

THE COUNCIL OF EUROPE AS A NORMATIVE
BACKDROP TO POTENTIAL EUROPEAN
INTEGRATION IN THE SPHERE OF CRIMINAL LAW

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ABSTRACT

At a European inter-state level, both the Council of Europe and the European Union (EU) have developed cooperation in criminal matters between European jurisdictions. Although the EU represents a deeper form of integration and cooperation in legal terms than does the Council of Europe, the EU also has to date preferred a looser 'intergovernmental' means of cooperation in police and criminal matters, as compared to the degree of integration of the common market. This reluctance to integrate, to a greater degree, national systems of criminal law is reflected in the relatively limited nature of the pre-existing Council of Europe framework of instruments in the field. This article seeks to illustrate this point through an assessment of three of the most relevant Council of Europe instruments – the European Convention of Human Rights, the Convention on Mutual Assistance in Criminal Matters, and the Convention on Extradition – in the light of recent EU developments.

INTRODUCTION

Two systems of cooperation in the sphere of criminal law exist in Europe – that of the Council of Europe and that of the European Union (EU). Criminal law is of more central relevance to the Council of Europe and its primary legal instrument, the European Convention on Human Rights

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(ECHR)– which, being concerned with individual rights, is of particular relevance to the exercise of coercive and punitive state power through the application of criminal law. The right to a fair trial in Article 6 of the ECHR, for example, was one of the rights originally set out in the Convention in 1950.¹ In the EU, cooperation in criminal matters developed as more of an offshoot of a primary concern with economic freedom of trade and the free movement of economic actors. Initially in the EU, cooperation in the context of the criminal law began in the 1980s with a core group of States, the Benelux countries, who sought to remove administrative restrictions to free movement at their borders, but at the same time to balance this greater freedom with law-enforcement measures, the most important of which was probably an information system for the pooling of data between police forces of the participating countries (the Schengen Information System).

The advent into the sphere of European cooperation of criminal law matters (and foreign policy) began formally only in the early 1990s,² with the adoption of the Pillar Structure of the Treaty of Maastricht.³ However, reflecting the enduring sensitivity of criminal law and foreign policy matters as regards individual member state sovereignty,⁴ cooperation under the Second and Third Pillars (the Third Pillar is now, since the Treaty of Amsterdam, dedicated to police and judicial cooperation in criminal matters⁵)

¹ The Convention was opened for signing on 4th November 1950 and came into force, in international law, on 3rd September 1953.

² Although European Political Cooperation and the Schengen Convention in the 1980s prefigured the development of the Pillar Structure at Maastricht. Generally on criminal law and the EU, see, eg G Corstens & J Pradel, *European Criminal Law* (The Hague, Kluwer, 2002); JAE Vervaele, 'The Europeanisation of Criminal Law and the Criminal Dimension of European Integration', *College of Europe European legal Studies Research Papers in Law* 3/2005 (Brugges, College of Europe, 2005): http://www.coleurop.be/file/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_3_2005_Vervaele.pdf

³ For an earlier overview, see, e.g. M Anderson, M de Boer, P Cullen, William C Gillmore, Charles D Raab & N Walker, *Policing the European Union* (Oxford, Clarendon Press, 1995) pp 218-249.

⁴ On this point in the context of criminal law cooperation, see, eg Advocate General Henri Mayras in Case 45/69, *Boehringer v. Commission* [1972] ECR 1281, at 1296; G J M Corstens, 'Criminal Law in the First Pillar?' (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 131 at 131; Vervaele, above n 1 pp 2-3.

⁵ At Maastricht (1992), the Third Pillar originally related to two main areas – police and criminal law cooperation and asylum, visa and immigration matters. At the Treaty of Amsterdam (1997), asylum, visa, and immigration matters were transferred to the First Pillar (albeit with transitional period before the application of compulsory jurisdiction of the Court – the latter was made subject to a unanimous decision of the Council – Article 67 of the European Community Treaty/ECT), meaning the Third

lacks the distinctive characteristics of the Community method of international law; cooperation is still at an intergovernmental level, with member state sovereignty preponderant relative to the Community/Union institutions.⁶ In other words, notwithstanding the high degree of mutual interest represented in the degree of member state cooperation that exists in the project of European integration generally, criminal law and foreign policy cooperation in an EU context are proving resistant to full-scale Communitarisation. This general picture would only be modified to a limited extent by the proposed Treaty on a Constitution for Europe, if the latter is adopted – for example, some areas of crime, those with a cross-border or Community dimension,⁷ would be ‘communitarised’, in being subject to qualified majority voting in the Council (as regards the passing of legislation) and also subject to the compulsory jurisdiction of the European Court of Justice (ECJ) and to the doctrine of the supremacy of EC law over national law;⁸ however, most criminal law would remain within the exclusive competence of the member states and criminal procedure would similarly remain largely unaffected (though the Constitution does envisage⁹ the possible adoption of harmonising measures in criminal

Pillar now relates solely to Police and Judicial Cooperation in Criminal Matters. A Protocol to the Treaty of Amsterdam further provided for the incorporation of the Schengen *acquis* into the EU. On Schengen, see, generally, C Jourbet & H Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Cooperation in the Light of the European Convention on Human Rights* (The Hague, Kluwer, 1996) who conclude, *inter alia*, that the need for common standards for the protection of rights in the context of the Schengen system is not met simply by adherence to the European Convention on Human Rights: “. . . Indeed, the role of the European Court of Human Rights as a common, international judge in criminal matters must not be neglected, but the main task of this body is not to guarantee a harmonized interpretation of police powers but to safeguard a minimum level of protection of human rights” (ibid p 542).

⁶ Specifically, in legal terms, the distinguishing characteristics of the First/Community Pillar (the ‘supranational’ Pillar’) that are not found in the other two (‘intergovernmental’) Pillars are: supremacy of EC law over national law, direct effect, compulsory jurisdiction of the European Court of Justice (ECJ), qualified majority voting (QMV) in the Council of Ministers, and co-decision in the passing of legislation for the European Parliament (EP).

⁷ Article III-271 of the Treaty Establishing a Constitution for Europe, Brussels, 29th October 2004, CIG 87/2/04 REV 2.

⁸ See generally, Articles III 270-277 (judicial cooperation in criminal matters)

⁹ For general discussion of the provisions of the Constitution in this area, see, e.g. A Weyembergh, ‘Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme’, (2005) 42 *Common Market Law Review* 1567.

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procedure, this is subject to a requirement of unanimity in the Council of Ministers¹⁰).

On the working assumption that the shared values and ideologies that permit the degree of inter-state cooperation that exists in the EU are not necessarily or likely shared to the same degree or extent as between nations in the world more generally, it seems likely that the difficulties and obstacles experienced in the process of greater EU cooperation in criminal matters may be replicated in the context of broader globalisation in criminal matters. To date, international criminal justice has been dominated by international crimes and the international criminal tribunals, whereas EU law is not generally concerned with this special category of crime, but with crime of cross-border concern more generally. In the context of the increased threat of international terrorism over the past decade or so, and the increased opportunities for criminality afforded by the capacity for instantaneous communication of complex data over the Internet and by the exponential increase in air travel, this latter broader category of cross-border crime is likely to become of more and more importance for law enforcement - so the European example may in this context be of broader interest for international criminal justice.

