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TACKLING CROSS BORDER CRIME

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There is increasing concern about cross border crime and its implications for the international community. A variety of explanations have been put forward for its increase.

In this era of so called globalisation, it is suggested that the incentives for cross border crime have increased, as criminals have identified the opportunities to gain greater rewards from criminal activity outside their traditional boundaries.

The higher levels of disposable income in Western Europe and North America create a marketing opportunity for the illicit trade of the rest of the world. This is not limited to the trade in drugs but extends to almost all criminal currency; prostitution, pornography, protection and counterfeiting.

However the flow of criminal trade is not all one way. The more developed countries export crime as well as import it. Corruption is an example of a crime exported from more developed countries to those that are vulnerable in the rest of the world. Citizens and corporations from the most developed nations would head any worldwide most wanted list.

Related to globalisation, is the perceived decline of the nation state. The reduced role of the nation state has disturbed or undermined the traditional measures available to discourage and control harmful activity. Increased social and geographical mobility coupled with the dismantling of legal and technical restrictions upon institutions has not only enabled entrepreneurs to create a legitimate global free market, it has also empowered those who would create an illegitimate free market. The creation of a free market in goods and services and the encouragement given to the free movement of capital has contributed to the growth of cross border criminal activity and the free movement of criminals and their criminal enterprises.

Finally, the increase in cross border crime must also be related to the ready availability of technology and global communications that can be readily used to facilitate the commission of cross border crime. The ease with which international communications can be effected is a boon for legitimate and illegitimate businesses alike. It is not just the good guys who have call centres in foreign countries. The classic boiler room fraud employs the same technology, and often the same techniques with the call centre in one country targeting consumers in a second country. The difference is that the boiler room is rather more efficient. They tend no to have automated answering systems

These sentiments are echoed in the European Council's opening statement in of its *Action Plan toCombat Organized Crime* [1] : 'Organized crime is increasingly becoming a threat to society as we know it and want to preserve it. Criminal behaviour is no longer the domain of individuals only, but also of organisations that pervade the various structures of civil society, and indeed society as a whole. Crime is increasingly organizing itself across national borders, also taking advantage of the free movement of goods, capital, services and persons. Technological innovations such as Internet and electronic banking turn out to be extremely convenient vehicles either for committing crime or for transferring the resulting profits into seemingly licit activities. Fraud and corruption take on massive proportions, defrauding citizens and civic institutions alike.'

The net result of current conditions is to have created a situation that is readily exploitable. The previously unremarkable fact that countries' law enforcement capacities and capabilities varied widely within regions, as well as globally, has now become (to use the current jargon) an exploitable 'criminogenic asymmetry'. Such asymmetries allow for the perpetrators of cross border crime to engage in 'jurisdiction shopping', where criminals are able to locate or re-locate their activities to a state that does not criminalise their behaviour or (even if the behaviour is criminal) does not give priority to its detection or prominence to the need to secure its prosecution. Such asymmetries make it possible to fragment enterprises and transactions over more than one country, often in countries that are a long way from the locus of the crime.[2]

Cross border crime is however somewhat shadowy. Much is made of its existence in the popular press. Barely a day passes without some reference to criminal gangs targeting the UK . Little research has been done to comprehensively analyse and empirically confirm the perceived growth of cross border crime. No doubt part of the reason for this is the inherent difficulties involved in gathering data from across several jurisdictions. Efforts to quantify cross border crime are also hindered by the lack of definitional certainty about the meaning of 'cross border crime'.

A distinction must be drawn between international crimes strictly so called (genocide, war crimes and crimes against humanity) that are prohibited as a matter of international criminal law by the Rome Statute to the International Criminal Court and crimes that are international only in the sense that the underlying conduct may cross national borders or may be sufficiently pervasive to warrant international attention. The term cross border crime can be used interchangeably with the term 'transnational' or 'transborder' crime.

This latter type of crime is more formally defined as being an act which: 'jeopardises the legally protected interests in more than one national jurisdiction and which is criminalised in at least one of the states or jurisdictions concerned'[3]. Cross border crime identifies 'certain criminal phenomena transcending international borders'.[4] Cross border crime is also taken to encompass certain types of organized crime (triad or mafia activities) and ideologically motivated political crime (Al Qaeda). Neither of these types of criminal activity necessarily has to have a transnational element. The international connections are often more apparent than real.

I will return later to the distinction between international crime and cross border crime. I will be suggesting that the structures and processes of international criminal law strictly so called may be of assistance in developing strategies for international cooperation in relation to cross border crime.

In exploring how we must tackle cross border crime in a modern, globalised context, it is first important to examine cross border crime in its historical context. It is clear that cross border crime is not a new phenomenon, nor has its increase been precipitated by any great paradigm shift in global economic activity or national political structures. Nor is the use of treaty law to tackle cross border crime a recent phenomenon. International cooperation and strategies for dealing with cross border crime date back to at least the seventeenth century, and are located in a long tradition of 'prohibition regimes' which would commonly rely on treaty law to establish or confirm them. These conventions commonly require criminalisation of particular activities by their states parties in domestic law, a variety of procedural measures such as the establishment of extra-territorial jurisdiction and the provision of mechanisms for mutual assistance or extradition.[5]

According to Nadelmann: 'International prohibition regimes are intended to minimise or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment. They provide an element of standardisation to cooperation among governments that have few other law enforcement concerns in common. And they create an expectation of co-operation that governments challenge at the cost of some international embarrassment.'[6]

These conventions however remain distinct from the wider body of international criminal law, for example the group of 'core crimes'. They are distinct in that they do not provide for penal responsibility before an international tribunal, but rely on national proscription.[7]

Historically these global prohibition regimes were used to suppress activities, which were of concern to the international community because there was shared national interest in suppressing them. Notable examples are piracy, slavery, and the trade in drugs. For each of these regimes, the reasons for the introduction of international treaties will be considered below, along with their relative successes in suppressing the activity in question.

