A review essay on Models of Mutual Legal Assistance: Political Perspectives on International Law Enforcement Cooperation Treaties

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Different national, regional and international political perspectives dictate the individual approaches adopted by domestic jurisdictions towards mutual legal assistance and international law enforcement cooperation. There is no common view of the purpose of international law enforcement cooperation and there are strongly divergent opinions about the most appropriate means of establishing an international legislative framework for mutual legal assistance. This paper examines different approaches in a transatlantic context and offers theoretical models of consensus, control and conflict as a means of understanding better the different positions from which national jurisdictions negotiate international law enforcement assistance.

Criminal law enforcement cooperation on an international scale is a phenomenon that has come to characterize international law relations during the last quarter of the twentieth century as transnational criminality is increasingly facilitated by improved global transport and communication links. What began with the innovative telegraphed request for the arrest of the murderer Dr. Crippen as he fled Britain on an ocean liner bound for Canada (Daily Mirror, 1 August 1910 p.1) has developed into a corpus of international treaty law on mutual legal assistance as different national jurisdictions wrestle with transnational organized crime run as a parallel and illicit global economic enterprise (see Fiorentini & Peltzman 1995; Findlay 1999; Ruggerio 2000). It is an area of law enforcement in which the usual range of actors (criminals, victims, and investigators) is extended to include diplomats and politicians with a foreign affairs perspective. Domestic investigations with a transnational element can be frustrated and thwarted by failures in cooperation from foreign law enforcement agencies. Equally, successful cooperation can preserve order and enforce criminal law even when criminals seek to evade justice through exploitation of national borders and transjurisdictional criminality. It is apparent, as law enforcement agencies from around the world grapple with the issues and emerging demands of investigating and prosecuting transnational criminality, that different philosophical perspectives inform national approaches to this international problem. This essay considers some existing models to explain the philosophies involved, and proposes further models to
explain the dynamics of making mutual legal assistance work through treaties. In doing so it focuses on treaties intended to promote investigative assistance rather than extradition issues.

**Legal Models of International Cooperation**

In 1990 Philip Heymann proposed two contrasting models to explain legal attitudes concerning international cooperation between states in law enforcement (Heymann 1990). 2 The first is the prosecutorial model. In this model, law enforcement agencies create an “extremely pragmatic structure designed specifically to serve their mutual law enforcement needs” (Heymann 1990:103). Requests are acted upon without scrutiny in a system dependent upon reciprocity and similar political attitudes towards law enforcement. The model works at all levels within the criminal justice system and at the micro-level is sometimes termed the philosophy of practical policing.

In contrast, the international law model explains the relationship between states and agencies with very different attitudes concerning law enforcement. It is a model based on strict international rules including criteria for the denial of a request. At the core of this regulatory structure lies inviolable national sovereignty, although the defined objective of such treaty-based relations is to ensure that there are no safe havens for criminals (Heymann 1990:103).

The former model operates where criminal justice systems are compatible and law enforcement agencies concur that securing a prosecution is paramount. In this regard, U.S. prosecutors have greater influence over policymaking than do their European counterparts (Heymann 1990:105). Where prosecutorial discretion exists, there is likely to be more enthusiasm for any given case and a greater willingness to engage in mutual legal assistance. The latter model has greater regard for the relationship between criminal jurisdictions. Here Heymann argues that “less powerful states have more interest in insisting on regularity in their dealings with more powerful ones” (Heymann 1990:106).

Heymann recognized that no nation “adheres to either [model] in its pure form” (Heymann 1990:105). He went on to conclude that “understanding the different perspectives with which our states approach questions of international cooperation in law enforcement and the reasons for those differences is essential if the United States and its Western European allies are to improve their cooperative efforts to fight transnational crime” (Heymann 1990:107). In endorsing that conclusion, this paper is intended to enhance mutual understanding through examination of the next stage in the model process: looking beyond general attitudes towards international law enforcement cooperation to see how the construction of international law through treaty negotiation is influenced by political considerations. It is necessary to consider what mutual legal assistance is intended to achieve from a political perspective.
Mutual Legal Assistance: The National Security Perspective

Much has developed on both sides of the Atlantic in the arena of international law enforcement cooperation and mutual legal assistance since Heymann’s models were published. Significant differences between U.S. and E.U. attitudes towards mutual legal assistance and its context remain. Indeed, they seem to have become further entrenched.

In the United States, a very robust view was taken of transnational organized crime by the Clinton administration. In Presidential Decision Directive [P.D.D.] 42, dated 21 October 1995, President Clinton asserted that “international organized criminal enterprises . . . are not only a law enforcement problem, they are a threat to national security.” In Executive Order 12,978, effective the same day, he declared a “national emergency to deal with that threat” and thereby bypassed certain constitutional restraints on the Executive (interview with Bruce Zagaris, Senior Partner, Berliner, Corcoran and Rowe, in Washington DC, 1 July 2001). Federal agencies were directed to take “all appropriate actions within their authority to carry out this order” (Executive Order 12,978). Whilst recognizing an “obligation to others,” the primary and overriding common purpose of the Directive and the Executive Order was “to protect the welfare, safety and security of the United States and its citizens” (PDD42), an emphasis reiterated in the preamble to the International Crime Control Strategy (1998) in which President Clinton asserted: “efforts at home and with our international partners will ensure the protection of America’s interests.” The interests of others were not considered. The state of national emergency declared in Executive Order 12,978 has never been rescinded.

