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Police Cooperation across the Irish Border: Familiarity Breeding Contempt for Transparency and Accountability

DERMOT P.J. WALSH*

This article critically examines the practice, methods, and regulation of cross-border police cooperation between the Republic of Ireland and Northern Ireland. Despite legal and political divisions, police cooperation has survived and flourished in recent years especially among police officers on the ground. By comparison, the development of transparent regulatory and accountability structures and processes has been disappointing. While there have been domestic initiatives at the intergovernmental and legislative levels, these have tended to emphasize the centrality of direct engagement between the police chiefs and senior civil servants at the expense of formal transparent procedures. EU instruments have been marginalized as the police forces and their administrations prefer informal networks and force-to-force agreements which, it is argued, shield cross-border police cooperation from standards of transparency, oversight, and accountability which are essential to its legitimacy. They also highlight the limitations of the current EU legislative approach to cross-border police cooperation.

INTRODUCTION

The completion of the single European market and the emergence of the Treaty on European Union in the early 1990s gave a major stimulus to research on cross-border police cooperation. Initially attention focused largely on the challenges, processes, and implications of policing across a

* *School of Law, University of Limerick, Limerick, Ireland*
dermot.walsh@ul.ie

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Union which was dismantling internal legal and political borders more rapidly than it was replacing them with its own distinct political entity and police competence.[1] As these aspects of the Union deepened with the Treaties of Amsterdam and Lisbon, so the locus of research moved to the mechanics and issues surrounding the growth and operation of European police machinery and process.[2] By contrast, bilateral police cooperation across national boundaries, whether home-grown or in response to Union initiatives, has attracted less attention in the English-language literature. Two notable exceptions are the cooperation between the Kent Constabulary in South-east England and its counterparts on the other side of the English Channel,[3] and Rijken and Vermeulen's study of joint investigation teams.[4] Surprisingly, given the local social, economic, cultural, and geographical environments, together with the national political context, research on the practice and regulation of policing across the land border between the Republic of Ireland and Northern Ireland (hereafter referred to as the Irish border) has not attracted comparable attention. This article is a contribution to redressing that deficit.

Utilizing Benyon et al.'s three-tiered typology of macro, meso, and micro levels of cooperation,[5] the article charts how policing across the Irish border survived the legal and political divisions and grew, especially at the micro level of engagement among police officers on the ground. Anderson and

1 See, for example, M. Anderson and M. den Boer (eds.), *Policing across National Boundaries* (1994); M. Anderson et al. (eds.), *Policing the European Union* (1995); B. Hebenton and T. Thomas, *Policing Europe: Co-operation, Conflict and Control* (1995); J. Benyon, *Police Cooperation in Europe: an Investigation* (1993); M. den Boer (ed.), *Schengen, Judicial Cooperation and Policy Cooperation* (1997).

2 See, for example, M. Anderson and J. Apap (eds.), *Police and Justice Cooperation and the New European Borders* (2002); J. Occhipinti, *The Politics of EU Police Cooperation: toward a European FBI?* (2003); M. Santiago, *Europol and Police Cooperation in Europe* (2000); M. den Boer (ed.), *Organised Crime: a Catalyst in the Europeanisation of National Police and Prosecution Agencies?* (2002); C. Rijken and G. Vermeulen, *Joint Investigation Teams in the European Union: from Theory to Practice* (2006).

3 For further details on cooperation between the Kent Constabulary and its counterparts on the other side of the channel, see F. Gallagher, 'Cross-border Police Cooperation: the Kent Experience' in *New Borders for a Changing Europe: Cross-border Cooperation and Governance*, eds. J. Anderson, L. O'Dowd, and T. Wilson (2003); J. Sheptycki, 'Police Co-operation in the English Channel Region 1968–1996' (1998) 6 *European J. of Crime, Criminal Law and Criminal Justice* 216.