In relation to piracy, a global consensus as to its prohibition emerged as a result of the increased desire for stable relations between states as a pre-requisite for international trade. 'As international society became more orderly, international relations became more regularised, the high seas were perceived as less of a no man's land, and larceny at sea became less justifiable.' [8] Indeed some commentators point to the fact that the sentiments in favour of its suppression demonstrated a moral view that piracy was 'evil.' The strong opposition to piracy thus created global norms requiring states to crackdown on pirates operating from their ports and to enforce national anti-piracy laws regardless of the nationality of the defendant.

Piracy was commonplace prior to the seventeenth century and in part reflected the Hobbesean view of man's original state of nature as being 'nasty, brutish and short'. During the middle ages, unless there was prior agreement between the states, the natural state of relations between states was presumed to be war. In the absence of prior agreement, rulers had absolute discretion as to the treatment of foreigners on their land. The high seas were a no man's land where no rules applied. The increase in international trade during the sixteenth and seventeenth century presented greater opportunities for pirates.

However, during the seventeenth century this growth in trade made it increasingly attractive for states to engage in international diplomacy and bilateral agreements; rulers preferring stable economic relations over piracy. Among the states of Christendom, this proliferation of bilateral agreements was also ideologically motivated. The states of Christendom were newly united against the perceived threat from the non Christian pirates in North Africa and Turkey . Up until the nineteenth century, state sponsored piracy remained an acceptable method of warfare. It was finally effectively eliminated in towards the end of the nineteenth century following the signing of the Declaration of Paris by a number of naval powers. The development of strong national navies had by then made privateering during wartime unnecessary, and the development of mechanised armoured fleets with heavy guns had made piracy a much less attractive and viable option.

Piracy is well established as being subject to universal jurisdiction. All states may both arrest and punish pirates, provided they are apprehended on the high seas or within the territory of the state concerned. The punishment of offenders may take place whatever their nationality and

wherever they happened to carry out their criminal activities. Piracy is now governed by High Seas Convention of 1952 and the Convention of the Law of the Sea 1982. According to Nadelmann the delay in codifying the international condemnation of piracy, was in part a result of the fact that the global norms condemning piracy were so universally acknowledged by the middle of the nineteenth century that a convention would have been viewed as superfluous.[9]

Freedom from slavery was one of the first rights to be recognised as a matter of international law, in the 1814 Bilateral Treaty with France[10] . Various other bilateral and multilateral treaties followed expanding the global criminalisation of slavery.[11] This movement ultimately culminated in the adoption of the 1926 Slavery Convention. [12] 'No other prohibition regime so powerfully confirms the potential of humanitarian and similar moral concerns to shape global norms'. [13] The global prohibition of slavery was unique in that it relied largely on moral arguments in favour of abolition. It was also more clearly a political and moral consensus which originated in Europe that was gradually exported to other parts of the world.

The need for the global prohibition of slavery was primarily articulated by abolitionist campaigners in the UK . These abolitionists were remarkable in that they generated a wave of public opinion against slavery through campaigning and publicising the issue. This public opinion was then utilised to motivate political figures both in Britain and abroad. What was interesting about these campaigns according to Nadelmann was the way in which they utilised Enlightenment humanitarian concepts of human rights and obligations as the justification for the abolition of slavery. Other novel features of the international campaign against slavery was the use of the British navy almost as an international police force to suppress the traffic in slaves. Economic sanctions were also utilised for the first time in peace time. Finally, multinational committees were created which were created in order to oversee the implementation of the various treaties.

This creation of a broad political and moral consensus when combined with the waning power of the remaining slaveholders and arguably lessening economic viability of slavery in the rest of the world, eventually resulted in the effective abolition of the slave trade world wide. The abolition of the slave trade was unique in that it resulted in concerted international action which criminalised all trade in a particular 'commodity'. Again, however it must be acknowledged that there were various economic factors that had a role to play in the elimination of slavery. Slavery was particularly susceptible to efforts designed to suppress it and slaves were replaceable by other forms of cheap labour.

The global 'war on drugs' was primarily instigated by the United States during the nineteenth century and was presented in similar moral terms as the abolition of slavery. The net outcome of these campaigns has been the worldwide criminalisation of drugs and drugs trafficking as a matter of national legislation alongside a number of international conventions. There are three major international drug control treaties. The Single Convention on Narcotic Drugs 1961 [14] aims to combat drug abuse by coordinated international action. First, it seeks to limit the possession, use, trade in, distribution, import, export, manufacture and production of drugs exclusively to medical and scientific purposes. Second, it combats drug trafficking through international cooperation to deter and discourage drug traffickers and by state parties taking such legislative measures as are necessary to fulfil these obligations by criminalising the above activities. The Convention on Psychotropic Substances 1971 [15] establishes an international control system for psychotropic substances. It responded to the diversification and expansion of the spectrum of

drugs of abuse and introduced controls over a number of synthetic drugs according to their abuse potential on the one hand and their therapeutic value on the other. The Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 [16] includes provisions against money laundering and the diversion of precursor chemicals. It provides for international cooperation through, for example, extradition of drug traffickers, mutual assistance and transfer of proceedings.[17] The limitations of these conventions will be further discussed below.