The origin of this policy perspective can be traced publicly to the speech that President Clinton delivered to the United Nations four months previously, on the occasion of the U.N.’s fiftieth anniversary in which he said “the threat to our security is not in an enemy silo, but in the briefcase or the car bomb of a terrorist. Our enemies are also international criminals and drug traffickers who threaten the stability of new democracies and the future of our children” (Address at the United Nations Fiftieth Anniversary Charter Ceremony, San Francisco, 26 June 1995 Text available at www.defenselink.mil/1995/s19950626-clinton.html: accessed June 2001).

Increasingly during the late 1990s, Congress considered the issue of international law enforcement, a subject that had little troubled the Legislature hitherto. With the promotion of democracy and market economies as top priorities for the Clinton administration, a key component of that effort was held to be the development of rule of law around the world (Congress 1995). Criminal justice systems in foreign countries which are considered ineffective or corrupt are perceived as havens for criminals seeking to exploit their criminality within and against the United States (see Kerry 1997; Robinson 2000). Thus, transnational organized crime has been presented as an external threat to the United States and an issue increasingly featured on the agenda for domestic federal agencies as well as for the Departments of State, Justice, and the
Treasury (interview, Jonathan Winer, former Deputy Assistant Secretary of State for Law Enforcement and Crime, 1 June 2001).

Whether or not transnational organized crime is truly a national security threat is an issue much debated both in the United States and elsewhere. It is an issue not unconnected with the need for security and intelligence agencies to redefine their post-Cold War roles (Zagaris 1998:1413; see also Bennetto 2001).

It is the view of many in the field that transnational organized crime has indeed become a matter of national security that threatens the very survival of a nation. Senator John Kerry cites testimony supporting this position given to his Senate subcommittee in 1994 by the CIA (Kerry 1997:28). Kupperman asserts that U.S. law enforcement agencies are now fully-fledged members of the national security apparatus, a view reinforced since the terrorist attack on the World Trade Center, 11 September 2001 (Kupperman 1994; interview with Kevin Delli-Colli, Director US Customs Cyber-Smuggling Center, 24 October 2001). But consensus on the exact nature of the threat is lacking. For Shelley the threat is insidious, the slow undermining of state control (Shelley 1999). Others are more specific, cataloging individual threats to national economic well-being, political stability, social harmony, the environment and the health of the citizens (Evans 1993). Security has, accordingly, been redefined into five arenas: military, political, economic, societal, and environmental, in each of which transnational criminal organizations [TCOs] can, if they choose, operate (Buzan 1991; for a similar perspective from Australia see MacFarlane 2001).

Frequently, transnational organized crime and terrorism are linked together in these arguments as if they presented a common threat to which there is a common solution (Kerry 1997:25). Terrorists utilize crime as a means of raising funds, and undoubtedly use the services provided by TCOs to further their cause (through the acquisition of firearms, for instance). Equally, TCOs are of use to security and intelligence agencies as a means of gathering intelligence about terrorist activities and achieving other state aims including the disruption of other TCO activity (Ciccarelli 1996; Farer 1999). But in their fundamental motivation, terrorists and transnational criminals differ. The ideological crusades of the former are of no interest to the profit-motivated criminals, except as a market opportunity for criminal services and products.

Indeed, transnational organized crime, being profit-based, requires market economies in which profits can be made. There is no incentive to destabilize states to the point where there is no further opportunity for profit. Whilst a regime that lacks rigorous domestic law enforcement may be suitable for drug production, for instance, the market for these drugs (the other part of the profit equation) remains affluent and stable societies which also sustain the financial institutions through which criminal profits are laundered. Without state prohibition, there would be no profit in organized crime (Friman & Andreas 1999; see also Celentanis et al. 1995 on the optimum level of government tolerance to be afforded transnational organized crime). The relationship between the
illicit transnational organized criminal market and legitimate economies is often symbiotic (Farer, 1999, 249). As such, transnational organized crime threatens the market state rather than the nation state (Treverton 1999).

A consequence of the interdependence of the global market economy is that nation states are no longer self-defined units (Chalk 2000:7). This in turn has prompted rethinking the nature of national security beyond the terms of conventional secure territorial sovereignty (Chalk 2000:135), but this thinking needs to go further than simply identifying transnational organized crime as a new threat to be added to the remit of conventional national security agencies and instruments. Transnational organized crime and terrorism have been conjoined in order to fill a hostility gap left by the Soviet Union (Farer 1999:252: this point was also often made in Congress, see footnote 5). But national security tools designed for the Cold War (including the state-sponsored and state-supported terrorism it spawned) by definition are intended to do a job very different from tools needed to enforce criminal laws. It is insufficient to equate transnational organized crime and terrorism for the purpose of formulating a response simply because there is evidence of terrorists providing an illicit market for TCOs to exploit. Whatever the talk of justice in the aftermath of the terrorist attack against the World Trade Center, such was the scale of the attack that it constituted an act of aggression that merited a military self-defense response. Such a response is appropriate for massive acts of terrorism, but not for “routine” transnational organized crime because the latter is still activity that challenges the values and order of a domestic society rather than national sovereignty per se. The latter mischief should therefore be addressed using domestic judicial instruments, aided as required by necessary instruments of international cooperation. Redefining crime and security so as to encompass transnational organized crime within national security affairs (Ciccarelli 1996:7) does not provide the ready response that might at first be apparent. An alternative solution would be instruments that achieve formal international regulatory regimes and agreements about how different national jurisdictions can assist each other (Chalk 2000:143). The OECD Financial Action Task Force is one example of an international regulatory regime; mutual legal assistance treaties (MLATs) are examples of aid agreements.