4 See Rijken and Vermeulen, op. cit., n. 2.

5 Broadly, macro refers to agreements between the governments expressed in the form of binding international instruments and/or legislation; meso refers to administrative agreements between police forces themselves; micro refers to cooperation between officers on the ground in individual instances or situations. See J. Benyon, L. Turnbull, A. Willis, and R. Woodward, 'Understanding Police Cooperation in Europe: Setting a Framework for Analysis' in Anderson and den Boer, op. cit., n. 1, ch. 3.

others have argued persuasively that such micro-level networks of informal cooperation play a critical role in determining the overall shape, substance, and quality of police cooperation.[6] Similarly, Gallagher has shown in his work on cross-channel cooperation between the Kent Constabulary and its counterparts that informal networks lay the essential foundation for the development of more formal government regulation.[7] This article finds only partial support for those perspectives in the Irish experience. It will show, for example, that the informal networks on the Irish border were eventually complemented and developed by meso-level cooperation in the form of agreements and memoranda of understanding between the police forces themselves. On the other hand, however, it will argue that macro-level cooperation, in the form of domestic legislation and transparent regulatory structures and processes (including those emanating from EU instruments), has had no more than a marginal impact across the Irish border. The police forces, and their respective administrations, have espoused a clear preference for the informal networks and direct force-to-force agreements associated with the micro and meso levels of cooperation. While these undoubtedly serve police institutional interests and deliver some dividends for law enforcement, it is argued that they also shield cross-border police cooperation from standards of transparency, oversight, and accountability which are essential to its legitimacy.

Before pursuing these arguments, it might be useful very briefly to contextualize the border and some of the policing challenges that it presents.

THE IRISH BORDER AND ASSOCIATED POLICING CHALLENGES

The border has divided the island of Ireland into two sovereign jurisdictions since 1922.[8] Separate unitary police forces were established in each jurisdiction; the Royal Ulster Constabulary (RUC) in Northern Ireland and the Garda Síochána in the Republic of Ireland. Although both forces shared a common parent in the Royal Irish Constabulary (RIC),[9] they emerged and developed in societies with very different cultural and political aspirations and sense of institutional identity.[10] This was reflected in the quite different

6 See, for example, M. Anderson, 'The Agenda for Police Cooperation' in Anderson and den Boer, id., p. 18; Rijken and Vermeulen, op. cit., n. 2, ch. 2.

7 Gallagher, op. cit., n. 3.

8 D. Harkness, *Ireland in the Twentieth Century: Divided Island* (1996); E. Morris, *Our Own Devices: National Symbols and Political Conflict in Twentieth-Century Ireland* (2005).

9 On the RIC generally, see D.J. O'Sullivan, *The Irish Constabularies 1822–1922: a Century of Police in Ireland* (1999); S.H. Palmer, *Police and Protest in England and Ireland*: *1780–1850* (1988).

10 S. Dunn, D. Murray, and D. Walsh, *Cross Border Police Co-operation in Ireland* (2003) 13.

relationships that each enjoyed with their various communities, and in the contrasting roles and responsibilities that each was expected to fulfil within its own jurisdiction. The RUC was an armed force with a primary role in protecting the established political order within a deeply divided state.[11] For the most part, it was composed of and reflected the political, cultural, and social values of one side (the majority unionist community) within that division. The Garda Síochána, by comparison, was generally unarmed and enjoyed the relative luxury of being able to focus primarily (although not exclusively) on a civil policing role in a less divided society.[12] The RUC was renamed the Police Service of Northern Ireland (PSNI) in November 2001.[13] For the remainder of this article it will be referred to as the RUC when dealing with matters occurring before the name change and the PSNI for events after the name change.