Within EU criminal law cooperation, harmonisation of criminal procedure, as opposed to substantive offences, has proved the most controversial and resistant to ready cooperation. Two examples, in particular, may illustrate this: 1. co-operation in the law of evidence and the adoption of European Evidence Warrant (EEW) 2. the process of adoption of the European Arrest Warrant (EAW) procedure. The paper places the pattern of EU cooperation in criminal matters in the context of the adherence of all EU member states to the European Convention on Human Rights¹¹ (ECHR) and other Council of Instruments - chiefly the ECHR of 1957;¹² the European

¹⁰ Article III-270(2) states:

“To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a European decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. . . .”

¹¹ ETS no 005.

¹² ETS no 024.

Convention on Mutual Assistance in Criminal Matters 1959¹³ - and assesses the normative backdrop provided by the Council of Europe system to EU involvement in criminal law; it is argued that Council of Europe norms in criminal law do not provide the depth of cooperation that could readily translate into deeper EU integration in criminal law. The most significant EU measure in criminal cooperation to date has been the EAW, which in some respects does considerably go beyond existing extradition practice as reflected in the Convention of 1957; however, there have been some difficulties with its implementation. On the other hand, EU cooperation in mutual legal assistance in the law of evidence has not gone much beyond the principles already reflected in Council of Europe instruments, which themselves were subject to the overriding principle of state sovereignty. In the law of evidence, proposed reforms have had to be watered down to, in effect, a streamlining of mutual legal assistance procedures.

COUNCIL OF EUROPE IN THE CONTEXT OF CIVIL AND COMMON LAW TRADITIONS

Common Law versus Civil Law

This divide between the common law and civil law families is the central cleavage globally in terms of legal systems and method. It of course originated in Europe,¹⁴ and is one of the central issues to be dealt with in developing common inter-state approaches to criminal law and procedure, as is reflected in EU experience to date in criminal law.

The general differences between the two systems of civil law and common law are well noted,¹⁵ the civil system developing from Greek and particularly Roman law, with an emphasis on general comprehensive codes and a corresponding lesser role for precedent; the common law system developed in England in the feudal period and is marked by the central role of case law and judicial development on an incremental, case-by-case basis of the law (with a correspondingly reduced role for statutes relative to the role of the latter in the civil law system). Increasingly, it is recognised¹⁶ that there is

¹³ ETS no 030.

¹⁴ See generally, eg R van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge, Cambridge Univ. Press, 1992).

¹⁵ See, eg C Van Den Wyngaert et al (eds), *Criminal Procedure Systems in the European Community* (London, Butterworths, 1993); M Delmas-Marty & J R Spencer (eds), *European Criminal Procedures* (Cambridge, Cambridge Univ. Press, 2002).

¹⁶ See, eg W Tetley, 'Mixed jurisdictions: common law vs civil law (codified and uncoded) (Part I)', (1993) 3 *Uniform Law Review* 591 and 'Mixed jurisdictions:

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a greater convergence between the two systems than the common law-civil law dichotomy traditionally may have suggested – statutes are increasingly important in common law jurisdictions, especially in the context of EC law, while precedent plays a significant role in civil law systems, even if in a less formal and systematic way than in the common law.

Criminal law is one of the areas where the differences between the two systems are perhaps most marked. In the common law, the adversarial tradition conceives of the defence and prosecution as parties on an equal footing battling to ‘bring out’ the truth, with a judge in a relatively passive role, almost as a referee – and it is usually a jury of lay members that makes findings of fact, not the judge. The laws of evidence in the common law tradition have mostly developed as a function of the jury system – the role of lay persons as triers of fact has resulted in a perceived need to regulate the admissibility of evidence, given the lack of professional forensic experience of the members of a jury; certain, broad categories of evidence were excluded so as not to prejudice lay juries unfamiliar with the legal process. The exclusion of character evidence, save for similar fact evidence, and the primacy of the principle of oral evidence, reflected in the rule against hearsay, are central examples of the regulation of admissible evidence in the common law tradition in the context of lay juries as triers of fact. In the civil law tradition where the judge has the central truth-finding or inquisitorial role, with a relatively subordinate function for defence lawyers, lay juries are not involved and virtually all relevant evidence is admissible.¹⁷ It is also worth noting that the adversarial-inquisitorial dichotomy and the characteristics it asserts does not hold true to the same extent for all jurisdictions in the civil law tradition, and that there are significant variations between jurisdictions in the latter – in the Nordic countries, for example, juries can be a feature of

common law vs civil law (codified and uncodified) (Part II)’, (1999) 4 *Uniform Law Review* 877; N Jörg, ‘Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps’, *Paper delivered at the International Society for the Reform of the Criminal Law (ISRCL) 17th Annual Conference* (The Hague, ISRCL, 2003). The emergence of the ad hoc international criminal tribunals and of the International Criminal Court further indicates the potential for common procedure between the two traditions.

¹⁷ The admissibility of relevant evidence is a starting point in the common law of evidence, but the established exceptions to this principle are so extensive that the principle is very heavily qualified – for example, concerning hearsay and documentary evidence and evidence as to character. In the Republic of Ireland, an additional consideration in this regard is the doctrine that evidence obtained in violation of constitutional rights is inadmissible save in extraordinary circumstances, which often is a central issue in criminal cases: see *The People (Director of Public Prosecutions) v Kenny* [1990] 2 IR 110.

trials (eg Norway, where lay juries are required in serious cases¹⁸) and the principle of oral evidence has a greater role.¹⁹

In terms of the number of jurisdictions both within the Council of Europe system and within the EU, the civilian tradition is clearly dominant. Only two jurisdictions are wholly in the common law tradition – Ireland and the United Kingdom, while two other smaller jurisdictions – Cyprus and Malta – have a hybrid system with both common law and civil law elements. Nonetheless, the importance of the United Kingdom²⁰ both politically and as the originator of the common law system has resulted in the common law-civil law divide being of central importance in the context of criminal law cooperation within the EU. The EU and Europe experience then may serve as a prototype to engaging with this issue on a more global level.

The Council of Europe and the Criminal Law

Within this overall European picture of both unity and diversity, European criminal law brings out possibly as much the potential for diversity, as of unity, in European traditions – or at least the complexity of cooperation. As a backdrop to EU criminal cooperation, the Council of Europe and the ECHR provide an existing context of interaction of European states in the criminal sphere. The way in which decisions of the European Court of Human Rights, including those in criminal matters, have become embedded to a degree in terms of their normative weight in legal and political debates²¹ might be

¹⁸ Norwegian Code of Criminal Procedure 1887 (*Lov om rettergangsmåten i straffesaker (Straffeprossessloven)*), replaced by a new updated Code on 22nd May 1981 (which came into force on 1st January 1986), sec 376a. See also, for an example of an EU country in this regard, with Spain's jury law of 1995 (*Ley Orgánica del Tribunal del Jurado*, BOE, 1995, 122, as subsequently amended) and Art. 125 of the Spanish Constitution.

¹⁹ As regards Norway, see, eg *ibid* at sec 296-I.