The adoption of a national security perspective on transnational organized crime and the mutual legal assistance necessary to prosecute such criminality has led to two consequences within U.S. policymaking. The first involves the practical impact on agency focus. The second influences attitudes toward MLATs.

P.D.D. 42 prompted certain policy documents that supported arguments for additional appropriations from Congress. The first of these was the 1998 International Crime Control Strategy (ICCS) followed two years later by the International Crime Threat Assessment (ICTA), a multiagency exercise pursuant to the ICCS (White House 1998; United States Government 2000). (It is noteworthy that a third document commissioned by Attorney General Janet Reno, working title The Map of the World, which attempted to demonstrate what was
known about criminals and their locations was never published. The FBI, whose support Reno had never enjoyed, refused to sign on to the document (interview, Jim Finckenauer, International Division, National Institute of Justice, Washington DC, 22 June 2001; see also “FBI Culture Must Change: Critics Say Freeh Leaving Behind Unfulfilled Goals,” *Washington Post*, 13 May 2001 p.A01)).

These documents reinforced the notion that transnational organized crime was best addressed beyond U.S. borders with action abroad intended to ensure that U.S. borders were inviolable to crime. With law enforcement agencies in open competition for Congressional funding, prosecuting transnational organized crime as a contribution to national security offered the opportunity to make extra appropriation claims against the public purse. Just as all the major law enforcement agencies are keen to investigate drug trafficking because of the potential to accrue income through asset forfeiture so, too, agencies were keen to take on increasingly international investigative roles in order to attract “national security” funding (interviews with Drew Arena, former Director OIA, Department of Justice, Washington DC (18 July 2001); Charles Bevan, International Affairs, FBI, Washington DC (3 July 2001); Glenn Nick, U.S. Customs, Fairfax Va. (3 June 2001); Tom Wade, International Investigations Section, DEA, Arlington Va. (28 June 2001)).

The ICCS and ICTA were initiatives of the Clinton administration. They were policy documents with calls for actions that were not directly funded. There is no mechanism by which to hold individual agencies to account if the ICCS actions are not followed up because accountability is to Congress for appropriated funds rather than to the Executive for policy execution. As of September 2001, the Bush administration had given no indication as to whether or not it was going to adopt these documents and as such the proposed strategies and policies remained in limbo, although considered opinion was that the status quo at least will be maintained (interviews with Arena, 18 July 2001; Winer, 1 June 2001; and Representative Frank Tierney (D), House of Representatives, U.S. Congress, 18 July 2001). Consequently, whilst there were individual agency initiatives in the arena of international law enforcement, there is no integrated U.S. approach to the issue of transnational organized crime (interview with Louise Shelley, Director, Transnational Crime and Corruption, American University, Washington DC, 18 June 2001). The events of September 11 shifted the focus further towards national security.

The second consequence of adopting the national security perspective is reflected in attitudes toward negotiating MLATs, the principal subject of this paper. MLATs are the instruments of international law that make provision for domestic law enforcement agencies in one jurisdiction to provide assistance to, or request it from, their counterparts overseas. In the language of international law, the terms treaty, agreement, and convention are synonymous (Shaw 1997:634). Here, for sake of convenience, the term MLAT will be used for bilateral treaties, and the term convention for multilateral treaties. This is a usage consistent with that adopted by American law enforcement agencies.
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P.D.D. 42 made clear that whatever mutual obligations might exist, the defense of the United States was the overriding policy in prosecuting transnational organized crime and that, if necessary, the United States reserved the right to take unilateral action pursuant to this aim (see also Kerry 1997:182). Consequently, there is a strong policy preference within the United States government for bilateral MLATs; that is, tailored agreements brokered with individual nations which impose mutual obligations on both parties, although there are examples of nonreciprocal agreements being negotiated in favor of the United States (Gilmore 1995:xxi). The advantage of this type of MLAT is seen to be the flexibility it offers for the United States to achieve detailed and specific obligations on a country-by-country basis (interview with Lystra Blake, Associate Director, OIA, Department of Justice, Washington DC, 16 May 2001). A diagrammatic representation of the relationship between these individual MLATs might be portrayed as a bicycle wheel, with the United States at the hub and the spokes representing the individual MLATs. By 30 March 2001, the United States had negotiated forty such agreements (interview with Charles Buyler, attorney, international law section, DEA, Arlington Va., 13 June 2001). This model for MLATs focuses on the control exercised at the hub. It is entirely consistent with the view of mutual legal assistance as an instrument in an armory intended to protect a single nation from the external threats posed by transnational organized crime.

The obligations that are imposed on signatory parties to assist the United States are not mirrored by an obligation on U.S. authorities to rely upon such treaties as the sole means of achieving their aims. The Supreme Court has held that bilateral treaties are a nonexclusive option available to U.S. authorities. In Alvarez-Machain, agents acting on behalf of the U.S. government ab ducted a suspect located in Mexico in spite of there being a bilateral extradition treaty in place. The periodic resort to forcible abduction or fraud as an alternative to extradition is not uncontroversial, but neither is it inconsistent with a power-broker’s approach to the control model (United States v. Alvarez-Machain, 504 U.S. 655 (1992) remanded, 971 F.2d 310 (9th Cir. 1992). For discussion of the case and its implications see Zagaris 1998:1434; also Paust et al. 2000:479-489).

