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The Practice of Shared Responsibility in relation to Cross Border Law Enforcement

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The Practice of Shared Responsibility in relation to Cross Border Law Enforcement

Saskia Hufnagel[*]

1. Introduction

This chapter focuses on the shared responsibility of multiple state-actors for their contribution to harmful outcomes in the area of cross-border law enforcement.[1] Two situations are to be distinguished: police cooperation and the exercise of extraterritorial jurisdiction. As the two can at times overlap, for example when treaties allow for the exercise of police powers on foreign territory, they will be discussed together.

The main question addressed is whether, in situations where cross-border law enforcement causes harm to suspects or victims in the criminal trial process, the states involved can share responsibility for such harm.

Sections 2-4 discuss three levels of cooperation: 'international cooperation' (meaning cooperation between remote countries with infrequent cooperation practice); 'regional cooperation' (occurring between countries forming part of a legally determined region, such as the European Union); and cooperation between two or more states with a common border region, often triggered by a common crime problem.[2]

Section 2 of the chapter addresses the international level and, in particular, law enforcement cooperation through the mechanisms of Interpol and international police liaison officers. The

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[1] See the introductory chapter of this volume for a definition of the term 'shared responsibility', Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), 1, at __.

[2] See for detailed overview S. Hufnagel, 'Cross-Border Law Enforcement in the Area of Counter-Terrorism: Maintaining Human Rights in Transnational Policing', in C. Walker and A. Masferrer (eds.), *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Cheltenham: Elgar Publishing, 2013), 241.

international mechanisms discussed in section 2 are predominantly informal practices which distinguishes them from the cooperation discussed in sections 3 and 4.

Section 3 discusses regional level cooperation and, in particular, cooperation mechanisms within the European Union (EU). Examples are Joint Investigation Teams (JITs), but also other strategies, such as Europol and measures created under the Schengen Convention[3] (e.g. cross-border incursions and surveillance). What is striking at the regional, compared to the international, level is the occurrence of formalised rather than informal cooperation mechanisms. Moreover, instances where laws on cooperation were circumvented or enforcement powers were exercised in the absence of a legal basis are investigated in this section.

Section 4 gives examples of international cooperation strategies in border regions, which can be both formal and informal, but usually start as informal strategies which are subsequently formalised (legitimised) by legislation. This section also discusses in detail examples as to how the law is implemented on the ground, and the potential for harmful outcomes.

Section 5 investigates actual cases of collisions of legal rules in international police cooperation between states with no common border region and in an absence of legal rules determining cooperation.

The chapter closes with a conclusion as to the value of formalisation in the area of cross-border law enforcement in relation to shared responsibility.

2. Cooperation at the international level

At the international level there are two institutionalised practices of cross-border law enforcement: Interpol (2.1); and liaison officers (2.2). Both international police cooperation strategies are governed by a high degree of informality. In the case of Interpol, it could be said that cooperation between 190 states parties would not be possible on a formal level. While two or three states with similar legal systems, policing, and human rights standards

[3] For the purposes of this study, the Schengen Convention is considered a regional or multilateral initiative in its early stages (1985-1999); after 1999, when the *Schengen Acquis* was integrated into the TEU by the Treaty of Amsterdam's [Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, in force 1 May 1999, (1997) OJ C 340/1 (Amsterdam Treaty)] Protocol Integrating the *Schengen* Acquis into the Framework of the European Union, (1997) OJ C 340/93, the Schengen Convention was regarded as a harmonised EU initiative.

might agree on binding legal rules to establish police and justice cooperation, this is less likely for all states of the world working within Interpol. With regard to liaison officers, cooperation has to be governed by informality to increase efficiency. However, the danger of human rights, in particular fair trial rights, violations are high in the absence of enforceable (legally binding) rules. In section 2.3 some comments will be made on the relevance of other international legal frameworks.

2.1 Interpol

Interpol is probably the first manifestation of a coordinated international effort in the fight against cross-border crime. Its establishment can be traced to the late 19th century.[4] In 1923, the International Criminal Police Commission (ICPC) was created as the first permanent international body of security cooperation in Vienna.[5] The aim of the organisation was the creation of stability in Western Europe in the aftermath of the effects of WWI and the Russian Revolution.[6] In 1946, following the Nazification of the ICPC, the organisation was re-established in Paris and moved, in its current form, after 1989 to Lyon.[7] Interpol, unlike the later discussed Europol, is considered a truly international cooperation mechanism since it is open to all states of the world. It comprises 190 member countries at the time of writing.[8]

Interpol is not a 'formal' organisation as its constitution is not binding and its members are not states but police forces. It is therefore questionable whether the entities cooperating within the institution themselves would share responsibility, in a formal sense, for harmful outcomes. Certainly no legal frameworks exist with regard to Interpol that could evidence such an assumption.

However, the practice of Interpol certainly can lead to situations where two or more actors contribute to harmful outcomes. This can be illustrated by an example involving the use of Interpol Red Notices. An Interpol Red Notice is issued to seek the location and arrest of wanted persons with a view to extradition or similar lawful action. They are international

[4] C. Fijnaut, 'International Policing in Europe: Its Present Situation and Future', in J.P. Brodeur (ed.), *Comparisons in Policing: An International Perspective* (Aldershot: Ashgate Publishing, 1995), 115, at 115–116.
[5] J. Occhipinti, *The Politics of EU Police Cooperation: Towards an European FBI?* (Boulder: Lynne Rieners Publishers, 2003), 29.
[6] Fijnaut, 'International Policing in Europe', n. 4, 116.
[7] M. Deflem, *Policing World Society* (Oxford University Press, 2002), 179.
[8] Interpol, 'Structure and Governance', at www.interpol.int/About-INTERPOL/Structure-and-governance/National-Central-Bureaus.

requests for cooperation, or alerts allowing police in member countries to share important crime-related information. The notices are published by Interpol's General Secretariat at the request of National Central Bureaus (NCBs) and authorised entities. NCBs are typically divisions of a national police agency or investigation service, and serve as the contact point for all Interpol activities in the field. NCBs also contribute to Interpol criminal databases and cooperate on cross-border investigations, operations and arrests. In the case of Red Notices, the persons concerned are wanted by national jurisdictions for prosecution, or to serve a sentence based on an arrest warrant or court decision. Interpol's role is to assist the national police forces in identifying and locating these persons with a view to their arrest and extradition or similar lawful action.[9] If a suspect is arrested in the country of his or her nationality, this might prevent extradition as many countries do not extradite their nationals. If a person is arrested in a country outside national jurisdiction, the requesting state will aim at achieving extradition. This procedure is, however, outside the realm of Interpol's competences as it concerns judicial cooperation, governed by national legislation or subject to bilateral or multilateral agreements.