Psycho-active substances had long been used across the world in many different cultures. However the moral movement for prohibition was generated by a number of politically prominent missionaries returning to the United States from the Far East alongside a number of public health campaigners. This movement towards prohibition was accompanied by advances in technology for the refining of substances such as coca and opium into more socially damaging and addictive forms. Nevertheless, it was not accompanied at the time by any objective analysis of the relative harms of socially acceptable substances such as coffee or tobacco as compared with other 'illicit substances'. Nor was the abolitionist movement accompanied by any objective analysis of the effect of prohibition; instead, these campaigns appealed to the concerns about the effect of such substances on the working classes and the potential impact on their overall economic output. It also appealed to the racial stereotyping of the day which associated the consumption of such substances with various vilified immigrant groups.

When compared with the movements against piracy and against slavery, it is clear that the movement to secure the worldwide prohibition of drugs has generated a much more extensive body of treaty obligation and national law without achieving anything like the same level of widespread popular support and without securing the effective suppression of the trade.

The approaches outlined above were what might be termed the original attempts at creating international prohibition regimes as a means of dealing with cross border crime. As can be seen, there was frequently some delay in adopting international conventions. The most effective action appears often to have taken place before the formality of international agreement (and universal prohibition) and to have been based on strong national action directly targeting the activity. Moreover the existence of some form of moral consensus (or at least general public acceptance) also appears to have played a part in ensuring the effectiveness of national action.

The other vital feature in the case of piracy and slavery was the fact that the national authorities were able to take effective direct enforcement action because of the nature of the conduct. There was no not need to rely upon any element of international co-operation in order to discover, interdict and disrupt the trade. Pirates could be apprehended on the high seas and tried for their piracy by any interested nation. Slavers similarly could be intercepted on the high seas and the slave markets were obvious targets for enforcement activity.

Drugs crime has proved far less susceptible to enforcement activity. The activity is widespread and difficult to detect. The prohibition on the use of drugs does not appear to have commanded the same popular acceptance at least on the part of consumers and producers. It does not seem to evoke the same level of moral condemnation in the societies affected by it.

It also demonstrates that the existence of international conventions and the creation of a seamless web of prohibition in every country is not a philosopher's stone that is capable of turning the base metal of prohibition into the gold standard of eradication. The symbolic value of

many of the modern conventions may have been greater than their practical utility.

More recent attempts to do deal with cross border criminal activities have moved away from relying on global consensus to create a concerted pattern of international activity and cooperation and have instead placed greater reliance on national procedures.

Obviously such an approach is problematic in the context of cross border crime as it creates divergence between states and leaves open the possibility of jurisdiction shopping for the transnational criminal. It is precisely the opposite of what the original prohibition regimes outlined above were attempting to achieve, in terms of avoiding the creation of havens where criminals could escape prosecution or punishment. Those original prohibition regimes emphasised the need for standardisation of procedure and offences.

A good example of this type of concentration on national procedures is provided by the attempt to suppress money laundering. Money laundering arose as an international political issue after the 1988 Vienna Convention quantified the threat to the industrialised world by estimating the proceeds from drug trafficking at $300 billion per year; later estimates raised the figure to $500 billion.[18] The Financial Action Task Force on Money Laundering (FATF) was established by the G-7 Summit that was held in Paris in 1989 and has since sought to promote a framework for anti-money laundering efforts and for universal application. They provide a set of recommended counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation. The so called Forty Recommendations have been recognised, endorsed, or adopted by many international bodies. More recently, following the events of 9/11, the FATF has issued new international standards for combating terrorist financing.

There have also been some regional efforts, most notably successive EC Directives[19], however, despite this, profound asymmetries of prohibition have emerged. The UK now has the most draconian money laundering legislation in the world. It criminalises dealing in money even where the money might not be the product of the commission of any crime in its country of origin; it prohibits dealing in money which is the product of fiscal offences (something that would have been unthinkable a few years ago – and remains unthinkable in much of the rest of the world). The UK law requires professionals dealing with money to report any suspicions as to the existence of money laundering anywhere in the world regardless of the amount involved and no matter how trivial the crimes. Such an extreme form of prohibition can surely only be effective if economically and geographically contiguous states can be persuaded to adopt a similarly wide ranging prohibition. However there are no signs of such an extreme form of prohibition being adopted anywhere else in the world. I would question whether in the circumstances the UK legislation may not be counter productive. It creates pressure on other states and offshore centres which do not impose the same standards, since it is bound to encourage the professional money launderers to move their activities out of the UK to states who are less able to combat the problem whilst still imposing a heavy and possibly unjustifiable burden on UK financial institutions in compliance costs.