Although the island had previously been a single legal jurisdiction, the political and violent conflicts associated with its division in 1922 ensured that no formal approaches to police and criminal justice cooperation across the border were attempted for more than fifty years.[14] With the exception of extradition up to 1965, cross-border investigations and prosecutions were processed largely in accordance with the bureaucratic norms of international relations between sovereign states.[15] From the Northern side, this can be attributed in part to the preference of the unionist majority and their elected representatives (and government up to 1972) for engagement with Britain and their innate sensitivity to the general subject of cross-border cooperation with the Republic.[16] In the 1970s and 1980s, this was reinforced by the

11 See, generally, C. Ryder, *The RUC 1922–2000: a Force under Fire* (2000); M. Farrell, *Arming the Protestants: the Formation of the Ulster Special Constabulary and the Royal Ulster Constabulary 1920–27* (1983); A. Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (2006); G. Ellison and J. Smyth, *The Crowned Harp: Policing Northern Ireland* (2000).

12 See, generally, C. Brady, *Guardians of the Peace* (1974); L. McNiffe, *A History of the Garda Síochána* (1997); G. Allen, *The Garda Síochána: Policing Independent Ireland 1922–1982* (1999); D.P.J. Walsh, *The Irish Police: a Legal and Constitutional Perspective* (1998).

13 Police (Northern Ireland) Act 2000, s. 1; and Police (Northern Ireland) Act 2000 (Commencement No. 3 and Transitional Provisions) Order 2001, art. 2 and Schedule.

14 An early, and ultimately unsuccessful, attempt to engage on policing and other matters occurred in 1922 when the leaders of the two jurisdictions (Collins and Craig) agreed a pact which included provisions on the sectarian composition of policing in Northern Ireland; Farrell, op. cit., n. 11, ch. 5.

15 On the international norms generally, see D. McClean, *International Co-operation in Civil and Criminal Matters* (2002).

16 See, for example, J. Loughlin, *Ulster Unionism and British National Identity Since 1885* (1995); G. McIntosh, *The Force of Culture: Unionist Identities in Twentieth-Century Ireland* (1999); F. Cochrane, *Unionist Politics and the Politics of Unionism since the Anglo-Irish Agreement* (2001); C. Townshend (ed.), *Consensus in Ireland: Approaches and Recessions* (1988) introduction; J. Whyte, 'Interpretations of the Northern Ireland Problem' in Townshend, id., ch. 2.

perception among elements of the unionist community that the Republic was a haven for IRA terrorists.[17] There was also a belief in some circles that elements within the Garda Síochána identified with the IRA and even contributed to separate fatal attacks on a Northern judge and his wife and two RUC officers on cross-border journeys.[18] From the Republic's side, there were considerable political sensitivities over cross-border police cooperation with a state that was considered by many to be part of the national territory.[19] These sensitivities were heightened during the 1970s and 1980s by the controversies surrounding RUC interrogation methods,[20] 'supergrass' strategy,[21] alleged shoot-to-kill policy,[22] alleged collusion with loyalist/unionist paramilitaries,[23] and the general perception of RUC hostility towards the Catholic/nationalist population which identifies closely with the Republic.[24] In such an environment, it might seem surprising that cross-border police cooperation survived at all; but survive it did, not least

17 This perception was fuelled by the application of the 'political offence exception' in the Republic in the 1970s to extradition requests from Northern Ireland in respect of IRA suspects; see G. Hogan and C. Walker, *Political Violence and the Law* (1989) 283–7.

18 See, for example, T. Harnden, *Bandit Country: the IRA and South Armagh* (1999) 460–1; K. Myers, 'An Irishman's Diary' *Irish Times*, 10 March 2000. It must be said that the allegations contained in these sources were heavily discredited in the findings of the Cory Reports; see *Cory Collusion Inquiry Report: Chief Superintendent Breen and Superintendent Buchanan* (2003) para. 2.120; see, also, *Cory Collusion Inquiry Report: Lord Justice Gibson and Lady Gibson* (2003).

19 See J. Tonge, *Northern Ireland: Conflict and Change* (2001, 2nd edn.) 2.8, 5.1; T. Garvin, 'The North and the Rest: the Politics of the Republic of Ireland' in Townshend, op. cit., n. 16, ch. 6.

20 See K. Boyle, T. Hadden, and P. Hillyard, *Ten Years on in Northern Ireland: The Legal Control of Political Violence* (1980); D.P.J. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (1983); Amnesty International, *Report of an Amnesty International Mission to Northern Ireland* (1978); *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (1979; Cmnd. 7947); P. Taylor, *Beating the Terrorists?* (1980).