²⁰ Scotland is of course an exception within the United Kingdom in that its municipal law is largely a product of the civil law tradition – in criminal law, Scots law tends toward the common law system, though it is often different from the common law of England & Wales in criminal matters. Unlike civil/non-criminal law in Scotland (see the Court of Session Act 1988 as to the latter), there is no appeal in Scots criminal cases to the House of Lords, and Scotland's High Court of Justiciary is the highest criminal court in the jurisdiction. Under the Scotland Act 1988, devolution issues can be appealed to the Judicial Committee of the Privy Council.

²¹ As evidenced, eg by the way in which the Good Friday Agreement between the UK and Irish governments on a the Northern Ireland peace settlement required the incorporation in the Republic of Ireland and Northern Ireland of the rights protected by the ECHR, as a two-way guarantee of good faith in the commitment to human rights. See Section 6 of the Good Friday Agreement:

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thought to provide a strong normative backdrop²² to more intense EU criminal cooperation. A good deal of the ECHR itself is concerned with rights in the context of criminal investigation, prosecution, and trial.²³ Article 3 provides for freedom from torture and degrading treatment. Article 5 sets out the circumstances in which detention is lawful, addressing, inter alia, the formalities for a valid arrest, a requirement to bring a detained person promptly before a judge, and what is referred to in the common law tradition as *habeus corpus* (the right to challenge the lawfulness of detention before a court of law).

Article 6 of the ECHR is the most relevant to criminal procedure. It sets out a requirement that in the determination of any criminal charge, everyone is entitled to ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal’. Article 6(1), which applies to both civil and criminal proceedings, states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The subsequent two paragraphs of Article 6 relate specifically to criminal trials. Article 6(2) requires a presumption of innocence until proven guilty. Article 6(3) states that everyone charged with a criminal offence shall have

<http://www.nio.gov.uk/agreement.pdf> .

²² The question of the normativity of law, in the sense of the duty to obey the law, is a contested one in legal theory, with some arguing, for example, that positivism fails to adequately account for this duty (for an overview, see, eg A Marmor, ‘The Nature of Law’, *Stanford Encyclopaedia of Law* <http://plato.stanford.edu/entries/lawphil-nature/> (visited 4th January 2007). In this article, the term ‘normative’ is used loosely to convey the sense in which ECHR standards have become broadly accepted within Europe as representing minimum safeguards and protections.

²³ ETS no 5 (46 ratifications). The data on ratifications in this article was obtained from the Web site of the Treaty Office of the Council of Europe (visited 4th January 2006): <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>

the following minimum rights: (a) to be informed promptly in a language the suspect understands of the nature and cause of the accusation; (b) to have adequate time and facilities for the preparation of a defence; (c) to defend himself in person or through legal assistance, which is to be given free where the defendant does not have sufficient means to pay for it and if the interests of justice so requires; (d) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; (e) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court. The Court has tended to emphasise that “Article 6 enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term”.²⁴ Although Article 6 is formulated in relatively detailed terms, compared to other Articles of the Convention, and thus allows the European Court of Human Rights to be more particular and specific in its rulings under this Article as to the requirements it imposes on States, “the Convention organs still have to steer a line between autonomy and subsidiarity”,²⁵ reflecting the general character of the ECHR as setting out minimum standards.²⁶

Article 7 of the ECHR goes on to enshrine the principle of legality (subject to the general principles of law recognized by civilized nations). Article 13 requires that everyone whose rights and freedoms as set out in the Convention are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity.²⁷

In addition, other Council of Europe conventions relate to criminal matters: the European Convention on Extradition of 1957;²⁸ the European

²⁴ *Golder v UK* A 18 (1975), 1 EHRR 524, § 28, cited in O Jacot-Guillarmod, ‘Rights Related to Good Administration of Justice (Article 6)’, in R St J Macdonald, F Matscher & H Petzold (eds), *The European System for the Protection of Human Rights* (The Hague, Martinus Nijhoff, 1993) p 381. See also generally, eg LG Loucaides, ‘Questions of Fair Trial under the European Convention of Human Rights’, (2003) 3 *Human Rights Law Review* 27.

²⁵ I Cameron, *An Introduction to the European Convention on Human Rights* (Uppsala, Iustus Förlag, 2006) p 89.

²⁶ *Ibid* p 74. See also, generally, H Petzold, ‘The Convention and the Principle of Subsidiarity’, in Macdonald et al, above n 24.

²⁷ Article 13 is somewhat limited in scope in that it can only be invoked where there has been a breach of another Convention right – it does not stand on its own as an independent basis of challenge: see, generally, P van Dijk & GJH van Hoof et al, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer, 3rd ed, 1998) p 696 et seq.

²⁸ ETS no 024 (47 ratifications – including Israel and South Africa) was the first European-wide attempt to codify common standards in extradition; its chief

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Convention on Mutual Assistance in Criminal Matters 1959;²⁹ European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders 1964;³⁰ European Convention on the Punishment of Road Traffic Offences 1964;³¹ European Convention on the International Validity of Criminal Judgments 1970;³² European Convention on the Transfer of Proceedings in Criminal Matters 1972;³³ European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes 1974;³⁴ Additional Protocol to the European Convention on Extradition of 1975;³⁵ European Convention on the Suppression of Terrorism 1977;³⁶ Second Additional Protocol to the European Convention on Extradition 1978;³⁷ Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 1978;³⁸ Convention on the Transfer of Sentenced Persons 1983;³⁹ European Convention on the Compensation of Victims of Violent Crimes 1983;⁴⁰ Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1984;⁴¹ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987;⁴² Convention on Insider Trading of 1989⁴³ and Additional Protocol to the Convention on Insider Trading 1989;⁴⁴

innovation was the relaxation of the requirement that a requesting state establish a prima facie case for extradition.

²⁹ ETS no 030 (46 ratifications).

³⁰ ETS no 051 (19 ratifications).

³¹ ETS no 052 (5 ratifications).

³² ETS no 070 (19 ratifications).

³³ ETS no 072 (23 ratifications).

³⁴ ETS no 082 (3 ratifications).

³⁵ ETS No. 086 (37 ratifications – including Israel), narrowing the scope of the political offence exception and specifying the scope of *ne bis in idem*.

³⁶ ETS no 090 (44 ratifications).

³⁷ ETS no 098 (40 ratifications – including South Africa), concerning fiscal offences, *in absentia* trials, and amnesties.

³⁸ ETS no 099 (40 ratifications).

³⁹ ETS no 112 (61 ratifications – including Australia, the Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Israel, Japan, Korea, Mauritius, Mexico, Montenegro, Panama, Tonga, Trinidad and Tobago, the United States, Venezuela).

⁴⁰ ETS no 116 (21 ratifications).

⁴¹ ETS 117 (39 ratifications), concerning, in relation to criminal matters, a right of appeal in criminal proceedings, compensation for wrongful conviction, and *ne bis in idem* in criminal trials generally.

⁴² ETS no 126 (47 ratifications).

⁴³ ETS No. 130 (8 ratifications).

⁴⁴ ETS no 133 (8 ratifications).