While generally a legitimate system of law enforcement cooperation, there are instances where Interpol Red Notices can lead to human rights infringements. In January 2003, for example, the 72-year old United Kingdom (UK) national Derek Bond was arrested in South Africa and held in custody for 17 days. After being questioned by immigration authorities at Cape Town airport, he was arrested on the basis of an Interpol Red Notice.[10] The Red Notice had been issued by the United States (US) Federal Bureau of Investigation (FBI). As was later discovered, Mr Bond was the victim of mistaken identity, as the details of his passport matched those of a wanted criminal called 'Derek Lloyd Sykes', who had used the name 'Derek Bond' as an alias. According to media reports, South African police were convinced of the innocence of Mr Bond, but US authorities insisted that he was to be extradited to the US.[11] After he was eventually released, Mr Bond considered suing the US government for damages, but his lawyers advised against it.[12] In this situation, the question can be raised whether responsibility would lie with the states involved and with Interpol, for instance in the light of the fact that no correct or readable photographs or fingerprints had been attached to the Notice, otherwise correct identification would probably have occurred. It can also be

[9] Ibid.
[10] T. Butcher and S. Pook, 'Wine tasting pensioner Finds Himself in Jail and Wanted by the FBI', *Daily Telegraph*, 26 February 2003.
[11] Ibid.
[12] B. Bowling, and J. Sheptycki, *Global Policing* (London: Sage, 2012), 8–11.

noted that the South African police kept Mr Bond in custody although they reported to the media they were convinced of his innocence. This could have been the effect of the powerful Red Notice from Interpol, but is more likely the result of US pressure on South African authorities not to let him go, despite the protest of the British High Commission.[13]

More in depth research into cases of mistaken identity and human rights violations by states using the Interpol platform for information exchange could not reveal further cases of similar significance. This does not mean, however, that they do not exist. The fact that Bond's lawyers recommended against suing for damages indicates that complaints in this field are rarely crowned by success, nor do many suspects or fugitives have the ability and means to assert their rights in front of national or international courts. As will be discussed below, victims of human rights abuses in the area of cross-border policing are often not even aware of them – nor are their lawyers.

Furthermore, there are a number of cases known and discussed in the media where Interpol has been abused for political purposes.[14] In these cases, Red Notices had been used by a number of countries to effectively place political opponents under house arrest. This can be seen as a significant abuse on an international police cooperation instrument, leading to the restriction of the right to free movement. However, these incidents have not been subject to court cases.

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

2.2 Liaison officers

Another form of police and justice cooperation are liaison officers. Before becoming an official strategy for police cooperation in many countries, police-to-police cooperation

[13] Ibid.
[14] *The Economist*, 16 November 2013 (Vol. 409, No. 8862), at 68.

between different states was a purely informal strategy. In the 19th century, police action across borders was mostly related to so-called 'political offences' and many covert operations in foreign countries at the time were not even cooperative, but rather operated as unilateral espionage operations. However, such political policing must have involved at least some bilateral and multilateral contacts between police, for example, through the 'personal correspondence system' between police officials and the distribution of alerts relating to wanted suspects.[15]

In Europe, the practice of deploying police liaison officers to other countries started in the 1970s.[16] The establishment and initial need for liaison officers differed according to the historical and political context of each country creating them. In Germany, Sweden and the Netherlands, for example, the establishment of police liaisons was closely linked to drug law enforcement, and their first officers were posted to Thailand.[17]

Liaison officers are subject to the national legislation of their home country. They are not part of the police of the receiving state, hence they cannot exercise enforcement powers on foreign territory. Their main task is to exchange information and coordinate investigation efforts.[18]

A major advantage of the employment of liaison officers is considered to be the informality with which they can cooperate with other jurisdictions.[19] However, as a cooperation strategy, international police liaison officers are legally bound by national, bilateral and/or multilateral frameworks, which aim at safeguarding the respective procedural rules of deploying and hosting states. Their deployment can be based on specific bilateral or multilateral treaties and agreements, depending on whether the liaison is deployed to one or more countries, or is derived from more general bilateral agreements on diplomatic relations.[20]

The potential for infringements of legal rules can be illustrated by a hypothetical, based on an actual case that involved several liaison officers from different countries that were

[15] Deflem, *Policing World Society*, n. 7, 47.
[16] L. Block, *From Politics to Policing – The Rationality Gap in EU Council Policy-Making* (The Hague: Eleven International Publishing, 2011), 170–171.
[17] S. Hufnagel, 'AFP Liaison Officers: Connecting Down Under to the World', in M. den Boer and L. Block (eds.), *Liaison Officers: An Analysis of Transnational Policing* (The Hague: Eleven International Publishing, 2013), 49.
[18] Block, *From Politics to Policing*, n. 16, 166.
[19] Ibid., 170.
[20] The use of liaison officers posted abroad by law enforcement agencies of member states of the European Union is commonly encouraged and facilitated (Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States, (2003) OJ L 67/27). The Nordic states also collectively send liaison officers to host states.

interviewed for a different study.[21] In country A, a national from country B is murdered. Seeing that country A does not have the resources to investigate the crime, a liaison officer from country C is asked to assist. Criminal evidence collected by the officer and the police in country A is sent to, and analysed in, country C. Through the analysis of the evidence by country C the perpetrators are identified, who are nationals of country A.

While there was a bilateral memorandum of understanding (MOU) that allowed for the presence of the liaison officer of country C in country A, this MOU did not provide for operational enforcement powers on foreign territory. However, as country A did not have the scientific means to properly gather and examine the evidence, the liaison officer of country C was granted ad hoc enforcement powers and the examination of the evidence was *de facto* outsourced to country C. This example can be construed as an act that circumvented the deploying and receiving state's legislation/agreement determining the competences of the officer. Extraterritorial law enforcement was here carried out in the form of an operational decision rather than a process following authorisation by law. It is the first of many examples given in this chapter where practitioners establish *de facto* cooperation rather than using legal channels. In the present case, no harm occurred. To the contrary, the involvement of the officer might even have prevented a miscarriage of justice, as the evidence could be more thoroughly assessed with modern technology in country C. However, the scenario would be different if the laboratory in country C would have made a mistake leading to the wrong perpetrator, who subsequently would be convicted in country A. In that case, arguably both states would have been responsible for the miscarriage of justice.

The case *Döner and Benoit*, involving a Dutch liaison officer in Turkey, is another example that shows the dangers of human rights violations arising out of a liaison operation.[22] In this case the Dutch police liaison officer based in Turkey condoned the operation of a Turkish informer in a drug ring on Dutch territory. This type of operation is illegal under Dutch law, but the Dutch liaison officer to Turkey even offered the informer payment, thereby breaching Dutch criminal procedural law. Although the Dutch police let the informer 'escape' when the drug ring was busted, he was nevertheless put on a 'wanted' list afterwards with his full name. Soon after his return to Istanbul the informant died. In this case the conduct of the liaison

[21] Hufnagel, 'AFP Liaison Officers: Connecting Down Under to the World', n. 17, 49.
[22] B. Haan and S. Altunterim, 'Nationale Recherche liet drugscrimineel bewust lopen', NOVATV Report from 13 December 2007, available at www.novatv.nl/page/detail/uitzendingen/5661/Nationale%20Recherche%20liet%20drugscrimineel%20bewust%20lopen.

officer led to a breach of national law, thereby potentially causing a harmful outcome. Here, the harmful outcome did not concern the suspect as much as the informer.

