 2001).

### **Instruments of Assistance**

Formal assistance, as the term implies, is based on legal instruments such as domestic laws and international treaties.<sup>7</sup> Both the UK and the US have domestic laws that permit the provision of assistance to foreign authorities (Criminal Justice (International Co-operation) Act 1990, Part I; Title 28 US Code, Section 1782). In the UK, the CJ(IC)A allows for the provision of assistance regardless of reciprocity, regardless of whether a mutual legal assistance treaty is extant, and in all but search and seizure provisions and some fiscal offences, regardless of dual criminality. The common principle is that assistance should be provided

in a manner consistent with the domestic laws of the requested state.

This principle finds expression in international legal instruments that can be categorised into bilateral mutual legal assistance treaties (MLATs) and multilateral conventions. The terms 'treaty' and 'convention' are synonymous in international law (Shaw, 1997: 73–4) but in this article they are used as a convenience to distinguish between bilateral agreements and multilateral agreements respectively. (Some extradition and tax treaties also provide formal mechanisms for evidence gathering and other investigative assistance.)

There is a very strong US political and foreign policy preference for bilateral MLATs (interview, US Government, Department of Justice, Washington DC, 16 May 2001; see also text of speech given in Japan in 1998 by John Harris, Director of the Office of International Affairs (OIA), US Department of Justice). The US has now negotiated bilateral MLATs with over 40 nations, including the UK. For US authorities, the advantage of bilateral MLATs lies in the legally binding obligations created between two nations. Multilateral conventions, such as the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters or the 2000 UN Convention against Transnational Organised Crime (UNCTOC), create common standards but without any element of compulsion.

The further advantage perceived by US authorities is the ability to tailor individual MLATs to particular international circumstances (US Department of Justice Resource Manual, Paragraph 276),<sup>8</sup> which arrangement usually benefits the US (even to the extent of negotiating non-reciprocal obligations in their favour; Gilmore, 1995: xxi). Bilateral partners can also use this to their advantage. A unique feature in the UK–US MLAT, for instance, is the obligation imposed upon the US to use the MLAT as a means of first resort before using other, unilateral methods to obtain evidence (Article 18(2)).<sup>9</sup> Such a clause is a consequence of the diplomatic argument caused when US authorities sought to compel the production of evidence from the UK Cayman Islands in a manner that would have resulted in a criminal violation of Cayman law (Gilmore, 1995: xxiii).

Multilateral conventions, which usually contain agreements to harmonise criminal liabilities (see Article 3 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); articles 3 and 4 of the UNCTOC) often have provision for mutual legal assistance measures. For instance Article 14 UNCTOC provides for the taking of statements, the

service of judicial documents, and search and seizure. In the absence of a bilateral MLAT (which will always supersede a multilateral convention as far as the US authorities are concerned), measures contained in a multilateral convention can provide a fall-back position (interview, FBI Legal Attaché, US Embassy, London, 22 February 2001). On 25 May 2001 the US ratified the Organisation of American States Inter-American Convention on Mutual Assistance in Criminal Matters (IACMA) and its related Protocol. In his Letter of Transmittal inviting Congress to support ratification, President Clinton went further than to argue that the IACMA was just a fall-back position, suggesting that it was preferable to trying to secure a bilateral treaty in some cases. He asserted that the 'Convention and Protocol would obviate the expenditure of resources that would be required for the United States to negotiate and bring into force bilateral mutual assistance treaties with certain OAS member states'.<sup>10</sup> It is not always an option the US wishes to adopt. The US has, for instance, declined an invitation to accede to the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters as a Third Party even though accession would create conventional relationships with European countries with which the US has no treaty relationship (interview, US Government Department of Justice, Washington DC, 16 May 2001). The US perspective is that such conventions achieve only the lowest common denominator of agreement and that nothing of substance can be agreed to in such arrangements (McDonald, 2000; interview, Department of Justice, Washington DC, 16 May 2001).

### **Grounds for Refusal**

MLATs and conventions contain grounds for refusing a request (see Article 21, UNCTOC). The UK-US MLAT is no exception (Article 3).