Convention on Laundering 1990;⁴⁵ Protocols Nos 1 & 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1993;⁴⁶ Additional Protocol to the Convention on the Transfer of Sentenced Persons 1997;⁴⁷ Convention on the Protection of the Environment through Criminal Law 1998;⁴⁸ Criminal Law Convention on Corruption 1999;⁴⁹ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 2001;⁵⁰ Convention on Cybercrime 2001;⁵¹ Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Concerning the abolition of the death penalty in all circumstances) 2002;⁵² Additional Protocol to the Convention on Cybercrime (Concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems) 2003;⁵³ Protocol amending the European Convention on the Suppression of Terrorism 2003;⁵⁴ Additional Protocol to the Criminal Law Convention on Corruption 2003;⁵⁵ Convention on the Prevention of Terrorism 2005;⁵⁶ Convention on Action against Trafficking in Human Beings 2005;⁵⁷ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism 2005.⁵⁸

The Limits of Criminal Law Convergence in the Council of Europe System

This impressive list of conventions in which, with varying support from contracting states of the Council of Europe, cooperation in the criminal sphere has been developed could be taken to indicate a geographical and political space in which a high degree of cooperation has been achieved in practice. However, most of the above conventions relate to substantive, rather than procedural criminal law – which criminal law cooperation has become the norm and in which many of the obstacles associated with inter-state criminal

⁴⁵ ETS no 141 (48 ratifications – including Australia).

⁴⁶ ETS no 151 and ETS no 152 respectively (46 ratifications each).

⁴⁷ ETS no 167 (31 ratifications).

⁴⁸ ETS no 172 (1 ratification – Estonia).

⁴⁹ ETS no 173 (35 ratifications).

⁵⁰ ETS no 182 (12 ratifications – including Israel).

⁵¹ ETS no 185 (18 ratifications – including the United States).

⁵² ETS no 187 (37 ratifications).

⁵³ ETS no 189 ((10 ratifications).

⁵⁴ ETS no 190 (25 ratifications).

⁵⁵ ETS no 191 (18 ratifications).

⁵⁶ ETS no 196 (3 ratifications).

⁵⁷ ETS no 197(3 ratifications).

⁵⁸ ETS no 198 (0 ratifications).

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cooperation have been surmounted. Certainly, much progress has been made, but closer analysis also indicates the limitations of current cooperation; many of the above conventions relate to substantive criminal law, but it is in procedure that the differences between common law and civil law really exist, since broadly speaking legal systems throughout the world show substantial similarity as to the content of what the criminal law prohibits. In the limits of this paper, it is not possible to comprehensively assess the scope of all the conventions referred to above – instead, the paper focuses on some of the conventions that are most relevant with respect to procedure. Taking the ECHR itself as a starting point in this regard, when taken in the context of the totality of criminal substantive and procedural law in any legal system, the scope of Convention rights in criminal matters is for the most part very general in nature. This is discussed in more detail in what follows.

The Convention establishes broad and basic principles – but many criminal issues are un-addressed. Perhaps the most obvious example of the latter concerns the law of evidence and of criminal procedure generally. The question of the mode of trial, for example, jury or non-jury, is not dealt with, reflecting the contrasting approaches in this area among contracting states. As to the law of evidence, the Convention says relatively little in a central area of the functioning of the criminal law – and one in which there are sharp divergences of approach between civil and common law systems. For example, hearsay evidence, criminal disclosure, and the precise nature of defence rights are all more or less outside of the scope of the Convention. Harris, Warbrick & O’Boyle observe:

“The right to a fair hearing in Article 6(1) does not require that any particular rules of evidence are followed in national courts in either criminal or non-criminal cases; it is in principle for each state to lay down its own rules. Such an approach is inevitable, given the wide variations in the rules of evidence in different European legal systems, with, for example, common law systems controlling the rules of evidence very tightly and civil law systems setting very few restrictions. However, the Strasbourg authorities have set certain parameters within which states must operate and have found that the use of a particular rule of evidence in any system may cause the trial to be unfair on the facts.”⁵⁹

⁵⁹ D J Harris, M O’Boyle & C Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995) p 210.

The authors go on to list three main categories in relation to which the Convention contains certain requirements: illegally obtained evidence, deposition evidence (primarily evidence from a complainant witness who does not appear at trial), and access to all material evidence: (1) The latter principle identified by Harris, Warbrick & O'Boyle - access to all material evidence – is a principle in both common law and civil law systems,⁶⁰ but it is heavily regulated in the common law by various exclusionary rules,⁶¹ recognition of the principle in a general abstract way in the jurisprudence of the European Court of Human Rights says little as to differing ways of applying and qualifying the principle. (2) The second evidential principle referred to above – relating to deposition evidence – is the only specific rule of evidence explicitly addressed in the Convention. Article 6(3)(d) states⁶² that everyone charged with a criminal offence has the right to examine or have examined witnesses against him or her and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him. (3) On the first principle identified by Harris, Warbrick & O'Boyle - concerning illegally obtained evidence, the requirements in the jurisprudence

⁶⁰ On civil law systems, see, eg K Zweigert & H Kötz, *An Introduction to Comparative Law* (trans by Tony Weir) (Oxford, Oxford Univ Press, 3rd ed, 1998) pp 274-275.

⁶¹ See Secretary of State of the Home Department/Lord Chancellor's Office/Attorney General, *Criminal Justice White Paper: Justice for All* (Cmd 5563) (London, HMSO, 2002), which proposed significant moves to relaxing the exclusionary rules of the common law. See also, eg the discussion of the White Paper in B. Fitzpatrick, 'Tinkering or transformation? Proposals and principles in the White Paper, "Justice for All"' (2002) 5 *Web JCLI*, available online at:

<http://webjcli.ncl.ac.uk/2002/issue5/fitzpatrick5.html> .

⁶² For an application of Article 6(3)(d), see, eg the decision of the European Court of Human Rights in *PS v Germany* (2003) 36 EHRR 61. The applicant was convicted of child sexual abuse, but was denied the opportunity to cross-examine the child and thereby test her credibility. The child's mother had expressed concerns about the effect of a cross-examination on the child's health. The Court held that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused had no opportunity to examine or cross-examine, whether during the investigation or the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6(3)(d). Cameron notes that the ". . . the Court has been very careful as regards *agent provocateurs* and allowing evidence from anonymous witnesses, or from victims of crimes or witnesses not present at the trial, something which can apply particularly as regards sexual offences against children, in security cases and in organised crime cases" (above n 25 pp 100-101, footnotes omitted). See also Petzold, above n 27 p 54.

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are relatively general,⁶³ and significant variations exist between contracting States. For example, Ireland applies a strict exclusionary rule for evidence obtained in breach of constitutional rights. As a consequence, for example, evidence obtained in the execution of a search warrant where the warrant is out of time is automatically inadmissible,⁶⁴ whereas in the UK, the trial court has discretion as to admitting such evidence.⁶⁵

The issue of delay in the criminal process can be taken as a further example of the general nature of the rights and principles set out in the ECHR. Both Articles 5(3) and 6(1) of the Convention are relevant here. Article 5(3) provides that everyone arrested or detained is to be brought promptly before a judge and shall be entitled to a trial within a reasonable time or release pending trial. Article 6(1) provides, inter alia, that in the determination of a person's civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established. These provisions in the ECHR on delay only arise where a person has been arrested or detained (Article 5(3)) or where a person has been subjected to a charge (Article 6(1)).⁶⁶ In relation to Article 6(1), the reasonable time guarantee runs from the moment that an individual is subject to a criminal charge, and not from when the alleged offences are committed (Article 6(1) also applies to civil cases, in which case the reasonable time guarantee runs usually from the initiation of court proceedings).