2.3 Other international frameworks

Transnational cooperation (including the cooperation discussed in the preceding sub-sections) often takes places within the framework of common rules established at the international level. These include, for example: the 1929 International Convention for the Suppression of the Counterfeiting of Currency;[23] the United Nations Convention against Corruption (UNCAC);[24] the United Nations Convention against Transnational Organized Crime (UNTOC);[25] and the 1988 Drug Trafficking Convention.[26]

Relevant in relation to Interpol cooperation would be the UNTOC. Provided a fraud offence underlying an Interpol Red Notice would be construed as an instance of 'Organized Crime', Article 18 prescribes that 'the Parties are required to afford another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the Convention'. Mutual legal assistance can then be requested for the taking of statements; service of official documents; searches; seizures; freezing of assets; examining objects and sites; and providing information and evidence (Article 18(a)-(e) UNTOC). This means that this provision can lead to cooperative action that potentially can lead to harmful outcomes. However, limitations exist with regard to the domestic law of the requested state party (Article 18(g) UNTOC). This means that any law enforcement action that is not provided for in police procedure of the requested party, or is prohibited under privacy laws of the requested party, cannot be requested.

It can be concluded that there is an international obligation for law enforcement cooperation with regard to certain types of offences. However, if the cooperation breaches the human rights of, for example, a suspect, the mechanisms to remedy a breach are national or regional

[23] League of Nations International Convention for the Suppression of the Counterfeiting of Currency, Geneva, 20 April 1929, in force 22 February 1931, 112 LNTS 371.
[24] United Nations Convention against Corruption, New York, 31 October 2005, in force 14 December 2005, 2349 UNTS 41 (UNCAC).
[25] United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in force 29 December 2003, 2225 UNTS 209 (UNTOC).
[26] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988, in force 11 November 1990, 1582 UNTS 95 (Drug Trafficking Convention).

(e.g. under the European Convention on Human Rights (ECHR)).[27] There are no examples of 'shared' responsibility for a breach.

With regard to the liaison officers example outlined above, it is more problematic to find a legal obligation. MOUs justify the presence of law enforcement officials from one jurisdiction in another, but certainly not the exercise of enforcement powers and the examination of evidence on foreign territory without more specific mutual legal assistance agreements between these countries. However, if the procedure is condoned or even requested by the host state, there is no apparent illegality vis-à-vis the host state – but this leaves open the possibility of an infringement of individual rights.

3. Regional level

The main regional mechanisms fostering cross-border law enforcement in the EU are Europol[28] and Eurojust.[29] Both institutions (discussed in 3.1) were set up to assist in law enforcement cooperation between EU member states. Section 3.2 will focus on joint investigation teams, and section 3.3 will discuss the Schengen Convention. Section 3.4 will highlight some possible implications for shared responsibility.

3.1 Europol and Eurojust

Unlike the Schengen Convention,[30] the Europol Convention[31] (and since 2010 the Europol Decision)[32] does not only provide a legal framework for certain forms of police cooperation, but sets up an EU agency that can be involved in JITs and may suggest to national police the initiation of investigations. The creation of Europol can be seen as a major surrender of sovereign state power to enhance police cooperation and security. Although the mandate and

[27] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).
[28] Council Act of 26 July 1995 Drawing up the Convention based on Article K.3 of the Treaty on European Union on the Establishment of a European Police Office, (1995) OJ C 316/2 (Europol Convention), as well as its protocols, now Council Decision of 6 April 2009 Establishing the European Police Office, (2009) OJ L 121/37 (Europol Decision); note that the 1995 Convention only entered into force in 1999.
[29] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA) (Eurojust Decision).
[30] See above, n. 3.
[31] See n. 28.
[32] Europol Decision, n. 28.

powers of Europol are still subject to controversial debates amongst member states, in particular in relation to possible enforcement powers,[33] the agency is by now an integral part of EU policing. This becomes particularly apparent in more recent developments, such as the expansion of the Europol mandate to initiate investigations and participate in JITs.[34]

Eurojust has been established to complement the competences of Europol in the area of justice, rather than police cooperation. It promotes information exchange at the judicial level.[35] Its mandate and powers follow from the Eurojust Decision.[36] Under Article 3(1) of the Decision, its main objectives are to coordinate investigations and prosecutions between the competent authorities of the member states, enhance cooperation by facilitating mutual assistance and extradition requests, and to support the competent authorities of the member states to improve the effectiveness of investigations and prosecutions. Like Europol, Eurojust can request the initiation of an investigation and participate in JITs.

The potential for shared responsibility arising out of the activities of Europol and Eurojust can be illustrated by a case involving the Netherlands and the United Kingdom.[37] The Dutch and the UK national crime squads had set up a JIT under the 2000 EU Mutual Assistance Convention.[38] The team was established because a UK investigation was linked to a major drugs find in the Netherlands. The joint investigation was determined to take place in the Netherlands, while the investigation in the UK would be purely investigated by UK law enforcement. The JIT was then conducted over three months, several suspects on both sides were arrested and proceeds of crime were confiscated in the Netherlands.[39]

Part of the UK evidence to be included in the JIT and to enable prosecution in the Netherlands included 'sensitive information', and the source of the information had to be protected. Under

[33] V. Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009), 165–166.
[34] See in particular in relation to the expansion of the Europol mandate the 'Danish Protocol', (2004) OJ C 2/3.
[35] Mitsilegas, *EU Criminal Law*, n. 33, 187–188.
[36] Council Decision of 15 July 2009 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, (2009) OJ L 138/14 (Eurojust Decision).
[37] C. Rijken, 'Scientific Research JIT', final report, printed at the Dutch National Crime Squad, Driebergen, 20 December 2005; C. Rijken, 'Joint Investigation Teams: Principles, Practice, and Problems. Lessons Learnt from the First Efforts to Establish a JIT' (2006) 2 ULR 99; and L. Block, 'Combating Organised Crime in Europe: Practicalities of Police Cooperation' (2008) 2 *Policing* 74; Block, *From Politics to Policing*, n. 16; L. Block, 'EU Joint Investigation Teams: Political Ambitions and Police Practices', in S. Hufnagel, C. Harfield, and S. Bronitt (eds.), *Cross-Border Law Enforcement: Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (Abingdon, Oxon: Routledge, 2012), 87.
[38] EU Council Act of 29 May 2000 Establishing in Accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, in force 23 August 2005, (2005) OJ C 197/3 (2000 Mutual Assistance Convention or 2000 Convention).
[39] Rijken, 'Joint Investigation Teams: Principles, Practice, and Problems', n. 37, 108–109.

UK law, sensitive information about police operations, such as the identity of informants or operational technique, can be withheld from disclosure to the defence,[40] while Dutch practitioners are bound to potentially disclose all information in criminal proceedings.[41] If information is therefore classified as 'sensitive', it cannot be disclosed by the UK to the JIT. Faced with this major impediment, the UK authorities used the Europol channel to provide sensitive information to the JIT. The source of the information remained thereby protected.[42]

This case is interesting in the present context as it can be construed in two opposing ways. First, one could claim that here ad hoc cooperation efforts, as well as the use of the Europol and Eurojust channels for information exchange, facilitated the successful conduct of this major cross-border drug investigation, and helped to protect the procedural right to anonymity of the informant under UK law. At the same time it could be argued that by 'laundering' the informant's information through Europol, the Dutch suspect and later defendant was deprived of his right to defend himself in full knowledge of the evidence under Dutch procedural law. The differences in legal procedure thereby created a situation where one state's laws were protected and the other state's laws were infringed.