Occasionally there is a requirement for dual criminality. In such circumstances assistance will only be provided if the criminal behaviour being investigated by the requesting state is also subject to criminal liability in the requested state. Wherever possible, the provision of assistance without a requirement for dual criminality is encouraged in the international legal community. Dual criminality is sometimes required only for specific types of assistance within a catalogue of measures contained within either a treaty or a convention. Domestic law sometimes requires dual criminality. The UK, for instance, will only execute requests for search and seizure in circumstances where the crime

being investigated by the requesting authority would constitute a serious arrestable offence in the UK (CJ(IC)A s.7(1)).

Requests must also be in compliance with the domestic law of the requested state, and here there is particular tension between the US and the UK in respect of search and seizure, provision for which is made in the UK–US MLAT (Article 14). US citizens are protected by the US Constitution the fourth amendment to which states: ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’ The key phrase in this eighteenth-century assertion is ‘probable cause’. Miles of law library shelves creak under the weight of accumulated learned tomes from the last two hundred years seeking to interpret what the framers of the US Constitution meant by this document. Nowhere is ‘probable cause’ defined. Rather, probable cause is a continuum of interpretation within a wider continuum (Shapiro, 1991: 143; see also Klotter, 1999: 90–91).

Individual judges determine whether or not there is sufficient probable cause to issue a search warrant. It is universally accepted within the US criminal justice system that the standard of probable cause to be met for a search warrant is more rigorous than the standard to be met when arresting a suspect, or when searching a suspect on the street. Such is the probable cause continuum. The wider continuum expresses the range of standards facing law enforcement agencies from reasonable belief, through reasonable suspicion and so on to probable cause (Shapiro, 1991).

This is not the place to debate the relative equivalence of the probable cause necessary in the US for a judge to issue a search warrant and the reasonable suspicion required under the Police and Criminal Evidence Act (PACE) for a UK judge to issue a search warrant; suffice it to say that US authorities assert that US probable cause offers a higher standard and better quality of justice than does UK reasonable suspicion. OIA lawyers interviewed for this research could not themselves recall a UK request for the execution of a search warrant in the US ever being granted, and do not necessarily expect to grant such a request because the ‘higher standards of justice’ in their domestic law give them grounds for refusal to what otherwise has been agreed in the MLAT (interview, OIA, US Government Dept of Justice, Washington DC, 22 June 2001).<sup>11</sup> Special Procedure



Material, on the other hand, for which PACE reserves protections above and beyond those necessary for an ordinary search warrant, can be compulsorily produced in the US upon the issuance of a subpoena by a US prosecutor.

The US Constitution is the essence of American being. It is sacrosanct (interview, ex-senior State Department official, Washington DC, 1 June 2001). The US has, from time to time, insisted that other countries change their own written constitutions to allow investigative techniques previously prohibited, to be admitted within the amended constitution and so facilitate US requests for formal mutual legal assistance, compliance often being achieved through powerful economic persuasion (Carlson & Zagaris, 1991). To all the interviewees asked, it was inconceivable that the US should ever return such flexibility of approach to accommodate foreign law enforcement requests (interview, former senior State Department and Clinton Administration expert on transnational organised crime, Washington DC, 1 June 2001).<sup>12</sup> There is little point in taking umbrage at the consequences foisted upon other nations since that will not achieve anything. Rather, investigation strategies and policies must take account of such a position.

Lawyers and federal agents are not slow to suggest a way around such an impasse. US judges, whose careers are dependent upon them not upsetting those who elect or appoint them, historically are more sympathetic to requests for compulsory process made by US agencies than those made on behalf of a foreign agency. If an American nexus to the investigation can be established, thus initiating a parallel domestic investigation in the US, evidence can be sought for the US investigation and then shared with a foreign authority. A US agency has a far better chance of persuading a judge that there is sufficient probable cause than does a foreign agency (interview, FBI, Washington DC, 3 July 2001; interview, Florida State Prosecutor, Washington DC, 29 June 2001).

Tempting though this approach may be, it is not without its own possible consequences. The fact that a domestic investigation concerning the same suspect or evidence is in progress may provide a possible further ground for refusal in the UK–US MLAT (Article 5(4)) which provides for the postponement (perhaps indefinitely) of a request execution pending the outcome of ongoing US investigations and court proceedings. Here the domestic dynamics within which US law enforcement agencies operate are engaged and these will be discussed below. The UK investigator must consider whether a parallel US investiga-

tion may ultimately compromise or frustrate the UK investigation before opting for this way round the 'probable cause' issue. That is not to say that US authorities automatically would refuse assistance in such circumstances, but none of the interviewees to whom the question was posed would say that such an outcome was unlikely.