⁶³ The general position in the ECHR caselaw is that the admissibility of illegally obtained evidence is a matter for national law: see *Schenk v Switzerland* (1988) 13 EHRR 242 and *Teixeira De Castro v Portugal* (1998) 28 EHRR 101 (both cited in EU Network of Independent Experts on Fundamental Rights, *Opinion on the Status of Illegally Obtained Evidence in Criminal Procedures of the Member States of the European Union* (Brussels, CFR-CDF, 2003) p 6). Van Dijk & van Hoof et al observe that "... as to the admissibility according to domestic law, the Strasbourg courts are guided in the first place by the opinion of the national court. However, if the latter has taken the position that it may use the evidence, though unlawfully obtained, a Strasbourg review of the way in which use is made of this evidence is very urgently needed if the principle of fair trial is not to be frustrated" (van Dijk & van Hoof et al, above n 27 p 436).

⁶⁴ Save for extraordinary excusing circumstances (see *Kenny*, above n 17).

⁶⁵ Police and Criminal Evidence Act, s. 78; *Scott v The Queen* [1989] AC 1242; *R v Khan* [1996] 3 WLR 162.

⁶⁶ There is no provision of the ECHR that explicitly relates to the time period between the alleged commission of a criminal offence and the initiation of a prosecution.

The relatively general nature of these requirements in Articles 5(3)⁶⁷ and 6(1) becomes apparent in relation to the issue of investigative detention. In common law countries, pre-trial investigative detention is generally prohibited. This principle of refusal to surrender for the purpose of investigative detention. It has some support in existing extradition practice, although there does not appear to be that much authority from Ireland or the UK (the two major common law jurisdictions in Europe) specifically on the point. It is consistent with the principle that an accused is entitled to a speedy trial, for which there is more considerable authority. The latter principle is guaranteed in relation to criminal trials at a constitutional level in Ireland⁶⁸ and the United States,⁶⁹ for example (and it is provided for in Articles 5(3) and 6 of the European Convention on Human Rights (ECHR), as referred to above). This concern with investigative detention is also reflected in the relatively short periods of detention without charge permitted by statute in Ireland⁷⁰ and the UK.⁷¹ It might also be argued that extended detention pending the completion of the investigative phase of a trial was a form of preventative detention, unless a fairly high threshold of evidence was to apply

⁶⁷ The European Court of Human Rights has applied a broad margin of discretion to states in applying Article 5(3), reflecting the diverse procedural traditions in the area: See, eg, van Dijk & van Hoof et al, above n 27 p 370.

⁶⁸ Bunreacht na hÉireann (the Constitution of Ireland), Article 38.1 (right to a trial in due course of law). The right is also recognised at common law. See, eg *Don Knowles v Judge Leo Malone and Ors*, High Court, Unreported, 6th April 2001, McKechnie J; *PC v Director of Public Prosecutions* [1999] 2 IR 25. No absolute time periods are established or identified in caselaw and each case is largely taken on its own facts: D Walsh, *Criminal Procedure* (Dublin, Round Hall, 2002) p 23. Although an accused will often have to show prejudice arising for a trial to be halted on grounds of delay, the caselaw also suggests a category of unconscionable delay as justifying the ending of proceedings, regardless of whether the delay prejudices the conduct or effectiveness of the defence.

⁶⁹ The Sixth Amendment to the US Constitution.

⁷⁰ The general requirement is that a suspect must be brought before a judge and charged as soon as is practicable (Criminal Justice Act 1951, s 15). It is now possible to detain a person for certain (again relatively short) periods without charging (see, eg Criminal Justice Act 1984 (as amended), s 4(2), which applies in relation to offences punishable by a period of five years' imprisonment or more as amended by the Criminal Justice Act 2006, s 9; Offences Against the State Act 1939, s 30).

⁷¹ The Police and Criminal Evidence Act 1984, s. 42(1) (as amended by the Criminal Justice Act 2003, s. 7, and by the Serious Organised Crime and Police Act 2005, s. 111) provides that a person arrested and detained may be held by the police for up to 36 hours without charge.

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to arrest in the first place pending the completion of investigation. It seems likely that preventative detention would be unconstitutional in Ireland.⁷²

On the question of investigative detention, the ECHR is relatively silent⁷³ – and there is a clear difference in approach on this issue between common law and civil law states.⁷⁴ Generally in the context of investigative detention, both Articles 5(3) and 6(1) are relevant, but primarily the latter. Article 5(3) will be satisfied once a judge has become involved, but the concern with investigative detention essentially arises where a holding charge is made against a suspect (satisfying Article 5(3)), but then there is delay before the trial proper - implicating Article 6(1). However, very long periods of pre-trial detention (from a common law point of view) have been held to be

⁷² See, eg *John Gallagher v The Director of the Central Mental Hospital (No 2)* [1996] 3 IR 10, at 18-19, 34 (in the context of detention of a person with a psychiatric illness). However, it is worth noting that the previous position in Irish law whereby bail could not be refused on the ground that an accused was likely to offend was the subject of a Constitutional amendment, which permits this as a ground for refusing bail (16th amendment to the Constitution, inserting Article 40.4.6°). Recital 12 of the Framework Decision provides, inter alia, that the Framework Decision does not prevent a member state from applying its constitutional rules relating to due process. This provision reflects the position in Irish law, whereby the State is prohibited from extraditing a suspect where the treatment of the suspect in the requesting state would amount to a denial of or an infringement of constitutional rights or fair procedures in Irish law. *Finucane v McMahon* [1990] 1 IR 165.

⁷³ The circumstances in which preventive detention are permitted under the ECHR are set out in Article 5(1)(e) -(f):
“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

In the context of prison sentences, the European Court of Human Rights has tended to hold that in cases of indefinite detention imposed on young offenders, it may be permissible to determine the latter stages of the sentence with reference to the risk posed by the offender, but in this instance the Court requires judicial oversight to ensure adequate criteria for release are developed by national authorities: see S Livingstone, ‘Prisoners’ rights in the context of the European Convention on Human Rights’, (2000) 2 *Punishment & Society* 309 at 320.

⁷⁴ In relation to the UK, see the Extradition Act 2003, s 2(3). In the House of Lords, Lord Filkin, Parliamentary Under-Secretary of State for the Home Office, noted regarding s 2(3) of the UK Bill that: “... The Bill, for the first time, makes it clear that extradition to another EU country will be possible only for the purpose of putting a person on trial” (*Lords Hansard*, 1st May 2003, col 854).

compatible with this provision. For example, in *W v Switzerland*,⁷⁵ where the time lag between charging and the trial was four years, no violation of the Convention was found by the European Court of Human Rights.⁷⁶

A further aspect to the degree of normative convergence in Europe apparent from the ECHR is the doctrine of margin of appreciation employed in the Strasbourg caselaw.⁷⁷ This concept essentially entails that the European

⁷⁵ A 254-A (1993).