Mutual Legal Assistance: A Domestic Issue With A Regional Solution

Some American commentators see advantage in an alternative approach to international law enforcement cooperation, namely that adopted by the nations of Europe. It has been argued that the United States needs to participate in a regional policy coordination body equivalent to the European Committee of Experts on Crime Problems [ECCP] (Zagaris 1996). The G8 Lyon Group provides an influential forum for discussion, but is not of itself an international institution concluding treaties (Sussman 1999). A coordinated multinational approach dictates a different model of mutual legal assistance.
In December 1994, a Summit of the Americas was held which originated a plan of action expressed in terms of twenty-three aspirations, two of which related to crime and corruption, and one of which related to terrorism (The text is reproduced in *Summit of the Americas: Declaration of Principles and Plan of Action*, International Legal Materials, 34:808-838 (1995)). It received a qualified welcome from legal experts. “The absence of real objectives represents, in part, a lack of agreement on the goals and trade-offs that are required to enforce the law and reflects the immature status of hemispheric mechanisms and institutions of enforcement” (Zagaris 1998:1899).

Western European nations have been collectively addressing the problems of crossborder crime since the late 1950s when the Council of Europe opened multilateral conventions on extradition and mutual legal assistance in criminal matters for signature and ratification. The problems to which these early instruments sought to provide solutions were focused on fugitive capture. Transnational organized crime, as the phenomenon is understood today, had yet to trouble policymakers. The threat of transnational organized crime to the European Union and its Member States now is viewed collectively, not the least because of the geographical circumstance of so many prosperous nations being such close neighbors. Shared law enforcement problems arise out of the achievement of greater economic integration in Europe (Harding and Swart 1995:97). Regional prosperity and security concerns override national concerns to the extent that national fortunes are inextricably linked to regional perspectives. Transnational organized crime is also viewed as essentially a “local problem” for which European institutions provide regional instruments and initiatives to assist domestic authorities (Fijnaut 1998:279). “In virtually none of the member states does organized crime pose a real threat to the democratic constitutional state and the free market economy. Rather, it represents a greater or lesser challenge to the authorities” (Fijnaut 1998:278).

The basis for regional cooperation was founded within the Council of Europe’s early conventions. It was given renewed political emphasis during the 1970s as Western Europe faced numerous terrorist threats, particularly in Germany, Italy, Northern Ireland and Spain. The intergovernmental counter-terrorist deliberations of the TREVI group fostered a spirit of cooperation that was to find later expression in the Schengen Convention of 1990, the scale of the terrorist threat having by now considerably reduced whilst that posed by routine transnational criminality having increased (see Anderson *et al.* 1995, for discussion of TREVI; on the Schengen Convention see Hebenton and Thomas 1995; for the text of the Schengen *Acquis* documents see Statewatch 1995). The Schengen Convention, fully implemented by most E.U. nations and some Third Parties, allows for greater sharing of information directly between law enforcement agencies and in certain urgent operational circumstances, crossborder hot pursuit and observation.

In 1997, a High Level Group of Experts within the European Union reported on the threat of transnational organized crime to the E.U., established fifteen points of principle and recommended thirty specific actions (European
Union, Action Plan to Combat Organized Crime, 7421/97, Official Journal 97/C 251/01 15 August 1997). The European Union formally assumed responsibility for providing its citizens with “a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters.” This aspiration is articulated in Title VI of the Treaty of Amsterdam 1997. This was taken forward in a number of Joint Actions and at the special summit at Tampere, Finland, in October 1999 (Council of the European Union 1998). A large number of initiatives have been generated post-Tampere, but it will suffice to summarize the main proposals: Europol to provide Unionwide strategic coordination and intelligence; Eurojust to facilitate the proper coordination of national prosecuting authorities, an initiative to which has been added the European Judicial Network for judges; a European police college; and a European Police Chiefs Operational Task force to exchange best practices and information in relation to transnational crime. There is also significant emphasis being placed on preventative measures to be deployed against transnational organized crime.

These developments have been complemented by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, which was opened for signature on 29 May 2000, and which is currently in the process of being ratified by all E.U. Member States (House of Lords 2000).

To these European examples of regional cooperation can be added global transnational crime initiatives from the United Nations, which began in earnest with the 1988 Vienna drugs convention, and more recently have included the 2000 Palermo convention against transnational organized crime. Common to both these conventions is a formula established in the informal Harare Scheme of the British Commonwealth: agreement by signatory parties to criminalize certain activities and the provision of certain mutual legal assistance actions where there is no MLAT in force (U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 7, Vienna, 1988; U.N. Convention against Transnational Organized Crime, Article 14, Palermo, 2000; on the Harare Scheme see Commonwealth Secretariat, Mutual Assistance in the Administration of Justice: Meeting of Senior officers to Consider Draft Schemes, 27th January to 7th February 1986, Marlborough House, London (Summary Record). See also McClean 1992:149-164).

These multilateral conventions are arrived at through diplomatic negotiation and illustrate an alternative consensus model to the control model identified above. Criticism of such an approach focuses on the fact that such agreements define nothing more than the lowest common denominator — the general issues upon which all the parties can agree (interview with Lystra Blake, Associate Director, OIA, Department of Justice, Washington DC, 16 May 2001). Thus, such multilateral conventions are seen as lacking the robust obligations expressed in bilateral MLATs. This, depending upon perspective, could be a weakness. Yet, the strength of such an approach lies in the norms it
establishes; norms which are not necessarily established through bilateral MLATs because such instruments are individually tailored to suit specific circumstances providing a flexibility which will suit the power broker within the relationship. Indeed, a lack of universal standards is now recognized in some quarters as an advantage in that enforcement actions prohibited on the grounds of due process or human rights in one jurisdiction may not be prohibited in another, allowing authorities latitude for process-laundering (interviews undertaken by the author within source confidentiality agreements at the offices of a major security analyst and consultancy firm, Washington DC, 13 July 2001; see also Gane and Mackerel 1996).