21 See, for example, S. Greer, *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (1995); T. Gifford, *Supergrasses: The Use of Accomplice Evidence in Northern Ireland* (1984).

22 J. Stalker, *Stalker* (1988); A. Jennings, 'Shoot to Kill: the Final Court of Justice' in A. Jennings, *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (1990, 2nd edn.); D.P.J. Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (2000); F. Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (2000) ch. 2.

23 See, for example, *Stevens Inquiry 3: Overview and Recommendations* (2003); *Cory Collusion Inquiry Report: Patrick Finucane.,* HC 470 (2004); *Cory Collusion Inquiry Report: Robert Hamill*, HC 471 (2004); *Cory Collusion Inquiry Report: Rosemary Nelson*, HC 473 (2004); *The Report of the Independent Commission of Inquiry into the Dublin and Monaghan Bombings* (2003).

24 See, for example, M. Farrell, *Northern Ireland: The Orange State* (1976); Farrell, op. cit., n. 11; J. McGarry and B. O'Leary, *Policing Northern Ireland: Proposals for a New Start* (1999) chs. 1 and 2.

because much of the violence emanating from the conflict had a cross-border dimension that rendered cooperation imperative.

Legal and political developments on the island and in the European Union over the past 15 years have created the environment in which cooperation between the police forces has been able to grow to unprecedented levels. The IRA ceasefire and the subsequent settlement enshrined in the British-Irish Agreement and the associated Multi-Party Agreement of 1998 (the Good Friday Agreement) followed by the Patten Commission on the reform of policing in Northern Ireland, offered the prospect of innovative domestic initiatives to enhance engagement between the two jurisdictions across a range of subject areas.[25] As will be seen later, these have produced dividends in police cooperation. At the same time, European Union developments in police and judicial cooperation in criminal matters have laid the basis for structures and processes that can minimize the effects of the legal and political separation.[26] Their impact will also be considered later. As against all that, it must be borne in mind that operational police cooperation across the border still faces considerable logistical barriers, including political sensitivities in some quarters.[27]

Although the Irish border separates two political and criminal justice jurisdictions, it is essentially an artificial imposition that has not always reflected economic, social, and cultural realities on the ground in its immediate hinterland.[28] It runs for 224 miles along county boundaries, dividing local communities and even family land holdings. Traversed by literally hundreds of road crossings, it presents all the familiar challenges for a police force attempting to investigate and detect crimes committed on one side of

25 R. Wilford, *Aspects of the Belfast Agreement* (2001); R. Wilford, 'Northern Ireland: St. Andrews – the Long Good Friday Agreement' in *Devolution, Regionalism and Regional Development: the UK Experience*, ed. J. Bradbury (2008); J. Ruane and J. Todd (eds.), *After the Good Friday Agreement: Analysing Political Change in Northern Ireland* (1999); J. Tonge, *The New Northern Irish Politics?* (2005).

26 On EU developments generally, see S. Peers, *EU Justice and Home Affairs Law* (2006, 2nd edn.); V. Mitsilegas, *EU Criminal Law* (2009); N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (2004); Rijken and Vermeulen, op. cit., n. 2.

27 J. Crosbie, 'Ministers to stop cross-border police activities' *EuropeanVoice.Com*, 24 May 2007.

28 See, for example, the following British Irish Studies working papers: R.J. Rankin, *The Creation and Consolidation of the Irish Border*, no. 48 (2005); R.J. Rankin, *Theoretical Concepts of Partition and the Partitioning of Ireland*, no. 67 (2006); C. O'Grada and B. Walsh, *Did (and Does) the Irish Border Matter?*, no. 60 (2006); E. Tannam, *Cross-Border Co-operation between Northern Ireland and the Republic of Ireland: Neo-Functionalism Revisited*, no. 40 (2004); see, also, J. Greer, 'Local Authority Cross-Border Networks: Lessons in Partnership and North-South Co-operation in Ireland' (2000) 48(1) *Administration* 52; D. Birrell, 'North-South Co-operation in Social Policy Areas' (1999) 47(2) *Administration* 3; E. Tannam, *Cross-Border Co-operation in the Republic of Ireland and Northern Ireland* (1999).

the border where the offender has fled to the other side in order to take advantage of the procedural and jurisdictional limitations.