3.2 Joint Investigation Teams

A JIT is set up 'for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team'.[43] The purpose of a JIT is hence to jointly investigate a criminal case; the teams are bi- or multinational, likely operating from one location, possibly multi-disciplinary, and are set up for a single investigation within an agreed time frame.[44]

The regulation on which the cooperation between the UK and the Netherlands, mentioned above, was based is the 2000 EU Mutual Legal Assistant Convention. Historically, JITs find

[40] See UK Criminal Procedure and Investigations Act 1996, at 1, sections 1–21; UK Criminal Justice Act 2003, sections 32–39.
[41] Rijken, 'Joint Investigation Teams: Principles, Practice, and Problems', n. 37, 113.
[42] Ibid., 114.
[43] Article 13 of the Council Act of 29 May 2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, in force 23 August 2005, (2000) OJ C 197/1.
[44] T. Schalken and M. Pronk, 'On Joint Investigation Teams, Europol and Supervision of their Joint Actions' (2002) 10 EJCCLCJ 70, 71.

their first mention in the EU context in a 1994 Discussion Paper.[45] They were subsequently included in the first draft of the Naples II Convention as an additional method of cooperation that improved traditional mutual legal assistance.[46] Consequently, Article 24 of the 1997 EU Convention on Mutual Assistance and Cooperation between Customs Administrations established the possibility of JITs in the EU context for the first time.[47] The 2000 Mutual Assistance Convention[48] introduced in Article 13 a cooperation provision on JITs; harmonised the use of covert policing techniques, such as controlled deliveries (Article 12); undercover operatives (Article 14); and the interception of telecommunications (Article 18).[49] While the Schengen and the 2000 Mutual Assistance Conventions furthered regional cooperation, they cannot generally be attributed a harmonising effect as implementation differed between member states. However, the countries that created closer cooperation with neighbouring states under the Conventions demonstrated a considerable willingness to give up sovereign power to enable cooperation.

JITs under the 2000 Convention have since 2004 been employed in the investigation of crimes with a cross-border aspect in the EU; the first was established between France and Spain in September 2004.[50] It can be argued that in the start-up period of the initiative, it was not perceived to be very useful by practitioners.[51] Some authors have based this conclusion on the fact that the strategy was, compared to the number of all cross-border criminal investigations in the EU, not extensively applied between 2004 and 2009 (40 JITs).[52] Other authors based this observation on interview data.[53]

The aim of introducing JITS in Article 13 of the 2000 Mutual Assistant Convention was to create a more efficient mechanism compared to parallel investigations. The latter were commonly based on the 1959 Council of Europe Convention,[54] as specified in bilateral and

[45] Council of the EU, Customs Cooperation Working Party, 'Revision and Updating of the Naples Convention of 7 September 1967 on Mutual Assistance between Customs Administrations', Doc. 8134/94 (1994).
[46] Council, Customs Cooperation Working Party, Draft Convention on Mutual Assistance Between Customs Administrations in the Internal Market (Naples II), Doc. 8925/94 (1994).
[47] Convention on Mutual Assistance and Cooperation between Customs Administrations 1997 (Naples II), (1997) OJ C 221/1.
[48] See n. 38.
[49] See also Article 73 of the Schengen Convention of 1990, n. 3.
[50] Block, 'EU Joint Investigation Teams', n. 37, 98.
[51] S. Hufnagel, *Policing Cooperation Across Borders – Comparative Perspectives on Law Enforcement within the EU and Australia* (Farnham: Ashgate, 2013), 215.
[52] E.g. Block, *From Politics to Policing*, n. 16, 158.
[53] E.g. Hufnagel, *Policing Cooperation Across Borders*, n. 51, 215.
[54] See n. 88.

multilateral agreements under, for example, Articles 39 and 40 of the Schengen Convention.[55] Parallel investigations are conducted through exchange of international letters of request (ILOR), which establish a legal basis for the direct and immediate exchange of intelligence and determine the possible preliminary measures necessary in the course of the investigation. The difficulty of this set-up is that if measures not foreseen in the initial request become necessary, additional ILORs have to be issued.[56]

As the 2000 Convention had the potential to lead to significant differences in implementation, the European Council adopted a Council Framework Decision on Joint Investigation Teams in 2002, which imposed legally binding obligations on the member states.[57] Despite these efforts, the 2005 European Commission report indicated that the implementation of the 2000 Convention provisions and the 2002 Framework Decision on JITs still differed significantly between member states.[58] Also, although the Council set up a model agreement indicating the different elements that need to be considered in the setting up of a JIT,[59] harmonisation was not achieved.

EU member states implemented and interpreted the 2000 Convention individually and concluded various bilateral and multilateral agreements. According to observations by Block, van Daele, Spapens and Fijnaut,[60] some member states implemented the general idea of a JIT into national legislation, leaving the details to the executive; others created detailed regulations. This contributed – paradoxically – to more fragmentation than existed within the traditional method of parallel investigations.

It can be concluded with regard to JITs that a common EU legal framework does not translate into a high degree of transparency with a view to cooperation processes across EU member states. The main strategy of engagement remains bilateral. In the context of harmful behaviour/human rights infringements, the Europol/Eurojust example shows that national rules of procedure can be breached during international cooperation. In the example provided in section 2.1, the defendant's right under Dutch law to know all the evidence including the

[55] Schengen Convention, see n. 3.
[56] Block, *From Politics to Policing*, n. 16, 152.
[57] Council Framework Decision of 13 June 2002 on Joint Investigation Teams, (2002) OJ L 86/1.
[58] 'Report from the Commission on National Measures Taken to Comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams', (2005) COM(2004) 858 final (not published in the OJ).
[59] Council, 'Council Recommendation of 8 May 2003 on a Model Agreement for Setting up a Joint Investigation Team (JIT)', (2003) OJ C 121/1.
[60] Block, *From Politics to Policing*, n. 16; and D. van Daele, T. Spapens, and C. Fijnaut, *De strafrechtelijke hulpverlening van België, Duitsland en Frankrijk aan Nederland* (The Hague: Intersentia, 2008).

identity of an informant was breached. The evidence had been collected in the UK where the informant cannot be disclosed, but became nevertheless admissible evidence before a Dutch court, as it was exchanged through the Europol channel.

3.3 The Schengen Convention

In the times of the European Community and today within the EU context, the Schengen Agreement of 1985, and the following 1990 Convention Implementing the Schengen Agreement of 14 June 1985 (Schengen Convention),[61] provided a legislative framework for cross-border law enforcement between the European states that signed on to them. France, Germany, Belgium, the Netherlands and Luxemburg were the first EU member states to abolish their common borders. The Schengen Convention is a broad legal framework that provides considerable scope and latitude for police initiatives. Amongst other measures, it established the Schengen Information System (SIS), and the possibility of cross-border surveillance (Article 40) and pursuit (Article 41). Title III of the Schengen Convention deals with police and security, and more particularly Chapter 1 (Articles 39-47) deals with police cooperation.