⁷⁶ In *W v Switzerland*, ECHR (1993) Series A, No 254. The Commission by 19 votes to 1 was of the opinion that Article 5(3) had been violated; a Chamber of the Court, by 5 votes to 4, disagreed, holding that the total pre-trial detention of 4 years and 3 days was justified in the circumstances of the case. The case involved a range of economic offences. The Court noted that “. . . [the ECHR] caselaw in fact states that the reasonable time cannot be assessed *in abstracto* . . . the reasonableness of an accused person’s detention must be assessed in each case according to its special features . . . Continuing detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty” (para 29). The Court upheld the three main grounds on which the Swiss authorities justified the pre-trial detention, which were, in addition to the serious suspicion against him: the danger of absconding, the risk of collusion, and the need to prevent the accused committing further offences. Judge Pettiti entered a strongly worded dissent, noting he would rather that the case had been decided by a Grand Chamber of the Court. His dissenting judgment also contained some research on the general picture on pre-trial detention in Europe. In France, he noted, pre-trial detention varied with the type of crime, the most lengthy period he cited being eight months – he noted also that excessive pre-trial detention was often deplored by Parliament in France. In other European states, he observed, the maximum length of pre-trial detention permitted varied from about six months to two years. Among his other comments was that “to justify four years of pre-trial detention is to step backwards in the history of criminal law, to regress to the ‘prehistoric’ era of the Lombroso [the 19th-century Italian doctor and criminologist who conceived of criminality as inherited] school of thought”.

⁷⁷ One academic commentator observed: “The margin of appreciation may be the single most distinctive interpretative feature of ECHR jurisprudence: it has defined not only the interpretative methodology of Strasbourg jurisprudence but also the substantive import of Convention rights. It remains pivotal to the operation of a critical symbiosis between national upholding of the Convention and the supervision of the ECHR mechanism: it lies at the heart of the ineluctable and perennial mediation of consensus and relativity, supremacy and national autonomy as well as uniformity and diversity” (S McInerney, ‘Review of Yourow, Howard Charles. *The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence* (Martinus Nijhoff Publishers, Kluwer Press 1996)’, (1998) 9(4) *European Journal of International Law* 777 at 777. See also generally Petzold, above n 26.

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Court of Human Rights in Strasbourg pays respect to the national context and the particular understanding of it possessed by national courts. Shany has recently identified two aspects to the doctrine: judicial deference - meaning respect for national discretion and evaluation; and normative flexibility - meaning international norms incorporating the concept are open-ended and unsettled and provide a limited conduct guidance that preserve a significant 'zone of legality' within which states are free to operate.⁷⁸ The doctrine does not seem to have been explicitly invoked much in the context of Articles 5 or 6, for example;⁷⁹ the degree of latitude these permit to contracting states seems to stem from the general wording of the provisions, rather than primarily the interpretative rule of margin of appreciation.

In summary, the content of the ECHR in terms of criminal procedure is rather general and as such limited. Substantial parts of procedure – such as the law of evidence and delay in the context of investigative detention – are largely outside of the scope of the Convention. It seems almost unnecessary to invoke the doctrine of the margin of appreciation in this context, since the concept or principle is inherent in the scope of the Convention as to criminal procedure.⁸⁰

THE EXISTING COUNCIL OF EUROPE FRAMEWORK IN THE AREA OF MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Council of Europe Convention of 1959

The Council of Europe's 1959 Convention on Mutual Assistance in Criminal Matters was the first European-wide measure of mutual assistance.⁸¹ The Convention applies to all judicial proceedings, but does not regulate police-to-police cooperation at the investigative stage (regulation of the latter,

⁷⁸ See generally Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', (2006) 16(5) *European Journal of International Law* 907 at 910-911. Shany suggests the two are analytically severable – the first relating to norm-application and the second to norm-interpretation. This application-interpretation distinction may not be fully sustainable, in that a norm arguably cannot be applied without being interpreted – at least if the term interpretation is given a broad meaning to convey the task of attributing *any* meaning to a term or legal provision (including if the meaning is clear or obvious).

⁷⁹ See, eg van Dijk & van Hoof et al, above n 27 p 86.

⁸⁰ Although Article 6 does contain a number of specific provisions (as noted above n 25).

⁸¹ See generally, eg C Nicholls QC, C Montgomery QC & J B Knowles, *The Law of Extradition and Mutual Assistance* (London, Cameron May, 2002).

in so far as it exists, as opposed to simply being a matter of practice, comes under the aegis of Europol, Interpol and the SIS, for example). The basic provision of the Convention is broadly framed and states that state parties commit to affording each other “the widest measure of mutual legal assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, fall within the jurisdiction of the judicial authorities of the requesting party”.⁸² The primary instrument provided for is a rogatory letter,⁸³ which is simply the term for a formal request for assistance. A basic principle of the Convention is that the requested party is permitted to execute letters rogatory in a manner provided for in its domestic law⁸⁴ – not the law of the requesting state, reflecting the traditional Westphalian principle of the paramountcy of individual state sovereignty in public international law.

However, Article 3 of the Convention further provides that a request in relation to obtaining witness or expert evidence should be acceded to where the law of the requested state does not prohibit it. This appears to represent a good faith clause that the requested state should cooperate to the maximum, rather than minimum, extent possible under its own law.⁸⁵ Perhaps the most obvious context in which this principle as to the priority of the law of the requested state arises is the admissibility of evidence – because of the sharp differences between common law and civil law traditions in this area. There are particularly significant differences across states in this area of law. As the Irish Director of Public Prosecutions, for example, has noted, the central problem for a common law jurisdiction seeking to establish an effective means of obtaining evidence from abroad is how to do so while respecting this principle.⁸⁶

Overall in its scope, therefore, the 1959 Convention does not significantly impinge on state sovereignty.

European Union Developments

The principal EU development in this field has been the adoption of the European Evidence Warrant (EEW). The main change arguably that the EEW effects is the standardisation of procedures in the area throughout the EU and

⁸² Article 1.

⁸³ Articles 3-6.

⁸⁴ Article 5(1)(c).

⁸⁵ J Hamilton, 'Mutual Assistance in Criminal Matters in Ireland and the Proposed European Evidence Warrant', (2005) *ERA Forum – Special Issue on European Evidence* 53 at 59.

⁸⁶ *Ibid.* Both Ireland and the UK implemented the Convention in domestic law in the early 1990s. Ireland did so in Part VII of the Criminal Justice Act 1994, the UK did so a few years previously in the Criminal Justice (International Cooperation) Act 1990.