So far I have concentrated on the development and standardisation of cross border laws. However it will be understood that the mere enactment of a prohibition and the imposition of a criminal sanction will never be effective on its own to secure compliance with the law. Compliance with the law can only be secured if offences are detected and investigated and if the offenders are brought to trial, convicted and punished. In the context of cross border crimes this

presents a particular challenge to the law enforcement authorities. Often the victims of crime will be in one country, the perpetrators of a crime will be in a second country, the evidence required to secure a conviction in a third, whilst the proceeds of the crime are in a fourth. This means that there must be national procedures to bring the perpetrators to trial in the country of the victim (extradition) and to enable the state concerned to secure the evidence and the return of the money (mutual assistance).

These procedures are not new. Extradition for example has been employed as a technique for tackling cross border crime since at lease 1280 BC when a peace treaty between Rameses II of Egypt and a Hittite Prince provided for the reciprocal surrender of criminals who had fled during the war[20]. However widespread development of international extradition arrangements did not start until the 18th Century. Even then the arrangements tended to be made between contiguous or at least neighbouring states. The main focus of concern was in relation to military deserters and other wandering bands of men. It was only in the 19th Century, with the development of steamships and railways, that extradition treaties were made between states who were geographically isolated from one another and that concern was focused on a broader range of crimes.

It was not simply the increased mobility of criminals or the range of their crimes that fuelled the growing enthusiasm for extradition treaties. The developing cities in the industrialised countries provided relatively safe havens for criminals to live in obscurity. The presence of these criminals was seen as a grave threat to society. London was described in the mid 19th century as 'a cosmopolitan thieves kitchen whose murk was occasionally lightened by an exotic bird of passage'[21] It was thought that extradition was a possible means for putting the birds of passage to flight.

The pace of treaty based activity slackened in the latter half of the 20th century but the sombre events of 9/11 has added a fresh impetus to the conclusion of extraditions treaties geared to the so called 'war on terror'.

However rhetoric at governmental and inter-governmental level has often not found any effective expression in national practice. Governments have been more willing to make policy pronouncements and to pursue legislative or treaty arrangements rather than taking effective steps to make extradition work on the ground.

The most effective schemes of extradition remain those where there is a high degree of public confidence in and popular support for the operation of the scheme. Extradition between regions in a federal state (such the interstate extradition that are used in Australia or the United States) and extradition between contiguous states sharing a common legal heritage (such as that between the Nordic states) demonstrate this clearly. Indeed the need for public confidence and popular support is starkly illustrated by the way in which the level of extradition between the Republic of Ireland and the UK has waxed and waned in harmony with the waxing and waning of public confidence in the legal systems of these states.

The recent Extradition Act 2003 is unfortunately an example of governments being more interested in legislative rhetoric than making tangible and practical improvements. For nearly 100 years there were two effective schemes of extradition in force in the UK , under the Extradition Act 1870 and the Fugitive Offenders Act 1881 and its 1967 successor. These schemes were combined in a single Act in 1989.

However the schemes were labelled as 'outdated and cumbersome' and declared to be causative of delay. A pronouncement that was made without the benefit of any comprehensive analysis of the operation of the schemes in practice. They were replaced with great fanfare by an Extradition Act 2003, a statute that was supposedly designed to sweep away the delays in the system.

The Act has certainly swept away many features of extradition which have previously provided some protection for fugitives from oppressive treatment in foreign states. The minimal protection of dual criminality (which required a requesting state to establishing that what the person was said to have done would have been a crime in the UK) has been swept away in relation to all category 1 countries. The protection of the requirement that some prima facie case (or probable cause) has to be shown before a person is removed from the country has disappeared in relation to category 1 and many category 2 countries. Strict time limits have been laid down for the commencement of proceedings. The great bulwark of the writ of habeas corpus has been replaced by neutered right to a statutory appeal. This last amendment was presumably intended to solve the problem that the High Court had been increasingly concerned at the bad faith evidenced in a growing number of requests made by some of the UK's treaty partners. The solution has taken the form of the abolition of the right of the High Court to investigate bad faith.

Notwithstanding these changes, the unfortunate fact is that the stated purpose of the legislation to reduce delays has not found any practical expression that would be effective to tackle the root causes of delay. It is notorious amongst those who practice extradition law in the UK that many of the delays in the process are due to the lack of resources devoted to the process rather than any particular technical difficulties created by the various legislative schemes. The Home Office Judicial Co-operation unit and the specialist sections within the CPS are understaffed and overstretched – so too are their foreign counterparts. This means that even relatively simple issues arising at the level of the executive may take weeks, months, and even possibly years to resolve. I know of at least two cases where the delays in getting responses from the requesting state coupled with the long consideration given to the case in the Home Office has led to years of delay.

There are also only a limited number of specialist lawyers, courts and judges available to conduct the necessary judicial hearings and thus hearings, even when they commence with the statutory time limits, often have to be slotted in around the regular work of these courts, and cannot be completed within those time limits. Indeed the only specialist extradition centre in England , the Magistrates Court at Bow Street , is to be closed and the building sold off for development.

Much greater practical effort and many more resources will have to be devoted to this process if the UK really wants to deliver the co-operation through speedy extradition that it has promised. It will have to be accepted that the system must have substantial spare capacity, otherwise it will continue to show the tendency, prominent during the processing of the Pinochet extradition request, to grind to a halt whenever any substantial demand is made of it

However the single most effective method of securing speedy extradition has been shamefully ignored. That is the development of the type of mutual confidence that exists in federal or contiguous extradition. There is no reason in principle why this type of confidence should not exist in relation to extradition to more distant states. However confidence must be encouraged, nurtured and sustained if it is to thrive.