### **The Request Process**

The UK-US MLAT dictates that each country must establish a 'Central Authority' and that a request for formal mutual legal assistance from the UK to the US (and vice versa) can only be made via the Central Authority in each nation (Article 2). The central authority in the UK is the UKCA based at the Home Office, London, and for the US it is the Office of International Affairs (OIA) based at the Department of Justice, Washington DC.

In the UK there are over 50 police forces.<sup>13</sup> In the US there are 49 federal agencies at least some of whose staff are entitled to make arrests and to bear arms (Geller & Morris, 1992; Bureau of Justice Statistics, 1996). The numbers of local law enforcement agencies are so numerous that there appear to be no definitive figures for just how many agencies exist but the best estimate of the Interpol National Central Bureau in Washington DC is that there are approximately 18,500 police forces at state, county and local municipality level (interview, Interpol USNCB, Washington DC, 23 May 2001). Thus funnelling request traffic through the central authorities resolves for the requesting state the vexed issue of to whom to address the request. The OIA, staffed with several teams of lawyers, each team having a regional responsibility for liaison with different parts of the globe, reviews both incoming and outgoing requests for legality and legitimacy. Incoming requests to the US are frequently deemed to be insufficient and are returned for further information, although while this is being done it is often possible for the US authorities to set matters in motion ready for when the paperwork is completed to their satisfaction (interview, OIA, US Department of Justice, Washington DC, 16 May 2001).

The OIA will then identify in which of the 94 Federal Districts the request needs to be executed.<sup>14</sup> The request is passed to the US Attorney for that Federal District and allocated to an Assistant US Attorney (AUSA) who will present the matter at court requesting the issuing of the compulsory process. Depending upon the nature of the request, the court will appoint the AUSA as its Commissioner to ensure the execution of the

request. The AUSA can then issue any necessary subpoenas and will approach the local field office of the appropriate federal agency in the event that a request require investigative assistance such as locating a witness (Resource Manual, paragraph 286). The product of the request is then returned via the OIA, although the federal agents may well contact the original requesting officer with an update to short-cut the official response.

Operation Cathedral, the investigation of a global paedophile network utilising the Internet coordinated by the National Crime Squad, resulted in the simultaneous execution of numerous search warrants in 12 different countries, one of which was the US. In the US, 32 warrants were to be executed in 22 Federal Districts. Whilst all these districts adhered to the Federal Rules of Criminal Procedure, some districts additionally had their own interpretative rules of procedure supplementing the Federal Rules. There was local variation, for instance, on the times at which search warrants could be executed. It was, in fact, more difficult for the US authorities to coordinate the simultaneous execution of these 32 warrants in 22 districts than it was for the National Crime Squad to coordinate simultaneous enforcement action in the remaining 11 nations (interview, US Dept of Justice, Washington DC, 19 June 2001). Foreign officers making requests do not always appreciate such local issues.

### **The Role of the Federal Agencies**

By and large, the execution of mutual legal assistance requests in the US is undertaken by one of the federal agencies. Law enforcement in the US is primarily the responsibility of State and local authorities but federal intervention is permitted where the circumstances implicate interstate commerce or crimes against the United States. By definition, an international request thus invites federal intervention. In the UK all police forces have the same powers and responsibilities and so the discriminating factor in determining to which force the UKCA will pass a US request is one of geography. In the US all federal agencies have national territorial responsibility and some additionally claim extra-territorial responsibilities. Thus the discriminating factor becomes functional jurisdiction. In many crimes there may well be concurrent jurisdiction between different agencies. It will be a matter for the AUSA which federal agency is engaged in the request, if that issue has not already been influenced through precursor contact and informal assistance. Having doubled in size since the appointment of Louis Freeh as its Director, the Federal Bureau of Investigation (FBI) often assists in foreign

requests because it has the staff available to do so, but much of its work is concurrent with the Drugs Enforcement Agency (DEA) and the US Secret Service (USSS).<sup>15</sup> Other agencies that may become involved include the Immigration and Nationalisation Service (INS), US Customs and the Bureau of Alcohol, Tobacco and Firearms (ATF).