A second advantage of the more general multilateral approach is that it establishes conventional relationships in the absence of bilateral MLATs. This was precisely why President Clinton recommended to Congress that the United States sign the OAS mutual legal assistance convention which the United States ratified on 25 May 2001, and which came into force a month later. In the letter of transmittal to the Senate, the President asserted: “one significant advantage of the Convention and Protocol is that they provide uniform procedures and rules for cooperation in criminal matters by all the States that become Party.” He also highlighted a second advantage: “[the Convention and Protocol] obviate the expenditure of resources that would be required for the United States to negotiate and bring into force bilateral mutual legal assistance treaties with certain OAS States” (Congress 1997).

Models of Mutual Legal Assistance

These two contrasting models of mutual legal assistance are products as much of geopolitical context as they are of international law. Both focus on the political use of international legal agreements; in the case of the control model, bilateral MLATs, in the case of the consensus model, multilateral conventions. As such, they both have equal advantage over the arrangements regarding assistance in criminal matters that existed prior to formal international agreements, namely diplomatic requests based on the comity of nations.

It is the obligation inherent in a formal agreement that is oft-cited by U.S. authorities as the preeminent advantage accruing to bilateral MLATs (interviews with Blake, 16 May 2001 and Emory, 22 February 2000). The same advantage is true of multilateral conventions. But in the absence of the sort of supranational enforcement mechanisms now extant in multilateral conventions such as those of the European Union, any international agreement between nations is only as useful as its observance. There is little recourse in international law for an aggrieved party to an international agreement in the event that another party fails in its obligations. The International Court of Justice exists as a mechanism through which international disputes about treaty breaches may be adjudicated, but in reality it has no mandatory powers of jurisdiction and only limited powers through the U.N. Security Council to enforce its judgments (Wheatley 1996:23). This leaves two other recourses to
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action: *in extremis*, the unilateral use of military force or the imposition (or threat) of economic sanctions. In the latter lies the preference for the bilateral MLAT over a multilateral convention where a bilateral treaty is negotiated between nations whose economic relationship is asymmetrical. Herein lies the attraction of the control model.

Through the judicious deployment of bilateral instruments between partners of unequal status, the control model can be used to promote a unilateralism that contrasts with the positive international law emphasis on the principle of cooperation echoed in the founding principles of the U.N. (Dupuy 2000:22-23). U.S. law enforcement agencies have long pursued unilateral action that has appeared to be at odds with prevailing cooperative practices elsewhere in the world (Nadelmann 1993; Manning 2000). This has been actively presented as a global colonization of U.S. law enforcement philosophies in order to secure compliance with the wishes of U.S. agencies (Nadelmann 1993). When U.S. practitioners and agencies have encountered sufficient resistance to their preferred *modus operandi* (which arguably is the pure form of Heymann’s prosecutorial model), the politicians and diplomats then resort to negotiating a bilateral MLAT. The U.S. became the first Common Law State “actively to explore the benefits to be derived from this form of international cooperation” (Gilmore 1995:xvi. For an account of the dispute between the U.S. and the U.K. that arose when U.S. authorities sought to take unilateral enforcement action outside U.S. jurisdiction, and which led ultimately to the negotiation of the U.K/U.S bilateral MLAT, see Gilmore 1995:xx). From a patriotic perspective, Nadelmann offers a slightly different yet candid spin: “the principal incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by U.S. prosecutors, police agents and courts to unilateral, extraterritorial means of collecting evidence from abroad” (Nadelmann 1993:315).

Such an approach is not inconsistent with the traditional position of international independence and self-reliance for the United States as expressed in James Monroe’s Doctrine and the “League of Nations” speech made by Senator Henry Cabot Lodge. In regarding transnational organized crime as the same sort of violation of sovereignty against which both these speeches warned, it is hardly surprising that the United States should adopt what is primarily a unilateral position in respect of transnational organized crime reinforced with bilateral MLATs designed to promote U.S. interests. This is precisely the position set out in P.D.D. 42.

History likewise influences European attitudes toward international agreements but from a different perspective. Post-World War Two economic integration and political cooperation in Europe, principally in Western Europe, is aimed at breaking the cycle of military conflict that has afflicted the continent almost continuously for two millennia (Pinder 2001:1-3; see also Cram 1996:40; Minogue 1995:56). The ease with which criminals and criminality can transgress European borders invites regional multilateral cooperation with an emphasis not felt in the Western Hemisphere.
Multilateral conventions involve compromise that the power brokers in a bilateral relationship may not have to endure. Negotiations within the European Union take a long time, as do those within the Council of Europe. Individual parties to the negotiations may not secure all the agreements they would wish. They may have to accept obligations that they would rather not have undertaken. That is the nature of diplomatic negotiation. The outcome is a consensus on a basic standard of cooperation and agreement on what constitutes particular crimes which can be the starting point for further development.\footnote{It is the setting of internationally agreed norms that is a particular advantage of the consensus model.}

The unanimous goodwill of all signatory parties to respect the agreements concluded is necessary for either the bilateral MLATs or the multilateral conventions to operate properly. In this they share a common weakness should any party default. The consensus model fails if signatory parties do not implement their obligations. Despite the attraction of the asymmetrical control model, its success in protecting the interests of the power broker is not guaranteed either. U.S. demands made of Central and South American jurisdictions have imposed insupportable burdens on criminal justice systems that were already unable to cope with the pre-existing workload (Zagaris 2000:1442). This has led to human rights abuses that undermine the integrity and legitimacy of the intended objectives (interview with Representative Janice Schakowsky (D), House of Representatives, U.S. Congress, Washington DC 18 July 2001).