If a fugitive has confidence in his rights in the requesting state he is much more likely to consent to (or at least not contest) his extradition. If a fugitive were to reassured about his entitlement to bail (or provisional release) he would be more inclined to surrender to a foreign court; if a suspect was confident that he would not face interrogation without legal advice and that any interrogation would be properly recorded he would be much more willing to co-operate. Guarantees as to the availability of legal representation and legal aid at trial; about the provision of translated copies of the relevant documents; and about the service of an interpreter are all matters that affect the willingness of a person to go to a foreign country to face trial. If these basic rights were guaranteed, the incentive to contest any extradition would be significantly reduced and the courts would almost certainly be less inclined to listen at length to the sort of complaints about conditions in the requesting state that are frequently made by fugitives. Complaints about torture or prison conditions might still be made but the courts would be entitled to conclude the fugitive would be able to assert and vindicate his rights in the requesting state rather than having to rely on the courts in the UK .

Despite the obvious benefits that would flow from these types of confidence building measure (and the fact that the provisions of such benefits would give practical effect to the principle said to underlie all extradition treaties that is reciprocal trust and faith in the judicial system of the parties) no real attempt has ever been made to secure that these basic rights are guaranteed. These rights could, of course, be incorporated as a part of any treaty arrangement. However the modern treaties have tended simply to ignore the need to secure the rights of suspects or defendants. Indeed in a particularly egregious example of its kind, the 2003 US/UK treaty has not only failed to deal with these matters, but in Article 18, has for the first time permitted the prolonged (and potentially indefinite) detention of a person extradited for any offence for a period of time that is entirely within the discretion of the executive powers in the requested state.

To be fair, the EC Commission has at least acknowledged the importance of suspects' rights to the effective working of mutual co-operation in criminal matters generally. In 2003 the Commission published a green paper on Procedural safeguards for suspects and defendants[22]. The Green paper acknowledged that the existing divergent practices in relation to the rights of suspects had hindered mutual trust and confidence, and that in order to counter that risk, action needed to be taken on procedural rights.

The Commission pointed out that even as between signatories to the ECHR there were very differing standards within the member states as to the manner in which the fundamental rights are delivered and that there continue to be many violations of the ECHR. These jeopardize mutual trust and affect the smooth operation of the mutual recognition principle. They make a mockery of the idea that there should be a common minimum standard of procedural and substantive protection throughout the EC.

A good example of the differing standards applicable within the EC is to be found in the right of access to lawyers during police interrogations. The British experience is that this right (coupled with tape recording of any interviews) is a vital measure to avoid the risk of false or manufactured confessions. Thus in the UK lawyers may consult privately with their clients and be present during their interrogation by the police, which must be tape recorded. In France , by contrast, before 2000, the right was considered satisfied by a 30 minute consultation 20 hours after the suspect had been placed in police custody – by which time one or more interrogations will have taken place. Since 2000, the suspects may see a lawyer from the start of detention – but still for only 30 minutes and the lawyer is not permitted to be present during the police

interrogation of the client.

In the absence of tape recording, this leaves suspects in France in a much weaker position than those in the UK . This is explained in part by the different, more inquisitorial, procedure for the investigation of crime in France . In theory, investigations are conducted or supervised by judicial officers who can ensure both an effective investigation and the protection of the rights of the defence. In this way, the suspect is thought to be less in need of legal assistance. However, this is does not work in practice. First, judicial supervision of suspects held in police custody is a distant form of oversight, not a close monitoring of treatment of the suspect. The oversight consists of a largely retrospective and cursory review of the paperwork. Secondly, the period of police detention and custody has yet to be recognised as central to the determination of the case. The history and culture of judicial supervision is such that the police investigation is regarded procedurally as less important; a preliminary enquiry before the 'real' investigation by the judge. However, judicial investigation by the juge d'instruction takes place in only some 8% of all cases. Supervision by the public prosecutor (where the police question the suspect with no lawyer, no tape recording and no judicial officer present) has become the norm of judicial supervision[23].

I do not by this comparison intend to suggest that the UK system of justice is superior to the French. There are aspects of UK trial practice that would shock a French lawyer to the core. The inability of the court (as opposed to the parties) within the English system to investigate the truth of any particular aspect of the case is a serious weakness. Many of the recent problems concerning the use of forensic experts in difficult cases might have been avoided if the court had power to investigate the evidence and determine its true value before trial.

It is these differences in standards which gives rise to understandable anxiety on the part of those affected by cross border co-operation. However the draft framework document[24] that has emerged from the EC consultation is disappointing. Indeed disappointing is probably to put it far, far too low. The limited rights provided are so hedged around with qualifications as to be functionally useless.

Furthermore the Green paper and draft framework document deal with only a restricted number of rights. The right to bail (provisional release pending trial) and the right to have evidence handled fairly have not yet even got to the point of being the subject of a green paper.

There is thus no real prospect of substantial progress being made in streamlining extradition until there is a sea change in approach to the twin problems of confidence and resources.

The other vital procedural tool essential for the purpose of tackling cross border crime is the provision of effective mutual assistance in criminal matters. Mutual assistance developed first in the context of European assistance in civil matters through the work of the Hague Conference on Private International Law which met first in 1893. The conference has now largely lost its European bias and its membership includes most of the developed countries of the world.