Attention has tended to focus on the organized crime and terrorist aspects of these challenges. The Garda Síochána and PSNI, for example, now publish annual assessments of the cross-border threat from organized crime, offering examples of criminal activities across drug and human trafficking; alcohol, cigarette, and fuel smuggling; money-laundering; fraud; counterfeiting goods, and vehicle theft, as well as the nature and extent of police cooperation in response.[29] Similarly, the Independent Monitoring Commission, established pursuant to the Good Friday Peace Agreement, publishes updates on the terrorist threat and activities every six months. Both list many serious incidents and operations that justify the attention being given to them, while the latest report from the Monitoring Commission asserts that:

> The high level of dissident activity would undoubtedly have led to many more deaths, injuries and destruction had it not been for the operations of the law enforcement and security agencies North and South and their ever closer cross-border cooperation.[30]

Surprisingly, however, there is no comparable monitoring and publication devoted to the 'ordinary' crimes with a cross-border element: road traffic offences, opportunistic robberies, thefts, assaults, and sexual offences.[31] It is likely that these exceed the volume of organized crime and terrorist incidents and are much more a part of daily border experience. Moreover, the investigation and prosecution of such offences can be particularly burdensome when there is a cross-border element. This is most vividly illustrated by the challenges typically presented by a rape complaint.

The victim lives in Armagh, Northern Ireland. She was socializing in a nightclub in Monaghan, a town about 15 miles away on the Republic of Ireland side of the border. She complained to the local gardaí that she was raped outside the nightclub by a named person who is also resident in Armagh. So the alleged offence was committed in the Republic of Ireland, but both the complainant and the offender are resident in Northern Ireland. The gardaí invited the complainant to attend a specialist sexual assault treatment unit for the appropriate medical examination and support, both of which are vital to advance the investigation. The most convenient Garda

29 See, for example, the latest published assessment: An Garda Síochána and Police Service for Northern Ireland, *Cross-Border Organised Crime Assessment 2008* (2009).

30 *Twenty Fifth Report of the Independent Monitoring Commission: Presented to the Government of the United Kingdom and the Government of Ireland under Articles 4 and 7 of the International Agreement Establishing the Independent Monitoring Commission*, HC 565 (2010) para. 2.5.

31 See, for example, House of Commons Northern Ireland Affairs Committee, Second Report, *Cross-border Cooperation between the Governments of the United Kingdom and the Republic of Ireland* HC (2008–09) 78, para. 22; 513 *Dail Debates*, cols. 413–14 (26 January 2000).

unit, however, is located in Dublin, 85 miles away and outside her home state. By comparison, a similar unit is available in her home state, fifteen miles up the road in Portadown. The gardaí cannot use it, however, as it is a PSNI facility.

The investigation of the offence is further complicated by the fact that the alleged offender is resident in Northern Ireland. Officially, the gardaí cannot simply travel the short distance across the border to seek a statement and samples from him and statements from the witnesses. Instead they must follow the bureaucratic procedure associated with international requests for assistance in criminal justice matters.[32] In this event, the local gardaí in Monaghan will have to submit a request to their superiors at Garda Headquarters in Dublin who, in turn, must submit a request to the Department of Justice and Law Reform in Dublin who, in turn, must submit a request to the Home Office in London who, in turn, must submit a request to the PSNI at their Headquarters in Belfast who, in turn, will convey the request to their officers on the ground in Armagh.[33] Any statements or samples will follow the same route backwards through Belfast, London, and Dublin before arriving back in Monaghan, just over fifteen miles from where they originated. And, of course, if the paperwork is faulty or incorrect procedures followed, it will all have to be done again, and possibly again and again. Since the law and procedure on criminal investigations do differ significantly on either side of the border, it is important that evidence is gathered in a manner that will satisfy the legal requirements of the jurisdiction in which it is going to be used. That requires the personnel gathering the evidence to operate in accordance with legal and procedural requirements with which they are not familiar. This enhances the prospects of error which can render the evidence gathered inadmissible in a subsequent prosecution on the other side of the border.[34]