Heymann, it will be recalled, argued less powerful states have a vested interest in insisting on regularity in their dealings with more powerful states (Heymann 1990:106). This recognizes the value of international legal instruments, his international law model, in regularizing relations between different national jurisdictions. The control model proposed here qualifies this conclusion by illustrating that powerful states have as much if not more to gain through bilateral MLATs than their weaker partners. As noted above, \textit{Alvarez-Machain} illustrates how the powerbroker in a bilateral agreement has the option of taking unilateral enforcement action outside treaty provisions. The operation of the control model also illustrates how Heymann’s prosecutorial approach to international law enforcement might be reinforced through bilateral agreements between unequal partners.

Heymann’s international law model and the consensus model proposed here are complementary. Both illustrate the mechanisms by which the citizen is protected against the abuse of state authorities exceeding their powers. The international law model explains how relations between assisting jurisdictions are regulated, the consensus model shows how common values are arrived at in a way that promotes them among the widest possible number of signatory parties. In Europe, mutual legal assistance conventions are agreed within the context of another post-war convention, the 1958 European Convention on Human Rights and Fundamental Freedoms [ECHR]. With the United Kingdom’s belated ratification of the ECHR in 1998 — having been the first coun-
try to sign the convention thus highlighting one of the weaknesses in consensus model treaties, the potential gap between agreement and enactment—all E.U. states now recognize the common values established through the ECHR which has its own separate enforcement jurisdiction, the European Court of Human Rights at Strasbourg.

The protection of an individual’s rights is entirely possible in both control model treaties and consensus model treaties. It is argued here that the latter are more likely to promote widely agreed norms in human rights. Equally, neither model guarantees rights protection. In a comprehensive and illuminating paper, Gane and Mackerel cite numerous examples from Europe and North America of cases in which courts have adduced evidence irregularly obtained abroad. Evidence obtained through telephone interception by French authorities on behalf of Belgian investigators was admitted in a Belgian court even though the particular circumstances of the interception were contrary to Belgian law (Gane and Mackarel 1996:114). In the case of Chinoy, whose extradition was sought from the United Kingdom by the United States in connection with charges arising from the BCCI money laundering investigation, English courts granted the extradition on the basis of evidence unlawfully obtained by United States agents undertaking unilateral investigations in France. U.S. authorities, realizing that an extradition application to France on the basis of the unlawfully obtained evidence would be unsuccessful, waited until Chinoy visited the United Kingdom before seeking his detention. The English courts took the view that it was not for them to consider the circumstances in which the evidence relied upon was secured (Gane and Mackarel 1996:113). In Verdugo-Urquidez and Alvarez-Machain, the U.S. Supreme Court “ignored the sovereign rights of the state in which the evidence or fugitive [was] abducted, in breach of international law” (Gane and Mackarel 1996:110; United States v. Verdugo-Urquidez, 110 S Ct. 1056 (1990); United States v. Alvarez Machain 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed. 2d 441 (1992)). In the latter case, the Supreme Court overruled the decisions of lower courts in finding that the protections of the U.S. Constitution against abuse of authority by federal agencies did not extend to non-American subjects of federal investigation outside the United States (Paust et al. 2000:479-489).

“The U.S. judiciary has limited the application of the Bill of Rights to citizens for acts that occur outside the United States. The judiciary has endorsed the use of abductions by overlooking the manner in which fugitives arrive at court, so long as the manner does not shock their judicial consciences” (Zagaris 1998:1464. The United States has declined to sign or ratify the American Convention on Human Rights, although it participates in the Commission that determines whether other states have violated the convention: Zagaris 2000:1442).

The equivocal application of legal standards undermines the notion of a global rule of law (which surely implies global norms universally applied) but is consistent with the prosecutorial and control model approaches to international law enforcement cooperation.
HARFIELD

International Law Enforcement Cooperation After September 11

In contrast to the control and consensus models of treaty negotiation, in the response to the September 11 terrorist attacks against the United States, what might be termed a conflict model of mutual assistance has emerged. In this model, comity rather than regulation is once again the basis for assistance. This is because the response is a mixed one. It has both military and law enforcement elements and is driven by a philosophy that has much in common with Heymann’s prosecutorial model: a common abhorrence of what happened.

Security experts have noted the unprecedented cooperation between intelligence and security agencies in the aftermath of the attacks (John McFarlane, Australia National University, presentation to the 25th Management of Serious Crime Course, Australian Federal Police HQ, Canberra, 29 October 2001). This has primarily been associated with the military and intelligence-gathering element of the response: allies executing a military action against ideological aggressors who perceive themselves as conducting a war (in this case a jihad). But there is also an element of judicial prosecution for criminal acts. At the time of writing, one American suspect has already been charged with criminal offenses in the United States; another American suspect has been repatriated to face charges (“Man alleged to be the 20th hijacker defies court in the name of Allah,” The Independent 3 January 2001, p.1). Non-Americans are incarcerated in Camp X-ray, Guantanamo Bay, Cuba (within U.S. territorial control but without the reach of the U.S Bill of Rights in the light of Supreme Court rulings already discussed), viewed as illegal combatants, apparently neither prisoners of war within the terms of the Geneva Conventions nor criminal suspects within the terms of U.S. criminal law.

The nature of terrorism on the scale executed on September 11 is hotly debated. The initial response to that unprecedented event has been military, as if it were an act of war, although al-Qa’eda is not a territorial state that can declare war or have war declared against it within customary international law.