Most of these agencies have liaison officers posted to the US Embassy in London. Informal assistance can be provided by these liaison officers and legal attachés and they are on hand to advise on such matters, as is a representative of the OIA, also posted to the London embassy. In any given investigation, more than one federal agency may be willing, and may have the jurisdiction, to assist.

The motivation to assist may not be based merely on comity however. Federal agencies seek appropriation of funding from Congress. Funding is linked to success and utility. In the US transnational organised crime is viewed as an external threat (Geary, 2000) and therefore a national security issue. In Presidential Decision Directive 42, dated 21 October 1995, President Clinton determined that 'international organised criminal enterprises . . . are not only a law enforcement problem, they are a threat to national security'.<sup>16</sup> In Executive Order 12,978, effective the same day, he declared a 'national emergency to deal with that threat' (USCCAN B106, 21 October 1995). Federal agencies were directed to take 'all appropriate actions within their authority to carry out this order' (ibid). Whilst recognising an 'obligation to others', the primary and overriding purpose of the Directive and the Executive Order was 'to protect the welfare, safety and security of the United States and its citizens' (PDD 42). Some commentators argued even before PDD 42 that US law enforcement agencies were fully fledged members of the national security apparatus (Kupperman, 1994: 132–3); others maintain that transnational organised crime is not a national security issue (Treverton, 1999).<sup>17</sup>

National security work attracts increased funding, thus there is a considerable financial incentive for federal agencies to become involved in international law enforcement that can be seen to be defending the national security of the US. The focus on national security demands that international law enforcement cooperation engaged in by US federal agencies should, primarily, deliver prisoners for federal agencies and convictions in US courts. There is no financial incentive or reward for engaging in cooperation that primarily, or wholly, assists foreign law enforcement without some return for US effort expended.

The considerable investment made by federal agencies in the provision of training to non-US law enforcement personnel, in such programmes as the International Law Enforcement Academies (ILEA) or the hosting of training courses for foreign law enforcement agents in the US, is intended primarily to establish personal contacts abroad for individual federal agencies for their own international political agenda (see Goldstein, 1996). A recent review of such training undertaken by the Government Accounting Office (the investigative arm of Congress roughly equivalent in function to the Audit Commission) concluded that without a structured plan for delivery or a means of evaluating the training provided, the millions of dollars invested in such programmes is being wasted (General Accounting Office, 2001).<sup>18</sup> The federal agencies, rivalling each other for successful foreign investigations, consider it money well spent because it enables them to establish an international network of contacts beholden to them who can then be called upon to assist in investigations abroad that the US agency wishes to conduct. The long-term goal of such projects is to lay foundations for the further facilitation of future US foreign investigations. Ultimately, successful foreign investigations mean money and political influence for federal agencies.

US domestic law makes considerable provision for asset forfeiture, and also allows the seized assets from criminals to be shared with foreign agencies in cases where such agencies have contributed to a conviction in the US courts. The value of seized assets amounts to millions of dollars each year and some state and local law enforcement agencies rely on such forfeiture for the majority of their funding. Confiscation provides a significant amount of funding for federal agencies (interview, FBI, Washington DC, 3 July 2001). Investigations likely to lead to forfeiture thus have an attraction not enjoyed by other investigations.

Such issues should not be viewed pejoratively. UK investigators need merely to be aware of the domestic political context within which US federal agencies operate in order to appreciate where confusions and frustrations may arise when the nuances of the system are not fully understood. Such a context may influence the enthusiasm with which and the extent to which US agencies assist UK investigations. Incentives, and disincentives, also influence UK responses and investigative behaviour. One US observer noted wryly how permission requests for UK officers to visit the US on enquiries always seem to peak just before Christmas each year (interview, Interpol USNCB, Wash-

ington DC, 23 May 2001). And local policing priorities in the UK do not take account of the *ad hoc* needs of foreign agencies. Scrawled in the margin of one *Commission Rogatoire*, returned to the UKCA with the request having been executed by an English police force, was the note of a disgruntled Detective Chief Inspector: 'I suppose we'll have to do this but it doesn't fit with our service plan' (interview, UKCA, London, 7 August 1998).