While police in JITs work under the command of one member state, common operations (such as joint border patrols) operate under the command of the officers who work at the time in their own jurisdiction. The team leader of a JIT is usually the magistrate/prosecutor of the jurisdiction closest to the crime/investigation. The operations are led, however, by the national police of the country on whose territory they take place with assistance of the other police part of the team. A breach of human rights is hence always attributable to the national police in a JIT situation. Police generally do not have enforcement powers in a foreign jurisdiction. They will always be supervised by the national police. There are instances, however, under the Schengen Convention in particular, where a state gives the police force of another country powers to act (within a certain radius of the border) independently. The Dutch-Belgium pursuit case below in this chapter is an example of this. In these cases, police act on the territory of another state with permission of that host state and in accordance with the Schengen Convention in conjunction with more specific bilateral legislation determining,

[61] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985, (2000) OJ L 239/19 (Schengen Agreement).

for example, the radius from the border within which they are allowed to exercise police powers. In these cases, if the police infringed a legal right of the suspect, both states (the state giving permission and the state exercising the powers) could be jointly implicated for having breached a procedural right.

In relation to 'hot pursuit', the Schengen Convention confers on member states some flexibility in implementation, which leads to the application of varying degrees of restrictions (Article 41). The impact of the Schengen Convention and the measures taken therefore differ from country to country.[62] Some of them are described in section 4 below. Regional and bi-/multilateral police and justice cooperation within the EU cannot be separated. There is a constant interaction between the two,[63] making the determination of shared responsibility for harmful behaviour a complex endeavour.

3.4 Possible implications for shared responsibility

Despite the existence of the Schengen Convention, police cooperation still has to follow the procedural rules of the individual member states, unless the states apply mutual recognition. Nevertheless, the case law in member states indicates that within the EU, different procedural rules are already interchangeable. This means that the evidence is admissible, if it had been gathered in another EU state. This can be illustrated by Belgian cases that deal with the admissibility of telephone intercepts from the 1980s and 90s.[64] Under Article 314bis of the Belgian Criminal Code[65] it is illegal to record a telephone conversation as a non-participant. Belgian police had nevertheless requested telephone taps to be conducted in the Netherlands, and these were used as evidence before Belgian courts. Similarly, French and Swedish telephone taps resulting from investigations within these countries, but with links to Belgian cases, were used before Belgian courts in both criminal trials and extradition procedures. In all of these cases the courts argued that the evidence was admissible, as it had been gathered in an EU member state where the practice of telephone tapping was consistent with Article 8

[62] C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1996), 6, 15–17, 538–542.
[63] Hufnagel, *Policing Cooperation Across Borders*, n. 51, 215.
[64] See, for example, Cour de Cassation (24me ch., sect. néerl.) 26 January 1993 (en cause de Co. D.), Revue de droit pénal, 1993, 768; Cour de Cassation (2me ch., sect. néerl.) 12 October 1993 (en cause de D.), Revue de droit pénal, 1994, 792; Cour de Cassation (2me ch., sect. néerl.) 19 February 1985.
[65] Belgian Criminal Code of 8 June 1867, in force 10 October 1867 (in its updated version of 1 January 2012).

of the ECHR and did not breach the defendant's right to privacy. Interestingly here, the existence of a human rights framework enabled the 'laundering' of foreign evidence to become admissible under national law.

It could be concluded that when a breach of procedure does involve a non-EU member state, the outcome would be different. One of the most prominent cases in this area is the *Chinoy* case,[66] which does not only involve EU countries, but most prominently the US. In this case, US agents had illegally obtained telephone and other voice recordings of Chinoy in France. As they knew that these would never be admitted as evidence in a French trial or extradition procedure, they took advantage of a visit by Chinoy in England and let him be arrested there. In the extradition procedure, the evidence illegally obtained in France was considered admissible by the UK Court. To be inadmissible, evidence would have had to represent abuse of process before this Court.[67] Furthermore, the Court stressed that it lies within the judge's discretion to allow illegally obtained evidence gathered in the UK and abroad. This case can be constructed in the context of shared responsibility for harmful conduct. Following a clear breach of French sovereignty by gathering evidence without the permission of the French authorities and in breach of French law, France could be considered the first victim of US-UK shared responsibility. The UK Court had the possibility to remedy the breach and acknowledge French sovereignty by declaring the evidence inadmissible. It could have sent a clear message to the US that their practices are inacceptable. Furthermore, the rights of the suspect were infringed in several ways. He could have relied on the inadmissibility of the evidence in France and the acknowledgement of this breach in the UK. Article 8 of the ECHR did not cover this breach, but the UK decision relied predominantly on the discretion of the judge under common law. There are a number of cases where the US behaved in similar ways in other countries. It is surprising how little public and/or judicial outcry these cases have triggered.

4. Law enforcement cooperation strategies in border regions

In relation to cooperation in border regions, law enforcement cooperation agreements include, for example, the 1962 Benelux Treaty;[68] the 1969 Cross Channel Intelligence Conference;[69]

[66] *R* v. *Governor of Pentonville Prison*, exparte Chinoy, [1992] 1 All ER 317 (*Chinoy*).
[67] Ibid., at 330.
[68] Treaty Concerning Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium,

the Nordic Police and Customs Cooperation;[70] and Police and Customs Cooperation Centres.[71]

The number of cooperative strategies in border regions, though limited here to the EU, is too high to be included in the form of hypotheticals, or to be explained in much depth here. As they are important with a view to shared responsibility for harmful outcomes, and there is national case law discussing instances of potential harm caused by cross-border law enforcement practice, some of the strategies are briefly outlined below.

Generally, enforcement cooperation strategies in border regions aim to counter common crime issues, for instance drug crimes or illegal immigration. Strategies established to counter one crime problem are often fit to enhance the fight against cross-border crime more generally.

Regions in the EU where the establishment of cooperation practices and their formalisation through legal frameworks have taken place include the Benelux countries (Belgium, the Netherlands, Luxembourg); the Meuse-Rhine (M-R) Euroregion; the Nordic countries; and the Cross-Channel region (United Kingdom, France, Belgium, the Netherlands). Strategies established encompass, for example, the granting of enforcement powers on foreign territory; joint investigations; information sharing mechanisms; and exchange of evidence.

Cooperation between the Benelux and the countries forming the M-R Euroregion is based on long-standing collaboration and policing practice, which predated the conclusion of a formal legal framework.[72] All countries concerned are also part of the Schengen zone today, enabling

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

[69] D.F. Gallagher, 'Sheer Necessity: The Kent Experience of Regional Transfrontier Police Cooperation' (2002) 12 RFS 111; C. Harfield, 'From Empire to Europe: Evolving British Policy in Respect of Cross-Border Crime' (2007) 19 JPH 180.

[70] Convention between Denmark, Finland, Norway and Sweden Concerning the Waiver of Passport Control at the Intra-Nordic Frontiers, 12 July 1957, in force 1 May 1958 (Nordic Passport Convention); Iceland acceded to the Convention on 24 September 1965. The Nordic Passport Convention has been amended by an agreement of 27 July 1979, supplemented by the agreements of 2 April 1973 and of 18 September 2000; see, generally, M.E. Kleiven, 'Nordic Police Cooperation', in S. Hufnagel, C. Harfield, and S. Bronitt (eds.), *Cross-Border Law Enforcement: Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (Abingdon, Oxon: Routledge, 2012), 63.

[71] O. Felsen, 'European Police Co-operation: The Example of the German-French Centre for Police and Customs Co-operation Kehl (GZ Kehl)', in S. Hufnagel, C. Harfield, and S. Bronitt (eds.), *Cross-Border Law Enforcement: Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (Abingdon, Oxon: Routledge, 2012), 73.