It can be argued also that, given the hijackings took place in U.S. airspace and the murders on U.S. soil, the entire episode is a matter of U.S. criminal justice and thus subject to U.S. domestic criminal procedures.

Terrorism is also proposed as an international crime by Bassiouni for which an international court model, the logical extension of the consensus model, might offer an alternative prosecution solution (Bassiouni 1986:135).

Of these three strategies, the latter can be easily dispensed with. Terrorism does not come within the jurisdiction of the International Criminal Court (ICC) because there is no agreed criminal definition of terrorism (Gregory 2000:126-127; see also McGoldrick 1999:627). The ICC is intended to have limited jurisdiction, and then only when national courts cede jurisdiction. It is not envisaged as a possible mechanism to prosecute routine transnational organized crime. So this phenomenon must continue to be investigated by domestic agencies within the framework of international law enforcement.
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cooperation as described above. A further weakness in this solution is the refusal by the United States to participate in an ICC (Law News, The Independent (Review Section) 20 February 2001 p.10).

This leaves either the military approach or the criminal law approach. The weakness in the latter is the extreme unlikelihood under prevailing circumstances that the United States would receive any assistance whatsoever from the Taliban authorities had evidence to support a criminal investigation been sought through diplomatic channels (the U.S. not having negotiated an MLAT with Afghanistan). A purely military approach would, however, assuage only those who sought vengeance rather than judicial retribution and from the outset U.S. authorities have spoken about bringing the perpetrators to justice.

If “illegal combatants” are to face criminal charges, how is the evidence to be gathered and adduced? By which agencies? What due process protections exist for those charged with criminal indictments? How are suspects to collate evidence in their defense? All of these are crucial questions the solutions to which impact on the mechanisms for the investigation of other, less sensational, types of transnational organized crime. U.S. authorities deny all formal MLAT channels to defendants who instead have to rely on old-fashioned diplomatic requests. Indeed, it shocked the conscience of all American government lawyers and law enforcement agents interviewed during the research for this paper that the defense should be afforded official channels through which to acquire exculpatory evidence (interview, Blake, 16 May 2001).14

“The U.S. Executive’s unwillingness to provide for due process for defendants and third parties has started to backfire in the judiciary’s refusal to sanction evidence gathering procedures” (Zagaris 1998:1464). What happens if the non-U.S. combatants are repatriated in order to face prosecution at home rather than in the United States, and the domestic authorities feel obliged to discontinue prosecution because of due process concerns? Such an action would, in all probability, discourage future international law enforcement cooperation.

There exists the danger that the distinction between the different types of cooperation post September 11, on the one hand evidence-gathering in relation to criminal prosecutions conducted within the due process bounds set by either control model or consensus model treaties and on the other hand intelligence-gathering in relation to military action, will become blurred. Such lack of clarity risks compromising due process and with it the overall integrity of international law enforcement cooperation as established through treaty law (“Guantanamo Bay,” The Independent, 18 January 2002 pp.4-5).

The conflict model of cooperation, identified specifically with the response to September 11, is itself riven with conflicting ideals. On the one hand, the U.S. administration’s “new ambition to lead a global coalition against terrorism makes unilateralism untenable” and so invites support for the consensus model approach (Ikenberry 2001:20). On the other hand, “lurking in some quarters of the government is a deep skepticism about operating within a rule-based international order and a preference for unilateralism and selective
engagement’’ that would be consistent with the control model (Ikenberry 2001:26). The United States could yet decide that its own agenda outweighs the need to sustain an antiterror coalition. “In this case it might use force in a way that split the allies into fragmented groups each seeking a separate settle-
ment’’ (Ikenberry 2001:37). Whatever the political convenience, the United States has less practical need of consensus in this issue (evidence of Admiral Sir Michael Boyce, U.K. Chief of Defence Staff, to the Defence Committee (House of Commons, 2001, at paragraph 86)). The concern is that a renewed unilateral emphasis will influence attitudes toward conventional international law enforcement cooperation.

Conclusion

At the conclusion of the Fulbright Fellowship the research for which informed much of this paper, the present author offered up for the first time for academic criticism the embryonic concepts of the control and consensus models at a seminar delivered to the National Institute of Justice, Washington DC, (31 July 2001). In the informal discussion following the seminar, one American member of the audience, welcoming the characterization of control and consensus, remarked that control did indeed precisely describe what happened when the United States was forced against its will to accept in multi-
lateral conventions (specifically U.N. conventions) terms that would not have been of its choosing, whilst consensus with equal precision described how the United States went about achieving exactly what it wanted through bilateral MLATs. Further discussion revealed this reversal of the model names to have been subconscious rather than a direct academic challenge to the concept. This vignette neatly illustrates the markedly different perceptions of mutual legal assistance mechanisms that prevail in the transatlantic arena founded upon the different political purposes which mutual legal assistance is considered to serve.

From the Asia-Pacific region comes a further perspective. In describing the Australian Federal Police (AFP) as an “international police service,” A.F.P. Commissioner Mick Keelty went on to identify a link between regional peace-
keeping work performed by the A.F.P. (under the auspices of the U.N.) and preventing or reducing transnational organized crime in the region through the promotion of societal stability. “In providing that service to the region, Australia is doing no more than strengthening its own security, since regional peace and security is essential if we are to prevent a spillover of problems like illicit drug trafficking and illegal migration into Australia’’ (Keelty 2001:9). This approach places the national security perspective within a regional coop-
ERATIVE context.