This situation seems nonsensical in a small island with a political, legal, and social history such as Ireland. Nevertheless, it seems that that the two governments and respective police forces are content to address it primarily through methods of informal cooperation.

32 McClean, op. cit., n. 15.

33 For United Kingdom procedure, see *Mutual Legal Assistance Guidelines for the United Kingdom* (2009, 7th edn.). It would appear that the recent devolution of policing and justice functions to the Northern Ireland administration does not entail any material change to this procedure; see the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

34 The whole exercise may prove pointless in the case of offences that are subject to a six-month time limit on the commencement of a prosecution. Typically, the time taken to gather the evidence through this cumbersome procedure will result in the offence being time-barred: see British-Irish Parliamentary Assembly (BIPA), *Report from Committee A (Sovereign Matters) on Cross Border Co-operation between Police Forces* (2009).

THE GROWTH, PRACTICE, AND RESULTS OF INFORMAL COOPERATION

In contrast with the relatively cool and formal relationships in political, administrative, and law-enforcement matters at official levels for at least the first sixty years of the border's existence, it seems that there has always been a degree of close informal cooperation between officers on either side of the border.[35] This might be explained primarily by individual personal associations and a shared occupational identity.[36] In the context of extradition, for example, officers in the two forces operated an informal arrangement whereby they would arrest each other's wanted persons and deliver them discreetly across the border.[37] Indeed, it was an incident of excessive enthusiasm by gardaí operating this arrangement for the benefit of British police officers that resulted in the introduction of a formalized judicial element to the procedure in 1965.[38] Inevitably, these close personal ties and informal methods were more severely restricted during the height of the 'troubles' in the 1970s and 1980s. Nevertheless, the informal cooperation survived and even began to expand and deepen as officers on either side of the border became more familiar with each other through direct personal contacts, and began to see each other as part of the same team faced by a common opposition. Even during some of the darkest days of the border conflict,[39] it seems that many local officers on the ground continued to cooperate across the border on the basis of informal personal contacts and relations. It will be seen later that the Anglo-Irish Agreement of 1985 and the Good Friday Agreement of 1998 promoted a more structured dimension to aspects of this cooperation. Nevertheless, that did not change the fundamentals of what was happening on the ground. The informal cooperation has

35 Dunn et al., op. cit., n. 10, p. 14.

36 Former Chief Constable of the RUC, Sir John Hermon, offers an anecdotal example of his own early experience in the 1950s where he apprehended two individuals attempting to sell two stolen bicycles in Derry (NI). He learned that they had been stolen in Muff, just over the border in Donegal (ROI). Without any formality he set off in a prison van with a colleague, the two individuals and the bicycles and drove to Muff where they were handed over informally into the custody of two gardaí who were on patrol as arranged; see J. Hermon, *Holding the Line: an Autobiography* (1997) 37.

37 P. O'Higgins, 'Irish Extradition Law and Practice' (1958) 34 *Brit. Yearbook of International Law*, reprinted in M. Forde, *Extradition Law in Ireland* (2005, 3rd edn.) 322.

38 See decision of the Supreme Court in *State (Quinn)* v. *Ryan* [1965] IR 70 which found the arrangement unconstitutional in so far as it deprived the wanted person of access to the courts. The Extradition Act 1965 was enacted to address the problem.