[72] T. Spapens and C. Fijnaut, *Criminaliteit en Rechtshandhaving in de Euregion Maas-Rijn* (The Hague: Intersentia, 2005).

further mechanisms of cooperation between member states. One of the first multilateral legal bases for regional cooperation was the 1962 Treaty on Extradition and Mutual Legal Assistance in Criminal Matters, concluded between the Benelux countries (Benelux Treaty).[73] Before the conclusion of this specialised treaty in the border region, cross-border incursions onto the sovereign territory of another state by law enforcement representatives had been regarded as a breach of state sovereignty.[74] With the introduction of the legislation, police from the three jurisdictions were cooperating more closely, conducting joint cross-border operations and pursuit.[75]

Police of the three states had already been cooperating closely before the establishment of specialised legislation. Before the introduction of the Benelux Treaty, police had been using diplomatic channels for cooperation requests, or in the case of border crossings, the requests had to be addressed formally to the relevant diplomatic and judicial representative before the border could be crossed. The various bureaucratic procedures were perceived by police practitioners to slow down processes and to complicate cooperation in matters of law enforcement and security.[76] Practitioners therefore tended to circumvent these complicated procedures by resorting to informal means of cooperation.[77] The establishment of the trilateral treaty changed this situation and provided authorisation for *de facto* practices. In the 1980s, the Benelux Treaty contributed to enhancing harmonisation as it became one of the main templates for the Schengen Convention, and was formally integrated into it in 1985.[78]

The Benelux countries also form part of another region with strong police cooperation practice, namely the M-R Euroregion. This region encompasses parts of the Netherlands, Belgium and Germany.[79] While not abiding by one legal framework, such as the Benelux Treaty, the states forming the region have established a number of bilateral treaties and

[73] See n. 68.
[74] Spapens and Fijnaut, *Criminaliteit en Rechtshandhaving in de Euregion Maas-Rijn*, n. 72, 26.
[75] Articles 26 and 27 of the Benelux Treaty, n. 68.
[76] M. Den Boer, C. Hillebrand, and A. Nölke 'Legitimacy under pressure: The European web of counter-terrorism networks' (2008) 46(1) JCMS 101, at 101.
[77] S. Hufnagel, '(In)security crossing borders: a comparison of police cooperation within Australia and the European Union', in S. Hufnagel, C. Harfield, and S. Bronitt (eds.), *Cross-Border Law Enforcement: Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (Abingdon, Oxon: Routledge, 2012), 177, at 182.
[78] C. Fijnaut, 'Police Co-operation and the Area of Freedom, Security and Justice', in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (New York: Oxford University Press, 2004), 241, at 249.
[79] T. Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Farnham: Ashgate 2008), 225.

agreements, which, altogether, provide a framework for cooperation without major gaps, supplemented more recently by the provisions of the Schengen Convention.

The M-R Euroregion cooperation has been established to counter particular crime issues in this border area. They arose from high population density and high frequency border crossings in connection with drug trafficking.[80] Police in this region are allowed to cross borders in 'hot pursuit', carry weapons in other jurisdictions, and make use of their weapons when crossing into another jurisdiction.[81] They are also allowed to exercise a limited number of enforcement powers on foreign territory, for example in cases of an emergency, and may even exchange physical evidence directly with their counterparts.[82] Information exchange within the region takes place directly between criminal investigation departments. The borders and main transport routes are patrolled by Joint Hit Teams (JHTs) consisting of law enforcement personnel from both sides of the border.[83] The police forces in the region have furthermore developed specific institutions facilitating police cooperation, and in particular information exchange, notably the 'Euregional Multimedia Information Exchange', and the 'Euregional Police Information Coordination Centre'. These are not based on transnational treaties and agreements, but are informal initiatives.

The fact that this advanced cooperation, which clearly incorporates authorisations for the exercise of extraterritorial law enforcement, is based on a multitude of legal frameworks, does not seem to hamper it. To the contrary, practice shows that officers take advantage of the existing choice of measures.[84]

A further practice that is based on a number of bilateral and multilateral treaties and agreements are the Police and Customs Cooperation Centres in the EU. Authorised under the Schengen Convention, these Centres (about 40 today) spread in many different forms throughout Europe.[85] One example is the German-French Police and Customs Cooperation Centre, the first Centre established of its kind. Similar to other regional initiatives described above, it had been created to counter particular crime problems in the French-German border region in Strasbourg/Kehl. The 'Common' Centre (or 'joint commissariat') was established

[80] Ibid.
[81] Before those treaties they needed to stop within a certain radius after crossing the border, between the Netherlands and Germany this was 10 kilometre.
[82] Spapens, 'Policing a European Border Region', n. 79, 226–229.
[83] Ibid.
[84] Hufnagel, *Policing Cooperation Across Borders*, n. 51, 56.
[85] Mitteleuropäische Polizeiakademie, Seminar: 'Polizeiliche Zusammenarbeit mit und über Polizeikooperations-zentren', Eisenstadt, Australia, 31 March – 3 April 2008.

under a bilateral agreement between France and Germany, the 'Mondorfer Abkommen', in 2000. In practice, German and French police officers patrol the border region together and both police are allowed to conduct 'hot pursuits' across borders.[86] As mentioned before in relation to the Schengen Convention, during common border operations the command is with the police acting on their own territory. The police agencies, despite differences in organisational structure, have also created innovative ways to share resources, to investigate crime together, and share information with each other on a day-to-day basis. The Centre is nowadays relevant beyond the border region, and information requests are put to it by all police agencies of the two countries. The close physical location of officers from different states and agencies helps furthermore to overcome legal, organisational and cultural differences.[87]

An earlier informal initiative, which is part of both the Meuse-Rhine Euroregion cooperation and the Benelux cooperation, was established by the Chiefs of Police in the border region of the Netherlands, Belgium and Germany (NebedeagPol) in 1969. NebedeagPol built upon existing legal bases for some of its activities, such as the Council of Europe (CoE) Treaties.[88] In 1979, NebedeagPol was formalised from an informal network of senior police into a registered non-profit law enforcement association in order to facilitate cooperation outside of formal government and diplomatic channels.[89] Many of the aspirations pursued by NebedeagPol resemble the provisions of the later Schengen Convention[90] and were taken into account in its formation.[91]

A Dutch Supreme Court decision[92] illustrates how the practice on the basis of such agreements can result in a situation of shared responsibility. The case dealt with the claim of a defendant in a weapon trafficking case. The defendant had been pursued by Dutch police in Belgium, driving his car towards the Dutch border. Once the border was crossed, the Dutch

[86] P. Hobbing, 'Management of External EU Borders: Enlargement and the European Border Guard Issue', in M. Caparini and O. Marenin (eds.), *Borders and Security Governance: Managing Borders in a Globalised World* (Geneva: LIT, 2004), 151, at 170-171.
[87] Hufnagel, *Policing Cooperation Across Borders*, n. 51, 52.
[88] Council of Europe, European Convention on Extradition, Paris, 13 December 1957, in force 18 April 1960, ETS No. 024; Council of Europe, European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, in force 12 June 1962, ETS No. 030.
[89] P. Swallow, *European Police Cooperation: A Comparative Analysis of European Level Institutional and Organisational Developments and National Level Policies and Structures* (PhD Thesis, University of Southampton, 1998), 206–207.
[90] Ibid.
[91] C. Fijnaut, 'The Internationalisation of Criminal Investigations in Western Europe', in C. Fijnaut and H. Hermans, *Police Cooperation in Europe* (Lochem: J.B. van den Brink, 1987), 126.
[92] ECLI:NL:HR:2010:BL5629 (5 October 2010); ECLI:NL:PHR:2010:BL5629, Conclusie Mr. Knigge (Advocaat-Generaal), 16 February 2010.