Mutual assistance in criminal matter was relatively slow to develop, partly due to the common law tradition of relying largely on oral evidence in criminal trials, thus rendering mutual assistance of limited utility. It may also reflect the xenophobic attitude often adopted to requests by other countries. In 1900 the Foreign Office was moved to describe a perfectly proper commission rogatoire issued in connection with criminal proceedings in Belgium as 'a piece of

impertinence'[25]

Mutual assistance in criminal cases should be available when a state is unable to continue with an investigation or procedure on its own and requires another state's help, such as to hear witnesses or carry out surveillance on persons located on the other state's territory or to freeze the proceeds of crime.

The last 50 years has seen a burst of treaty based activity, both regional and bilateral[26]. However all too often the treaty rhetoric has not be borne out by what has happened in practice on the ground. There have been substantial delays in implementing those treaties that have been agreed. The existing procedures are slow and inefficient.

The European Convention on Mutual Assistance in Criminal Matters signed with much fanfare in 2000 and designed to modernise and streamline procedures within the EC has yet to come into force. Even where there is an effective international agreement to co-operate, differences in national laws often result in barriers to that co-operation because of the wide variation in national powers available for example to enter premises for the purpose of search and seizure or to obtain real time information.

Within the EC it is proposed that a European Evidence Warrant should now take the place of the 2002 Convention in an effort to secure that the mosaic of international and EU Conventions governing the cross-border gathering of evidence within the EU may be replaced by a single EU body of law. It remains to see whether this lofty ambition can be realised.

As is the case in relation to extradition, states have also failed to devote the resources that are necessary to make those systems that are in force work in practice. There are the same serious resource constraints. The UK Central authority in Home Office is overstretched, the courts cannot, and do not, treat these applications as a priority over national business and the availability of specialist police officers and prosecutors is limited. The provision of assistance almost inevitably involves some dialogue with the requesting state and (as is the case with extradition) this engenders delay.

I would not wish it to be thought that, by singling out the UK for the purpose of analysing the difficulties associated with judicial co-operation, that it is typical of all states. In fact the UK has displayed a high level of zeal for improving the systems of extradition and mutual assistance compared to many other states. It illustrates the depth of the problem that even a zealot is failing to deliver an effective and speedy system.

In addition, on any view, the rising level of cross border crime demonstrates clearly that national procedures directed at dealing with this type of crime have not been effective. I have already explored a number of reasons for this.

But perhaps the most significant and distinctive reason for the failure of the procedures used to date is that they depend upon the prior detection, investigation and identification of perpetrators before any substantial cross border assistance is available.

Extradition is only available once a suspect have been identified, his whereabouts are known and sufficient credible information is available to implicate him in the commission of crimes in order to justify the issue of a warrant. Many extradition arrangements still require the provision of evidence or material establishing probable cause.

Mutual assistance in relation to the provision of evidence or the freezing of assets is similarly restricted by the need to identify the whereabouts of the evidence and assets before any request may be made. In addition it is then necessary to identify with some specificity the areas of interest to the enforcement authorities and the type of assistance sought.

Thus it will be seen that the national mechanisms are only of any help to a state if it has already made considerable progress in helping itself. A state cannot get any assistance if it does not know that a crime has been committed (where for example state A is unaware that millions of dollars have been deposited on behalf of a state A minister in state B) or it does not know how the crime was committed (i.e. it is told that the state A minister has taken a bribe but does not know how or where the money was paid).

The only attempt to fill this lacunae has occurred in the context of terrorism. Attempts have been made in that context to require active co-operation through intelligence sharing. It remains to be seen how effective this will be. However until there are arrangements for such active co-operation in respect of a much wider range of crimes it is very hard to see how cross border crime can be effectively tackled. Active co-operation would require the cross border sharing of police information such as DNA databases, covert intelligence, suspicious transaction reports and the like.

The reluctance to develop institutions such as Europol and Interpol suggest that this type of active co-operation is a long way off.

The above discussion shows that there are a number of issues for consideration when developing new strategies for dealing with cross-border crime.

First, humanitarian and moral considerations should inform the selection of those cross border crimes that may be the subject of effective international action. Certainly these considerations have been a source of strength for prohibition movements in the past. Modern concerns with fiscal crime or with corruption do not appear to have captured the moral high ground. Without this element global prohibition may be hard to achieve and harder still to enforce.

Secondly, it is clear that the effectiveness of prohibition regimes may be affected not just by their moral authority, but by the structural features of the criminal conduct itself. For example, the elimination of drug trafficking has been hindered by the relatively concealable nature of illicit drugs when compared with relatively unconcealable nature of slaves.

Thirdly, as any new regimes are likely to be in response to newly perceived threats, attempts to combat these new types of cross border crime must be carefully examined. We have seen that the responses to drug trafficking were swayed by the political and moral agenda of those advocating their abolition. It is absolutely vital that we assess the nature of an emerging transnational threat with particular care, along with the appropriateness of penal responses. In the modern climate Boister rightly points out: "Rhetorical assertions of such a threat may presume a common interest in suppression where none exists and may lead to legal overkill. Transnational criminal law has developed in response to the pressing issues of the time.'