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tighter deadlines – the EEW as currently proposed would not appear to entail any fundamental departure from current mutual legal assistance principles. Probably the most significant aspect of the new measure that is investigative in nature is that it envisages search and seizure; this is, however, to be carried out according to normal rules of the requested/executing Member State,⁸⁷ and a series of grounds for non-recognition/non-execution are provided for.⁸⁸ The EEW as proposed would cover a relatively limited spectrum of evidence; it will only relate to evidence in being – it excludes requests to take further evidence, such as witness statements; obtaining evidence in real time, such as interception of communications and monitoring of bank accounts; as well as the taking of evidence from the body of a person, including DNA evidence (Article 3(1) - however, *existing* evidence within these categories - for example, existing DNA evidence - does not appear to be excluded (Article 3(2)).⁸⁹

One of the principal differences effected by the EEW proposal from existing practice would be for a relaxation of the double criminality rule, applicable under the 1959 Council of Europe Convention in respect of search and seizure powers⁹⁰ had previously lessened the scope of double criminality. An existing Framework Decision⁹¹ on freezing orders and the non-destruction of evidence, also addresses the issue of transmission of evidence ordered to be frozen and this measure already relaxes, for the purposes of the transfer of evidence, the double criminality requirement for a range of offences (Article 10 of this Framework Decision) (so the relaxation of double criminality is a significant step that had already been taken prior to the EEW).⁹² It is provided that the condition of double criminality for offences not specified in the EEW shall be further examined by the Council five years after the entry into force of the Framework Decision.⁹³ Arguably, the dis-application of double criminality is not all that significant, since in terms of their substantive

⁸⁷ Article 11 of European Evidence Warrant, Brussels 10th July 2006, 11235/06-COPEN 74. The preamble of this instrument states that “The Council adopted at its meeting on 1-2 June 2006 a general approach on the proposal for a Framework Decision on the EEW, with the exception of the Form to be annexed to the instrument and recitals other than those recitals agreed specifically as a part of the general approach.”

⁸⁸ Article 15.

⁸⁹ Hamilton, above n 85 at 64.

⁹⁰ Article 51 of the Schengen Convention 1990, (1991) 30 ILM 184.

⁹¹ Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 181/2 5 7 2000.

⁹² Hamilton, above n 85 at 65.

⁹³ Article 16 (4).

content, legal systems in the EU are broadly similar as to criminal law prohibitions. Moreover, double criminality can be applied strictly or broadly – *in abstracto* (relating to the legal definition of offences – which is strict, since it requires equivalent legal definition, and not just criminalisation) or *in concreto* (relating to the factual definition, ie that the same acts be criminalised, whatever the legal definition in the respective systems – which is thus looser). The fact that double criminality is abolished in relation to *specific* offences actually retains the broad principle of correspondence – arguably the effect of this is just to exclude a strict *in abstracto* application of double criminality.

It will not be necessary for a prior freezing order to have been issued, which would quicken up and streamline procedures. It would seem to follow from the fact that the EEW relates, to a large extent, to evidence already in being means that in many cases an issue as to compliance with domestic law may not arise, as presumably domestic law will already have been complied with in the acquisition of the evidence. The proposal provides that an EEW should be issued only when the issuing authority is satisfied that it would be possible to obtain objects, documents or data in similar circumstances if they were on the territory of the issuing state, even though different procedural measures may be used;⁹⁴ further, the obligation on the executing state is likewise to execute the warrant “in the same way as the objects, documents or data would be obtained by an authority of the executing state.”⁹⁵ The EEW proposal appears to leave some room for Member States in regard to the requirements of their domestic law by providing that an issuing State may require the executing State to comply “with other specific formalities and procedures expressly indicated by the issuing authority, unless such formalities and procedures are contrary to the fundamental principles of law in the executing state”.⁹⁶ The precise implications of this may be unclear in some respects – for example, if there is a breach of procedure by the executing state (ie a breach of its own laws),⁹⁷ which member state (the issuing or executing) would be thus liable. However, it is clear that the general principle of existing mutual legal assistance law - that the laws of the executing state will apply to any request for obtaining evidence – is retained in the EEW proposal, and that its chief effect would be to streamline and standardise to a greater extent procedures across the Union. Even in the EU, developments in mutual legal assistance therefore have been rather modest

⁹⁴ Article 6(b).

⁹⁵ Article 11.

⁹⁶ Article 13(e).

⁹⁷ Article 6 states that the conditions in it shall be assessed only in the issuing State in each case, but this seems to relate to the execution of an EEW, rather than to any subsequent judicial challenge.

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and have not gone much beyond the Council of Europe instruments, which are themselves premised on the traditional principle national sovereignty and adherence to the law of the requested state.

In terms of the general significance of this in the scheme of EU criminal cooperation, it is important to note the background and context of its adoption, which was the Commission Green Paper on the Protection through the Criminal Law of the Financial Interests of the Communities and the Establishment of a European Prosecutor.⁹⁸ This Green Paper contained a far-reaching proposal, that evidence admissible in one member state should automatically be admissible in another member state, in relation to those matters – crimes relating to the financial interests of the Community – over which the envisaged European Public Prosecutor (EPP) was proposed to have jurisdiction.⁹⁹ The EPP would have, as proposed in the Green Paper, competence to initiate and direct prosecutions in national courts¹⁰⁰ (so, under the proposal, there would not be a European court with a special jurisdiction). This would clearly represent a seismic shift in approach for common law jurisdictions, where virtually all the usual rules of admissibility of evidence would be relaxed in relation to this category of evidence. This proposal was first made in 2001, and the degree of criticism it attracted¹⁰¹ appears to be reflected in the more modest scope of the EEW, which does not address the general issue of mutual admissibility at all.¹⁰²

⁹⁸ Commission Green Paper on the Criminal Law Protection of the Financial Interests of the Communities and a European Prosecutor (COM (2001) 715 final, Brussels, 11 12 2001).

⁹⁹ Ibid, at 6 3 4, dubbed ‘free movement of evidence’ by some commentators: A Biehler, Dr S Gleß, N Parra, Dr H E Zeitler, *Analysis of the Green Paper on Criminal-law Protection of the Financial Interests of the Community and the establishment of a European Prosecutor* (Freiburg/Br, Max Planck Institute of Foreign and International Criminal Law, April 2002) pp 33-45, available on the Internet at:

http://europa.eu.int/comm/anti_fraud/green_paper/contributions/pdf/gp_mplanck_de_en.pdf (visited 4th January 2007).

¹⁰⁰ Above n 93 at 3 2 1.

¹⁰¹ See, eg J Fish/President of the Council of Bars and Law Societies of Europe (CCBE), *European Commission Public hearing on the Green Paper on the establishment of a European Public Prosecutor for the criminal- law protection of the Community’s financial interests*, (Brussels, CCBE, 16/17 September 2002): http://www.ccbe.org/doc/En/d_16_170902_en.pdf (visited 4th January 2007).

¹⁰² See C Williams, ‘The European Evidence Warrant: The Proposal of the European Commission’, (2005) *ERA Forum – Special Issue on European Evidence* 17 at 25.