police officers stopped and searched the car, seized the weapons in the car and arrested the defendant. It was claimed by the defence that the pursuit through Belgium had breached Belgian sovereignty under the Schengen Convention and the right to privacy of the defendant under the European Convention of Human Rights. Therefore, the evidence would have been gathered in breach of the law and would be inadmissible. The Court decided that the Schengen Convention had not been breached and that the operational agreement of the Belgian and Dutch police, allowing for the presence of Dutch police on Belgian territory, was sufficient to establish the right of pursuit under the Schengen Convention. In this case, despite of the existence of a multitude of bilateral, multilateral and EU level treaties and agreements, the Court fell back on general principles rather than substantiating its decision with the plethora of legislation available to it. This puts the usefulness of such legislation in question, with a view to the rights of the defendant.

As illustrated above, the first five Schengen states have developed advanced cooperation strategies that involve considerable ceding of sovereign rights under the Schengen Convention, like for example the Meuse-Rhine Euroregion cooperation. In particular in the regional context, states use the Schengen Convention to promote police cooperation. This becomes also apparent in other regions, like the Nordic countries, although the Schengen Convention was less influential in the establishment of this cooperation. The Nordic Police cooperation scheme[93] has been labelled 'best practice' in the EU.[94] The Nordic countries had already abolished passport controls at their common borders in 1957 through the Nordic Passport Control Agreement.[95]

The actual regulation of cross-border cooperation strategies in the M-R Euroregion are specified in the Benelux Cooperation Treaties, which were expanded by the Treaty of Senningen,[96] the Treaty of Enschede,[97] and the Treaty of Prüm,[98] as well as several other

[93] The five Nordic countries – Denmark, Finland, Norway, Iceland and Sweden have established close police cooperation since the 18th century. In 1952 a Nordic Council was created, and in 1957 a mutual passport agreement (the Nordic Passport Convention, n. 70) was established resulting in the abolition of systemic control at the internal borders between the Nordic countries.

[94] EU Schengen Catalogue, 'Police Co-Operation: Recommendations and Best Practices', Volume 4, Council of the European Union, General Secretariat, June 2003, at 16.

[95] Joubert and Bevers, *Schengen Investigated*, n. 62, 31. Nordic Passport Convention, n. 70.

[96] Verdrag tussen het Koninkrijk der Nederlanden, het Koninkrijk België en het Groothertogdom Luxemburg inzake grensoverschrijdend politieel optreden, Luxembourg, 8 June 2004, Trb. 2005, 35 (Treaty of Senningen).

[97] Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de grensoverschrijdende politiële samenwerking en de samenwerking in strafrechtelijke aangelegenheden, Enschede, 2 March 2005, Trb. 2005, 86 and 241 (Treaty of Enschede).

[98] See Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of

bilateral agreements. The development of these initiatives shows that bi-/multilateral strategies continue to grow in the field of police cooperation. Supranational legal frameworks facilitate regional cooperation and enhance law enforcement across borders, even though they might not be implemented uniformly.

A constant interaction takes place between supranational and bi-/multilateral initiatives, which expands cross-border powers in the field of EU policing. This finding is particularly relevant as other regions of the world have not developed similar dynamics. In comparison, the US-Mexican border region[99] or the Southern Chinese Seaboard[100] did not have any impact on regional North/South American or Southern Chinese legal frameworks on police cooperation. It could therefore be concluded that a common value- and human rights system fosters formalised cooperation, and potentially reduces human rights infringements.

Many police and justice cooperation strategies exist between neighbouring states, for example at the Southern Chinese Seaboard. These are, however, mainly informal, due to the differences between the states in applying the death penalty, and therefore any cross-border action could potentially breach the procedural requirements of the cooperating systems.[101] By contrast, EU informal strategies, such as NebedeagPol, were incorporated into supranational legal frameworks.

5. Cross-border law enforcement in the absence of agreed arrangements

The collision of national legal rules becomes particularly apparent in contexts where a supranational legal framework is not available. In the *Döner and Benoit* (outlined above),[102] the Dutch liaison officer to Turkey had condoned the operations of a Turkish civilian informer in a Turkish drug-ring in the Netherlands contrary to Dutch law. The evidence provided by the informer was declared inadmissible by a Dutch Court in 2012, as under Dutch criminal

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Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, Prüm, 27 May 2005, in force 1 November 2006, Trb. 2005, 197 (Treaty of Prüm).

[99] D. Schneider and C. Gallaher, 'Evaluating and Improving Law Enforcement Cooperation in Combating Mexican Drug Trafficking Organisations', Conference Presentation, American Society of Criminology Conference, Chicago, 14 November 2012.

[100] S.S.-H. Lo, *The Politics of Cross-Border Crime in Greater China – Case Studies of Mainland China, Hong Kong, and Macao* (New York: M.E. Sharpe, 2009).

[101] S. Hufnagel, 'Strategies of Police Cooperation along the Southern Chinese Seaboard: A Comparison with the EU', Special Journal Issue on 'Policing the Southern Chinese Seaboard: Histories & Systems in Regional Perspective', in (2013) 61 CLSC 377.

[102] Haan and Altunterim, 'Nationale Recherche liet drugscrimineel bewust lopen', n. 22.

procedure civilian informers cannot be used by the police.[103] The informer had subsequently returned to Turkey, causing an outcry in the Dutch media that claimed the Dutch police had let a criminal escape from Dutch justice. Following his return, the informer died in Turkey. This case could be construed in the context of shared responsibility for a harmful outcome, but like most cases concerning cross-border law enforcement, it remained at a national level and there were no repercussions towards Turkey acting on foreign territory.

However, even in scenarios where supranational rules are available, collisions of rules are clearly apparent, but are condoned by the courts due to a common human rights framework. An example case in this area is a Belgian-Dutch cross-border arrest case, which has also been outlined above in section 4. In this case the arrest of a Dutch national by Dutch police, after pursuit through Belgium, had been deemed illegal. It was claimed that there was no legal basis for the Dutch police acting in a law enforcement capacity in Belgium before the arrest. The Court considered the Schengen Convention; the Treaty of Senningen (bilateral cooperation treaty between the Netherlands and Belgium, which did not provide a legal basis for pursuit); and Article 8 of the ECHR. It concluded that the police action had been justified under the Schengen Convention, which provided a legal basis for the joint operation between Belgian and Dutch police in the border area targeting the trafficking of weapons. The right to privacy under the European Convention on Human Rights was hence not infringed. It was furthermore within the discretion of the judge to consider evidence obtained illegally, as long as this did not render the trial against the defendant unfair.

This and several other national judgments outlined above in section 4 denied abuse of process and declared evidence obtained illegally under national law admissible. They did, however, not systematically base the legality of the measures on existing cross-border law enforcement treaties and agreements. The courts thereby condoned the progressive enlargement of police powers in the area of cross-border policing.