The attacks against the United States on 11 September 2001, were in every sense, quite literally, extraordinary. They demanded a vigorous response. But that response must not overwhelm or derail the mechanisms for daily investi-
gation and prosecution of ordinary transnational organized crime. As of May
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2003, and due in no small part to increased vigilance against a continuing threat, the number of murderous terrorist attacks committed in the United States by Al-Qa’eda is zero. That is the same total number of days on which TCOs have not smuggled illicit drugs, arms and immigrants or laundered money across American and other national borders since 12 September 2001. Legislatures have responded to September 11 by enacting extraordinary powers. But in doing so, hasty decisions are being made about what enforcement and investigative powers should relate to what sort of activity and what authorities should be invested in which agencies. In the United Kingdom, such a reaction has in fact undermined the law enforcement arguments for data retention by Internet and communication service providers for the purposes of investigating transnational organized crime. Limited and conditional obligations on communication service providers to assist authorities with the provision of data to aid investigations have been reserved for national security issues to the exclusion of investigations into daily transnational organized crime.

It remains to be seen how the events of September 11 will influence future assistance treaty negotiations, and whether, at a time when some commentators are calling for the United States to engage more fully in consensus model treaties, America in fact relies even more heavily on the control model. If indeed the final quarter of 2001 witnessed unprecedented and successful cooperation between law enforcement agencies, security agencies and intelligence agencies from different jurisdictions, then a strong case for the consensus model appears to have been made. The danger exists, however, that the location of the attack will dictate a reaction founded upon the control model favored in that jurisdiction. And the control model, focused as it is on the national security of the hub nation, does not address the needs of the wider global community.

The models proposed by Heymann and those proposed here are not mutually exclusive. Rather, the latter complement and illuminate the former. Heymann illustrates how different attitudes toward international law enforcement cooperation might be characterized. The control and consensus models illustrate how different political considerations influence strategic approaches to the negotiation of mutual legal assistance treaties and conventions intended to facilitate the investigation and prosecution of transnational organized crime by domestic law enforcement agencies. The conflict model illustrates how a mixed military and prosecutorial response to a single event might compromise international law enforcement cooperation in other areas. The control and consensus models each have individual strengths and weaknesses. They also have different consequences for the future of international law enforcement cooperation. This paper does not argue that one model has greater value than the other. In seeking to promote enhanced understanding and cooperation between transatlantic allies against crime, the control and consensus models are intended to explain attitudes toward treaty negotiation alongside Heymann’s models of attitudes toward prosecution.
NOTES

1. Contact information: Clive Harfield, Department of Politics, University of Southampton, Highfield, Southampton SO17 1BJ, UK. Telephone +44 20 8095 5000. E-mail: cliveharfield@hotmail.com

2. The author was Assistant Attorney General in charge of the Criminal Division of the Department of Justice from 1978 to 1981.

3. I am grateful to the National Security Council Information Office for supplying me with a copy of this now declassified U.S. Government document hereafter P.D.D. 42.

4. With the economy going well and the Cold War over, Clinton was in need of a new flagship policy: interview with Drew Arena, former Director Office of International Affairs, Department of Justice, Washington DC 18 July 2001.

5. Among the numerous other Congressional hearings which examined transnational crime were those which examined global organized crime (focusing almost exclusively on the threat from Russian organized crime, January 1996), Russian organized crime (April 1996), international organized crime and global terrorism (October 1997), African international crime (July 1998) and mutual legal assistance mechanisms and treaties (September 1998).

6. A doctrine of self-defense was first devised by the United States in 1837. Arguably it has been superseded by Article 51, U.N. Charter, which provides for such action “until the Security Council has taken the measures necessary to maintain international peace and security,” Malcolm Shaw (1997, 788).


9. In interviews conducted in various foreign embassies in Washington DC, May through July 2001, more than one foreign law enforcement liaison officer posted to Washington observed that the United States had used economic supremacy as a means of achieving compliance for its own requests, an option unavailable to the other nation concerned when the latter’s requests to the U.S. went unanswered or were handled with insufficient expedition to be of use. Zagaris demonstrates how certification under the Foreign Assistance Act 1961 and the annual International Narcotics Control Strategy Report are used to justify the provision or withholding of foreign aid by the U.S.: Zagaris (1998:1408).

10. The Monroe Doctrine of 2 December 1823 (actually formulated by John Quincy Adams), advocating that the encroachment of any European ways in the western hemisphere would be dangerous to the peace and safety of the United States, and the speech to the Senate of August 12, 1919, denouncing the proposed League of Nations, are reproduced in Grant 1996, 267 and 400 respectively.

11. Article 17(5), Chapter II, Second Additional Protocol to the 1959 European Convention on Mutual Assistance in Criminal Matters (11 November 2001) allows for bilateral extension of the cross-border observations provisions by Signatory Parties. Similarly, with E.U. extradition agreements, bilateral extensions from the basic standard have been executed.
12. There is no single international agreement covering the circumstances in which assistance was sought by the United States following the attacks. NATO countries invoked Article 5 of their treaty for the first time, thus characterizing the attack as an act of war.

13. The concept of illegal combatants begs questions (beyond the scope of this paper) about the status, not only of the conflict itself, but also of all participating parties to the conflict.

14. Many others expressed the same view. In the U.K., defendants have access to the same request procedures as the prosecution under Section 3, Criminal Justice (International Co-operation) Act 1990.

15. In the U.K. the Anti-Terrorism, Crime and Security Act 2001; in America the ("Patriot’s Act"), Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (25 October 2001) HR 3162 RDS.

REFERENCES


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