THE COUNCIL OF EUROPE AND EXTRADITION

The Council of Europe Convention of 1957 and Subsequent Instruments on Extradition

The 1957 Council of Europe Convention on Extradition¹⁰³ was the first multilateral treaty at European level to deal with extradition. It places parties to the Convention under an obligation to extradite in respect of relevant offences, but qualifies this obligation by: a requirement of double criminality;¹⁰⁴ a political offence exception;¹⁰⁵ a discrimination exception where extradition is sought for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons;¹⁰⁶ the non-return of fugitives for purely military or fiscal offences;¹⁰⁷ a rule of speciality;¹⁰⁸ and restrictions in circumstances where the death penalty may be imposed by the requesting state.¹⁰⁹ Specific aspects of extradition have been dealt with in subsequent protocols.¹¹⁰ Probably the most significant innovation was the relaxation of a requirement for the requesting state to establish a *prima facie* case against the suspect in relation to the offences for which extradition was sought. Numerous states entered reservations when ratifying the Convention.¹¹¹

In general, as with the ECHR, the 1957 Convention represents minimum common standards rather than innovation. This was reflected, for example, in caselaw developments from the European Court of Human Rights - in particular, *Soering*¹¹² - where the Court suggested that the likelihood of violations of an extradited person's human rights by the requesting state could

¹⁰³ ETS no 024, above n 28.

¹⁰⁴ Article 2.

¹⁰⁵ Article 3.

¹⁰⁶ Article 3.

¹⁰⁷ Articles 4-5.

¹⁰⁸ Article 14.

¹⁰⁹ Article 11.

¹¹⁰ Additional Protocol to the European Convention on Extradition 1975 ETS No. 086, above n 35, narrowing the scope of the political offence exception and specifying the scope of *ne bis in idem* and Second Additional Protocol to the European Convention on Extradition 1978 ETS no 098, above n 37, concerning fiscal offences, *in absentia* trials, and amnesties.

¹¹¹ C Gane & M Mackarel (eds)/International Bar Association, *Human Rights and the Administration of Justice* (1997, Kluwer, 1997) p 621, citing MC Bassiouni, *European Inter-State Cooperation in Criminal Matters* (The Hague, Martinus Nijhoff, 1987) pp 41-62.

¹¹² *Soering v United Kingdom* (1989) Ser A vol 161, 11 EHRR 439.b.

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be a ground for refusal of extradition, which goes beyond what the 1957 Convention makes explicit.

Recent EU Development – European Arrest Warrant

The Framework Decision on a European Arrest Warrant (EAW)¹¹³ by the EU is one of the most significant EU initiatives to date in criminal matters. The immediate context of its enactment was the atrocities in the US of September 11 2001 – a factor that appears to have significantly speeded its adoption through the EU legislative process. The main aim of the Framework Decision was to speed up and facilitate the extradition or surrender of suspects between EU member states. In addition to establishing common standards in a sphere that was to date largely reserved for more conventional multilateral cooperation, the Framework Decision involved a number of departures from the traditional principles governing extradition. One of the most significant of these is the relaxation of double criminality, which requires that the offence for which a suspect is sought to be extradited be a criminal offence in both the requesting and the requested state.¹¹⁴ However, as noted above in relation to the EEW – the abolition of double criminality in respect to specific offences only arguably retains a broad principle of correspondence, since in order to be excepted the crimes would have to come within the list. Other novel aspects are provisions concerning the optional abolition of the rule of speciality; the assignment of most functions of national authorities to judicial personages, rather than the executive; and the non-application of the political offence

¹¹³ See, generally, eg V Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’, (2006) 43 *Common Market Law Review* 1277; G Conway, ‘Judicial Interpretation and the Third Pillar Ireland’s Acceptance of the European Arrest Warrant and the *Gözütok and Brügge* Case’, (2005) 13(2) *European Journal of Crime, Criminal Law and Criminal Justice* 255; J Wouters & F Naert, ‘Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU’s Main Criminal Law Measures Against Terrorism After “September 11”’, (2004) 41 *Common Market Law Review* 909; S Allegre & M Leaf, ‘Mutual Recognition in European judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant’, (2004) *European Law Journal* 200; M. Plachta, ‘European Arrest Warrant: Revolution in Extradition?’, (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 178.

¹¹⁴ The concern has been expressed, for example, that the extra-territorial scope of the EAW combined with the absence of a double criminality rule for a range of offences could have the effect of rendering a person subject to criminal sanction for actions not criminalized in the state where they occur. See Lord Filkin, Parliamentary Under-Secretary of State for the Home Office, in the House of Lords – *Lords Hansard*, 1st May 2003, col 855 (referring to the UK Extradition Bill 2003, ss 64(2) & 65(2), the UK implementing measure); Irish European Arrest Warrant Act 2003, s 32.

exception to extradition. For civil law jurisdictions, a further very significant element of the new measure is that it requires the surrender of nationals. The willingness of civil law countries to depart from this principle perhaps runs counter to the general thrust of this article – it is a good example of how far the EU can go and has gone in reconciling diverse criminal law traditions. However, it was on this ground that the implementing legislation of Germany¹¹⁵ and Poland,¹¹⁶ for example, was declared unconstitutional by their respective Constitutional Courts. Further, for example, Ireland and the UK in their implementing legislation sought to restrict the application of the EAW procedure for pre-trial investigative detention.¹¹⁷ Nonetheless, overall, the EAW is more far-reaching than the EEW and represents the high point of cooperation to date (in contrast, the main innovation of the Council of Europe Treaty on Extradition of 1957, as mentioned above - apart from the fact of codifying existing law - was the relaxation of the requirement for the requesting state to show prima facie evidence of the committal of offences(s) for which extradition was sought); however, if the thrust of the argument in this article is valid, that is perhaps not saying too much.

CONCLUSION

On the basis of an assessment of the three Council of Europe instruments of most relevance to the criminal law and, in particular, criminal procedure, notwithstanding the implicit acceptance of the need for and desirability of European inter-State cooperation, the instruments adopted for the most part allow contracting states to retain their own traditions of criminal law and

¹¹⁵ *Bundesverfassungsgericht*, Judgment of 18th July 2005 - 2 B v R 2236 /04. The German Federal Constitutional Court (*Bundesverfassungsgericht*) held that Germany's implementing legislation for the Framework Decision on an EAW encroached upon the freedom from extradition (Article 16.2 of the Basic Law (*Grundgesetz*)), in a disproportionate manner because the legislature had not exhausted the margins afforded to it by the Framework Decision on the European arrest warrant in such a way that the implementation of the Framework Decision for incorporation into national law showed the highest possible consideration in respect of the fundamental right concerned and infringed the guarantee of recourse to a court (Article 19.4 of the Basic Law) because there was no possibility of challenging the judicial decision that granted extradition

¹¹⁶ Polish Constitutional Tribunal, judgment of 27th of April 2005 concerning Polish law implementing the European Arrest Warrant. The Tribunal held that Poland's implementing legislation violated Article 55(1) of the Polish Constitution, which states that "The extradition of a Polish citizen shall be forbidden". See K Kowalik-Bañczyk, 'Should we Polish it Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', (Oct 2005) 6(10) *German Law Journal*.

¹¹⁷ See Conway, above n 97.

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procedure. In that context, it is easier to understand the, in general, relative caution and slowness of cooperation in criminal matters at EU level (although the EAW is a significant innovation in several respects), notwithstanding the more general acceptance of and engagement with the ideal of cooperation in matters of mutual concern more generally than the EU obviously represents. The relative speed of adoption and innovation of the EAW seems to be explained to a significant extent by the context of post-September 11, when the need for greater inter-State cooperation in combating the threat of international terrorism was most keenly felt. Perhaps it is only such pressures, from the real threats posed by organised and transnational crime and terrorism, that will overcome national adherence to criminal law traditions.