Fourthly, the current patchwork of suppression conventions which adopt a multiplicity of approaches do not form a coherent system of law. As jurisdictional barriers continue to be eroded by increased opportunities for transnational criminal activity created by globalisation, the challenge will be to make this system more coherent and capable of practical application.

Given the limited success at a national level it may be that the future goal should be to create regional or international bodies to help deal with cross border crime. There is nothing to prevent such an approach being used outside of the core international crimes. There is no reason in principle why regional or international bodies should not be created to deal with such offences.

However this may require a substantial adjustment to current thinking. The Diceyan view of criminal activity as completely local in its effect, has pervasive influence even to this day. This principle is expressed in a number of jurisdictions:

'No society takes concern in any crime, but what is hurtful to itself.'

'Penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority'.

'All crime is local[27]'

However the changing shape of crime must be recognised. As Lord Griffiths observed[28] in the 20 th century crime ceased to be largely local in origin and effect. Crime became established on an international scale and the common law, along with the worlds other legal systems, has to face the new reality.

Regional or international action may be the answer, or at least a partial answer to address this new reality. The notion of separate substantive laws and procedures for such crimes does not appear to be inherently objectionable. The practical problems surrounding the co-existence of two legal regimes (one national one international) for crimes do not seem to be insuperable.

The treatment of the core crime of genocide demonstrates that it is possible to have a national, regional and international response to a crime without fragmenting or diluting the enforcement effort.

The Convention on Prevention and Punishment of the Crime of Genocide was signed in 1948. The structure of the convention did not provide for a system of implementation. It stated that persons charged with genocide should be tried by a competent tribunal of the state in the territory of which the act was committed or by an international penal tribunal.

The Genocide Conventions were until the 1990s seen largely as having historical significance; however the events in former Yugoslavia and Rwanda made it necessary for the international community to re-visit them and adapt them for modern purposes. The International Tribunal for the Former Yugoslavia and International Tribunal for Rwanda have been successful in investigating and prosecuting individuals accused of the crime of genocide, within defined, jurisdictional, chronological and geographical limits.[29]

In addition, as I have said the Statute to the International Criminal Court has recognised genocide as one of its core crimes. Genocide is described in Article 1 of the Genocide Convention as a 'crime under international law' as distinct from the so called 'treaty crimes' such as under the 1988 Drug Trafficking Convention, in which drug trafficking is stated in the preamble to be merely an 'international criminal activity'. As such, and strengthened by its inclusion in the Rome Statue of the ICC, genocide is firmly established as a crime contrary to customary international law which means that criminal liability at a national or international level may be imposed even in the absence of domestic prohibition. Genocide is thus subject to direct

enforcement[30] where the individual may be prosecuted before a permanent international criminal court, a regional court or a national court.

The responsibility of national courts has recently been reaffirmed, at least in European terms by the Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes[31], which requires the EC states, where they receive information that a person within the state or that has applied to reside in the state is suspected of having committed or participated in the commission of genocide, to ensure that the relevant acts are effectively investigated, and, where justified, prosecuted in accordance with national law. Cooperation at transnational level between authorities of the states parties to the Rome Statute, including the member states is also encouraged.

I believe that the time may have come to accept that there are crimes, outside of the 'core crimes' identified in the Rome Statute, that may require the establishment of international or regional courts as an additional weapon in the armoury of law enforcement. The coming into force of the Rome Statute and the activation of the ICC suggests that international society (with the notable exception of the USA) may have accepted the challenge of dealing with international criminal law in a more coherent manner.[32]

However it is be necessary for any new international or regional body to have fully developed substantive and procedural laws and directly enforceable investigative and judicial powers giving it the jurisdiction to investigate offences and try individuals directly before it can hope to be accepted or effective.

It is not possible to create such a body piecemeal. As the Russian proverb goes 'It is not possible to cross a river in two jumps'. If such a body is to be established and accepted its rights and obligations must be clearly defined and understood. Its powers and duties must be agreed. There must be a clearly defined relationship with national laws.

The failure of the proposal for a European Public Prosecutor in the Corpus Juris[33] demonstrates that it is not possible to create a supra national or regional authority without a fully developed constitutional framework with full judicial oversight and executive accountability.

The type of regional or international court that I have in mind could not and should not be created by making incremental changes to existing institutions. Organisations such as Eurojust, Europol and Interpol cannot be adapted to fulfil a different role by tinkering with their remit.

Many questions arise as to the way in which such regional and/or international courts would operate. Clearly the political will for the establishment of such courts is vital, since it would have an effect on national sovereignty and on states' autonomy to define the ambit of their criminal law. It is inescapable that national governments would have to surrender sovereignty, if such a court is to have directly enforceable powers.

The continued opposition to the suggested appointment of a European Public Prosecutor's Office (EPPO) within Eurojust[34] suggests that states may not yet be ready to surrender powers in this area. The UK government sees no need for the creation of a European public prosecutor. I agree for the reasons already given. However government policy appears to proceed on the assumption that national methods alone are sufficient for dealing with cross border crimes. That is an assumption that is not necessarily justified

It is of course obvious that, in terms of identifying the types of crimes that should be within the jurisdiction of such a body, careful attention would need to be paid to the social construction of cross border criminal threats and the appropriateness of any penal responses. Once again the failure of the EPPO proposal illustrates the point. There was no widespread moral crusade supporting the eradication of crimes against the EC's financial interests so as to persuade the Europeans and the European states that such crimes deserved a regional response.