UK experiences of assistance provided by US agencies will vary from one part of the US to another. The research on which this article is based was conducted entirely within 'the Beltway' and must, by default, reflect 'Beltway views'.<sup>19</sup> In Florida liaison with non-US law enforcement agencies is a daily occurrence: so, too, for the law enforcement professionals in California's Silicon Valley area. Interviews with Floridian state and federal prosecutors indicate that some attitudes evident in DC are not shared, even within the same organisation, outside Washington (interviews, Washington DC, 21 June 2001; 29 June 2001; 25 July 2001) and elsewhere in the US there is little or no familiarity with international law enforcement cooperation.

### **The Role of the Prosecutor**

State and Federal prosecutors may play a greater role in investigation strategies than their UK counterparts in the Crown Prosecution Service.<sup>20</sup> Even before specific crimes and suspects have been identified, prosecutors may be involved in the planning stages of investigations. They may be appointed to direct the activities of multi-agency task forces which second staff from federal state and local agencies. Once appointed as Commissioners to oversee the execution of a foreign request, they are empowered to issue subpoenas. There are also a great many more of them: in some US Attorney's offices, AUSAs are numbered in hundreds for a single federal district.

It is the prosecutor who controls how and when a foreign request is executed in the US. One foreign liaison officer posted to his country's embassy in Washington advises that establishing a working relationship with the AUSA is the key to the successful resolution of a request (interview, foreign liaison officer, Washington DC, 3 June 2001). This will be difficult to do for a UK-based officer. The advice of the FBI legal attaché in London is that UK investigators need to identify and liaise with the law enforcement officer assigned by the AUSA to carry out the request (interview, US Embassy London, 22 February 2001).

Again, this may be difficult to achieve if there has been no occasion to establish precursor informal contact.

### **The Role of Interpol**

The USNCB is located within the Department of Justice, Washington DC. All the major federal agencies, be they Justice or Treasury agencies, are represented in the USNCB. Any formal requests erroneously directed to the USNCB will be referred for resubmission to the OIA via the central authority (unless the relevant MLAT provides for request transmission to OIA via Interpol). The USNCB is well positioned to help establish informal assistance contacts, particularly if there is no agency representative available at the London embassy (interview, Interpol USNCB counsel, Washington DC, 23 May 2001).

### **Human Rights and Constitutional Rights**

The European concept of human rights is not shared in the US. Despite its active participation in the American Commission for Human Rights (in which it jointly adjudicates on allegations of human rights abuses by other states), the US has refused to sign or ratify the American Convention on Human Rights. Protection from overbearing government action for the US citizen rather is to be found in the US Constitution, drafted, as its preamble asserts, to 'establish justice' where previously none was found. It is difficult to equate constitutional rights with human rights. It seems possible, however, that action lawfully undertaken in the US that does not violate the Constitution may nevertheless be subject to a human rights challenge in a UK court. In the case of *Soering*, the European Court of Human Rights held that the extradition of Soering (a German national) from the UK to the US to stand trial for capital murder, for which he was liable to be executed upon conviction, would violate Article 3 of the European Convention on Human Rights [ECHR] (11 EHRR 439 [1989]; also 28 ILM 1063 [1989]). This judgment effectively established extra-territorial effect for the ECHR.

The extra-territorial effect of the US Constitution was tested in *Alvarez-Machain* (504 US 655, 112 S Ct 2188, 119 L Ed 2d 441 1992). Alvarez-Machain was abducted in Mexico by agents of the US Government and delivered across the US/Mexican border. Once inside the US he was arrested. His property in Mexico was searched without warrant by US federal agents. These actions were challenged successfully as a violation of the US Constitution at both the court of first instance and the appeal court. The matter was referred to the US Supreme Court which

overtaken the rulings of the lower courts and adopted a very narrow reading of the Constitution. It held, notwithstanding the existence of an extradition treaty between the US and Mexico, that the treaty mechanism was not an exclusive means for rendering a suspect located in Mexico liable to US jurisdiction. It was not concerned with the manner in which a suspect might be so rendered, nor did it hold that the Fourth Amendment prohibition against unreasonable and unwarranted searches applied to non-US citizens (Paust *et al.*, 2000: 479–89; see also Lowenfeld, 1989a and b; Wedgewood, 1990 for other examples).