An outstanding case where the consequences of police cooperation were far more severe is the Australian-Indonesian *Bali 9* case. Here, there was no supranational framework available and also no common human rights framework to justify breaches of national rules. The Australian Federal Police (AFP) Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations explicitly states that assistance can be provided

[103] *Benoit* case, ECLI:NL:RBROT:2012:BW3203 (16 April 2012), see full judgement (in Dutch) at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2012:BW3203.

'irrespective of whether the investigation may later result in charges being laid which may attract the death penalty'. In 2006, the AFP released the Revised Death Penalty Guidelines, altering this provision and making cooperation in death penalty cases dependent on assurances that the death penalty would not be carried out.[104] However, whether a country applying the death penalty will be assisted by the AFP should always be decided on a case by case basis and mirror government policy.[105] In the *Bali 9* case, nine Australian citizens were arrested in Bali for attempting to smuggle 8.2 kilograms of heroin from Indonesia to Australia. Four of the nine were arrested by the Indonesian National Police when boarding a flight from Bali to Sydney, with the drugs strapped to their bodies, on 17 April 2005. Four other offenders were arrested at a hotel in Bali and 350 grams of heroin were found in their room, and one was arrested at the airport not carrying any drugs. They were charged with trafficking heroin, which carries the death penalty under Indonesian law. In the first instance, two were sentenced to death and all others to life imprisonment by the Denpasar District Court.[106] After several appeals by the defence, three were sentenced to death, six to life imprisonment and one to 20 years imprisonment.[107]

The AFP had provided information to the Indonesian Police through a letter written by the AFP senior liaison officer in Bali.[108] Assurances for a non-application of the death penalty in case of apprehension by Indonesian law enforcement had not explicitly been sought.[109] In the pre-trial phase, the AFP provided the Indonesian National Police with further evidence gathered in Australia to assist the Indonesian prosecution on a 'police-to-police' basis.[110]

The cooperating countries in the *Bali 9* case have significantly different human rights regimes. There is no transnational law governing their police cooperation, only a non-binding MOU between the government of the Republic of Indonesia and the government of Australia on 'Combating Transnational Crime and Developing Police Cooperation'.[111] There was hence no security given that the Bali 9 would be extradited to Australia or not convicted to death. The Court in *Rush* v. *Commissioner of Police* (Rush was one of the Bali 9 and made an

[104] L. Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 SLR 95.
[105] See interview with Mike Phelan (AFP) who was, at the time, responsible for international operations, ABC Australian Story, 13 February 2006, available at www.abc.net.au/austory/content/2006/s1568894.htm.
[106] Denpasar District Court Sentencing Decisions of 13, 14 and 15 February 2006 (*Bali 9*).
[107] S. Bronitt, 'Directing Traffic and the Death Penalty: Policing the Borders of Drug Law Enforcement' (2006) 30 CLJ 270, at 270.
[108] Finlay, 'Exporting the Death Penalty', n. 104, 98.
[109] *Rush* v. *Commissioner of Police* (2006) 150 FCR 165 [22] (Finn J) (*Rush*).
[110] Finlay, 'Exporting the Death Penalty', n. 104, 99.
[111] *Rush*, n. 109, at 25, 43.

application for preliminary discovery to the Federal Court of Australia, claiming the AFP should not have cooperated with a death penalty applying country) held that the AFP had not breached Australian national legislation, such as the Mutual Assistance in Criminal Matters Act 1987 (Commonwealth), by not seeking explicit assurances that the death penalty would not be applied. The only immediate government response was the changing of police guidelines in death penalty matters.

The dangers of law enforcement without clear rules and guidelines become very apparent in this case. Between countries with very similar value- and human rights systems, the creation of informal cooperation and judicial decisions relying on 'fairness' principles do not carry with them immediate dangers of human rights infringements. In cooperation scenarios with very different systems, the absence of any binding framework can lead to significant harm.

Other examples of cross-border law enforcement in the absence of agreed arrangements, and its dangers with regard to human rights protection, are *Öcalan* v. *Turkey*[112] or *Ilich Sánchez Ramirez* v. *France.*[113] Öcalan was a Turkish citizen accused of major terrorism offences in Turkey. After expulsion from Syria in 1998, he fled to Kenya where Kenyan officials eventually facilitated his capture by Turkish security officials at Nairobi airport. The European Court of Human Rights (ECtHR or Court) did not find that the kidnapping violated the ECHR. The decision of the Court did not discuss any violations of sovereignty, as the focus was on the protection of the rights of the individual. A violation of sovereignty through unlawful exercise of extraterritorial jurisdiction would have to be reprimanded by Kenya. Kenyan officials, however, even condoned the exercise of extraterritorial law enforcement by facilitating its exercise. The ECtHR similarly did not find the extraordinary rendition from Sudan and the subsequent treatment in French prisons of Carlos the 'Jackal' to violate the ECHR.[114]

Both decisions do not deal with a breach of sovereignty or procedure with regard to cross-border law enforcement. They also do not discuss shared responsibility for harm caused by law enforcement acts on foreign territory that were condoned by the 'host' states. However, in both cases the state condoning the forced rendition from its territory, as well as the state exercising enforcement powers, arguably could both be jointly responsible for a breach of human rights.

[112] *Öcalan* v. *Turkey*, App. No. 46221/99 (ECtHR, 12 May 2005).
[113] *Ilich Sánchez Ramirez* v. *France*, App. No. 59450/00 (ECtHR, 4 July 2006).
[114] Ibid., at 10–76.

The cases outlined above indicate that rendition, but also less obvious exercises of law enforcement powers, such as surveillance and other evidence gathering, are at times conducted in other jurisdictions without international or transnational legislative permission to do so. However, cases addressing these issues are rare and not focused on the procedural breach, but other consequences.

6. Conclusion

Within a collection on shared responsibility in international law the issue of cross-border policing does not sit comfortably. Police and intelligence agencies rarely consider international legal obligations in their work, nor do they consider breaches of national sovereignty when they work informally with colleagues across borders. Law enforcement agencies and personnel active in the area of international cooperation are assigned a wide discretion to be able to fulfil their mandates (as seen in the example of liaison officers above). Their work is usually conducted with the support of the agencies from the cooperation partner and if not, issues are solved through diplomatic channels out of the view of the public. It is hence very difficult to determine whether harmful conduct or harmful outcomes exist in this area, triggering potentially shared responsibility. However, what can be concluded is that at the international level, problems are more likely to become known to the media, in particular in cases that trigger human rights abuses of citizens of western democracies, such as in *Bali 9* or *Derek Bond*. This is in stark contrast to cooperation between western democracies (as examples of US cooperation with EU member states show), and even more so if compared to cooperation between countries that are part of one human rights instrument, such as the EU. In the latter case, the national case law assumes that all EU member states have procedural rules in place that adhere to ECHR requirements. Breaches of sovereignty and rights of the defendant under national law are hence not possible anymore. It could therefore be stated in conclusion that harmful conduct and harmful outcomes with regard to the defendant or national sovereignty have become impossible if all states cooperating in cross border law enforcement are part of the same human rights regime. Only where this is not the case, the potential for shared responsibility for harmful conduct and outcomes arises.