The offences would have to be underpinned by common regional or international standards and values. Any variation in standards might affect the legitimacy of the bodies that seek to enforce them. One way of ensuring that the subject matter reflects only the most strongly felt regional concerns would be by developing the definitions and jurisdiction for such offences through an open, transparent and democratic process.

Such international and regional courts could only have legitimacy if they have fully developed procedures that provide rights for defendants as well as investigators and prosecutors. It is not possible by repressive methods to secure the public support that is necessary to secure support and co-operation in practice. The EPPO proposal was doomed to failure once it emerged that there was no clear framework of jurisdictional rules or judicial mechanisms for controlling such a prosecutor or for protecting those who might suffer at his hands.

The provision of adequate funding and support by the states would of course be essential. But it may be that states would be less able to shirk their responsibilities in a transparent regional organisation than within their own national boundaries.

It is in the interests of society as a whole that problems of cross border crime are tackled and eradicated. We must be as flexible and inventive in our reaction to these problems as the criminals are seizing new opportunities. It would be a mistake on doctrinal grounds to shut our minds to the possibility of some better method of dealing with these problems. We should begin debating those questions now.

[1] 28 April 1997 , [1997] OJ C251/1

[2] See Passas N, 'Cross Border Crime and the Interface Between Legal and Illegal Actors', in Van Duyne P, Von Lampe K and Passas N (eds),*Upper World and Under World in Cross-Border Crime* (Wolf Legal Publishers, Nijmen, 2002)

[3] Passas N, 'Cross Border Crime and the Interface Between Legal and Illegal Actors', in Van Duyne P, Von Lampe K and Passas N (eds), *Upper World and Under World in Cross-Border Crime* (Wolf Legal Publishers, Nijmen, 2002), at 13.

[4] Mueller, 'Transnational Crime: Definitions and Concepts', in Williams P and Vlassis D (eds), *Combating Transnational Crime* (2001) at 13.

[5] See Boister N, 'Transnational Criminal Law', 2003 *EJIL*

[6] Nadelmann E, 'Global Prohibition Regimes: the Evolution of Norms in International Society', in Passas N (eds) *Transnational Crime* (Ashgate, Aldershot, 1999), at 490.

[7] See Boister N, 'Transnational Criminal Law', 2003 *EJIL*

[8] Nadelmann E, 'Global Prohibition Regimes: the Evolution of Norms in International Society', in Passas N (eds) *Transnational Crime* (Ashgate, Aldershot, 1999), at 481.

[9] Nadelman E, 'Global Prohibition Regimes: the Evolution of Norms in International Society', in Passas N (eds) *Transnational Crime* (Ashgate, Aldershot, 1999), at 490.

[10] Additional Articles to the Paris Peace Treaty of 30 May 1814 , 63 CTS 193.

[11] Treaty of London 1841,Treaty of Washington 1862 and Brussels Convention of 1890

[12] 25 September 1926 , 60 LNTS 253

[13] Nadelmann E, 'Global Prohibition Regimes: the Evolution of Norms in International Society', in Passas N (eds) *Transnational Crime* (Ashgate, Aldershot, 1999), at 491.

[14] 520 UNTS 204 see http://www.unodc.org/pdf/convention_1961_en.pdf

[15] 1019 UNTS 175 see http://www.unodc.org/pdf/convention_1971_en.pdf

[16] See http://www.unodc.org/pdf/convention_1988_en.pdf

[17] See UN Office of Drugs and Crime,http://www.unodc.org/unodc/en/un_treaties_and_resolutions.html

[18] See Van Duyne PC, 'Crime-Entrepreneurs and Financial Management', in Van Duyne P, Von Lampe, K and Passas N (eds) *Upper World and Under World in Cross-Border Crime* (Wolf, Nijmegen , 2002) at 62.

[19] See 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceed of Crime, the 1991 European Community Directive on the prevention of the use of the financial system for money laundering and the amending Directive of 2001

[20] Shearer Extradition in International law

[21] Thornberry 12 ICLQ 414 at 424

[22] COM(2003) 75 final, 19.2.2003.

[23] Hodgson, J. (2002) "Constructing the pre-trial role of the defence in French criminal procedure: An adversarial outsider in an inquisitorial process?" International Journal of Evidence & Proof 6(1) 1-16

[24] SEC(2004) 491}

[25] McClean International Co-operation in Civil and Criminal Matters

[26] The 1959 Council of Europe Convention and its 1978 Protocol on Mutual Assistance in Criminal Matters, the Benelux Treaty of 1962 and the 1990 Schengen implementation Convention and the 2000 European convention mutual assistance in criminal matters and the 2001 Protocol concerning mutual cooperation on banking information

[27] *Macleod v. Attorney-General for New South Wales*[1891] A.C. 455,

[28] Liangsiriprasert v. US Government [1991] 1 AC 225 at 251

[29] See Shaw M, *International Law*, at 209-212 (Cambridge University Press, 1997)

[30] Albeit, subject to state enforcement of the orders of the ICC.

[31] Council Decision 2003/335/JHA 8 May 2003

[32] See Boister N, 'Transnational Criminal Law', 2003 *European Journal of International Law*

[33] See the 9 th Report of the Select Committee on the Corpus Juris 18 th May 1991

[34] COM (2001) 715 final, 11.12.2001.