The effect of human rights legislation on international mutual legal assistance is a complex area of law in which there are contradictory judgments (Gane & Mackarel, 1996). As a rule of thumb for interim guidance pending definitive case law, it seems reasonable to suggest that any actions undertaken by US authorities in the US on behalf of UK authorities, and in fulfilment of a UK request for formal mutual legal assistance, ought to accord with the Human Rights Act 1998 or else they will be liable to challenge in a UK court either as a breach of human rights or at least as unfair evidence to be excluded under s.78 PACE.

### **Conclusion: Vive la Différence**

Western Hemisphere and European attitudes to criminal justice and law enforcement are influenced by geopolitical context. America's relations with its immediate geographical neighbours are very different from the UK's relations with its European neighbours. There, crime is a domestic issue with increasingly international aspects (Fijnaut, 1998). In the EU regional JHA solutions are being developed and these dominate international law enforcement cooperation within Europe (Joyce, 1999). In the US, the perspective of transnational crime as an external threat to national security (a perspective enshrined in policy since 1995) drives a different approach in which the primary purpose of international law enforcement cooperation is to secure foreign assistance in protecting US borders from crime before it arrives in the US (White House, 1998: 5).<sup>21</sup> It is a perspective reinforced by the events of 11 September 2001.

Across the world, cops have a common interest in catching the bad guys. But exactly who constitutes a bad guy and how best to catch him are issues that can differ markedly. There exist a number of *ad hoc* structures, both legal instruments and cooperative fora, that seek to facilitate international law enforcement cooperation. There seems little prospect of ever achieving



full consensus on how best to achieve such cooperation or any consistency in the current structures, although legislative and policy reactions to the 11 September attacks have given added emphasis to the further synchronisation of cooperation mechanisms (Statewatch, 2002: 1, 13–16). And accepting national differences in politics and culture, this may not be a desirable goal. Given that consistency within the current structures is not imminent, to make existing mechanisms work at their optimum, political and cultural differences must be understood and accommodated rather than resisted. Frustrations in international law enforcement are inevitable but they can be minimised with the realisation that, however familiar the foreign system may appear, it will in fact be very different. In the case of UK/US cooperation, the illusion of familiarity is particularly deceptive.

#### Endnotes

- 1 The UK–US relationship is not universally regarded as ‘special’ and recent US press comment has been generally anti-European (*Washington Post*, 22 June 2001, p.A24). ‘For most countries in Europe, Asia, Latin America and the Middle East, the most important bilateral relationship each one has is the one with the United States, and each of these relationships is, to put it bluntly, more important to them than us’ (*Washington Times*, 26 June 2001, p.A19). ‘However far Europe moves towards economic, political, and military unity, the rivalries among its major component nations – Britain, France and Germany – can never be totally laid to rest. Washington will be able – and entitled – to play on these in its own interests’ (*Washington Times* 6 July 2001, p.A19).
- 2 Offered annually in open competition to staff from any UK police force, two such Fellowships were awarded in 2000. In 2001 eight were available and in 2002, 14 will be on offer: [www.fulbright.co.uk](http://www.fulbright.co.uk).
- 3 The research consisted of 60 interviews with 58 individuals as well as library-based and Internet-based documentary research. Interviewees included Congressional members from the House of Representatives (equivalent to MPs), their staff, senior officials from the government departments of State, Justice and the Treasury (the first two of these being equivalent respectively to the Foreign and Commonwealth Office and the Home Office), investigators and lawyers from several federal agencies, state and federal prosecutors, lawyers in private practice who previously held senior positions in the Clinton Administration and academics. (Some interviewees requested anonymity and for sake of consistency this courtesy has been extended to all.) The author is grateful to all these individuals for their participation and to staff at the Library of Congress, the Congressional Research Service, and

the libraries at Georgetown University for their assistance. The author has been researching mutual legal assistance issues for a number of years and research data from other projects has been used in this article.

- 4 This article will confine itself to UK–US issues, since that relationship is the focus of the Fulbright Award Scheme. It should be recognised however, that relations with other Western Hemisphere nations are equally important to European nations.
- 5 The Home Office tends to refer to informal assistance as ‘mutual assistance’ and formal assistance as ‘mutual legal assistance’.
- 6 These issues were debated at an EU–US conference held on 24 January 2001 in Ghent. Of particular relevance were papers presented by K. Lowrie (Acquisition and dissemination of law enforcement information in the US) and P. Zanders (Strategies of the EU and the US in combating transnational organised crime). At time of writing, August 2001, it is understood that a collection of papers from this conference is to be published.
- 7 Assistance may be provided simply on the basis of comity between nations, in which case a diplomatic request will be made between embassies. In the US, such a request is called a Letter Rogatory, the translation of the term *Commission Rogatoire*, and is used exclusively for non-treaty requests. In Europe the term *Commission Rogatoire* describes any sort of formal mutual assistance request be it pursuant to a treaty or simply a diplomatic request.
- 8 I am grateful to Stewart Robinson, Deputy Director, Office of International Affairs, US Department of Justice, for allowing his staff to provide me with relevant extracts from their Resource Manual and the US Attorney’s Manual. These extracts are held on file with the author.
- 9 The text of the UK–US MLAT is archived at the Public Record Office (FO 93/8/537) and is reproduced in Murray and Harris (2000), Appendix Q.
- 10 Message from the President of the United States to Congress, 3 September 1997, 105th Congress, 1st Session, Treaty Doc. 105–25. I am grateful to the Office of International Affairs, Department of Justice, Washington DC, for providing me with a copy of the IACMA text. [www.oas.org/jurisdico/english/signs/a-55.html](http://www.oas.org/jurisdico/english/signs/a-55.html) indicates that the US ratified the treaty on 25 May 2001 and that it came into force for the US on 25 June 2001. Only two other OAS states have so far ratified it.
- 11 That is not to say that there have never been such requests granted, just that the four lawyers available for interview at the time of this research could neither recall nor envisage a successful application.
- 12 As one liaison officer posted to a foreign embassy in Washington observed, for his country economic sanctions were not a viable option in trying to secure assistance from US authorities (interview, foreign law enforcement liaison officer, Washington DC, 12 June 2001).

- 13 Police forces are not the sole recipients of mutual legal assistance requests. HM Customs & Excise receive a great many but it is equally possible that simple requests for driver details, for instance, would be passed from the UKCA to the DVLA for response.
- 14 The US federal court system is divided into 94 districts. Often these are contiguous with State boundaries but in States with high population there will be more than one federal court district. For each federal district the President appoints one US Attorney in charge of prosecutions. Any given UK investigation may involve enquiries in more than one federal district. The federal appellate courts are divided into 11 circuits.
- 15 The USSS, a Treasury federal agency, has responsibility for investigating fraud and financial crimes as well as its more publicised role of protecting the President. The FBI, DEA, INS and USMS are federal agencies of the Justice Department. The USSS, the ATF, and US Customs are federal agencies of the Treasury Department. US Customs and US Marshals are the oldest agencies, both established in 1789.
- 16 I am grateful to the National Security Council Information Office for supplying me with a copy of this now declassified US Government document.
- 17 President Clinton's declaration of national emergency has never been rescinded. The debate about whether or not transnational organised crime constitutes a national security threat depends partly upon what is considered vital to the national security. National security protection requires tools very different from routine law enforcement: witness the heated Parliamentary debates about emergency legislation following the terrorist attacks against the continental US on 11 September 2001 (see for instance, Parliamentary report, *The Independent*, 21 November 2001). Combating transnational organised crime (usually a form of economic trading in illicit commodities and services) does not necessarily warrant the sorts of strong coercive powers considered necessary for national security protection against terrorist acts.
- 18 Other GAO reports note the rivalry and lack of cooperation between US federal agencies (1995; 1997).
- 19 The Beltway is the orbital interstate network circumnavigating Washington DC. It is the DC equivalent of the M25. 'Beltway views', a colloquial expression much used in DC, Maryland and Virginia, are those of Washingtonians, federal agency HQs and federal government. They might roughly equate with the 'chattering classes' of Islington.
- 20 In Florida, state prosecutors may, if they so wish, carry a badge and a gun: two potent symbols of the US cop.
- 21 This is the first goal of the International Crime Control Strategy published in 1998. At time of writing, August 2001, the ICCS (a Clinton initiative) had yet to be adopted and endorsed by the Bush Administration and informed opinion from a number of sources

suggested that it was unlikely to be endorsed. Nevertheless, it is a philosophy adopted vigorously by federal agencies. And it is a founding philosophy much reinforced since 11 September 2001, the events of which have blurred yet further the distinction in perceptions between terrorism and transnational organised crime.

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