39 There was a cooling of relationships at times in response to heightened tensions over RUC methods North of the border during the 1970s and 1980s, and a perception in some quarters in the North that IRA personnel could live with impunity in the South. These setbacks proved temporary as relations improved steadily after the Anglo Irish Agreement 1985. See Dunn et al., op. cit., n. 10, p. 14.

continued to grow in both scope and depth beneath the radar of outside checks and controls. Accordingly, when the British-Irish Parliamentary Assembly examined the subject in 2008 and 2009, it found the general level of cooperation to be excellent. Both forces worked together on many issues, and there was regular contact on a daily operational level.[40] Similarly, police chiefs and their political masters regularly go to some lengths to emphasize the closeness of cooperation across the border.[41]

Typically the informal cooperation takes the form of officers on the ground reacting to events as they unfold. It is now standard practice for police officers responding to a crime in progress on one side of the border to alert their counterparts on the other side with a view to apprehending the offenders. In 2001, for example, when gardaí were notified of a robbery at a nightclub in Muff, County Donegal (ROI), they immediately alerted the RUC to be on the look out for the robbers. The RUC duly apprehended the robbers by deploying a stinger device to puncture the tyres of their getaway car as it crossed the border into Northern Ireland.[42] Similarly, a robbery at a *bureau de change* in Derrylin, County Fermanagh (NI), in 2009 resulted in gardaí arresting one of the fleeing robbers after having been alerted by the PSNI.

Sometimes the cooperation produces results without having to rely on the exercise of coercive powers at all. In November 2008, sex offender George Finlay breached his sex offender's order by leaving his home area near the border in Northern Ireland. The PSNI notified the Garda Síochána, who located him south of the border, stopped him and told him to return to Northern Ireland where he was subsequently arrested and convicted for breaching the order.[43] A variation on this arose in the context of the rape of an elderly woman in a small town in Northern Ireland. A DNA sample taken by the RUC matched that of a man living in a town on the other side of the border. Rather than seeking his extradition, the RUC decided to wait until he crossed back into their jurisdiction. They had notified gardaí informally of their intentions. When gardaí subsequently spotted him crossing the border into Northern Ireland, they notified the RUC who moved in and arrested him.[44]

Increasingly, the cooperation includes proactive operations targeting individuals or groups suspected of involvement in terrorism, organized

40 BIPA, op. cit., n. 34.

41 See, for example, the joint prefatory statement from the Garda Commissioner, Fachtna Murphy, and the Chief Constable of the PSNI, Matt Baggott, and that from the Northern Irish Minister for Justice, David Ford and the Irish Minister for Justice, Equality and Law Reform, Dermot Ahern, to the *Cross-Border Policing Strategy* (2010).

42 Dunn et al., op. cit., n. 10, p. 26.

43 S. McKay, 'Dealing with Cross-border Sex Offenders: Learning from the North's Multi-Agency Approach' (2009) 4 *J. of Cross Border Studies in Ireland* 67, at 68.

44 Dunn et al., op. cit., n. 10, p. 26.

crime, drug-trafficking or smuggling. In 2009, for example, a joint PSNI-Garda operation against a group of drug-traffickers resulted in the arrest of two suspects in the Armagh and Lisburn areas of Northern Ireland and one in County Monaghan in the Irish Republic. Similarly, in 'Operation Belton', the United Kingdom's Serious Organised Crime Agency (SOCA) and the Irish Criminal Assets Bureau (CAB) targeted the oil-smuggling activities of an individual, while in 'Operation Achilles', SOCA repatriated €375,000 to the Republic of Ireland after information sharing between the two agencies led to the restraint of assets in Manchester. These operations have been supported by a cross-border fuel smuggling group set up jointly by the two forces, and an increase in asset profilers deployed by them in the border regions.[45]

Joint road traffic operations on either side of the border targeting speeding and drink/drug driving are now a regular feature. The local policing plan for the Newry and Mourne area in Northern Ireland, for example, encompasses joint operations with the Garda Síochána in border areas to reduce the number of fatal or serious road traffic collisions. In its 2008 briefing to the local District Police Partnership Board, the PSNI confirmed that such joint operations were carried out throughout 2007–2008. The annual Christmas drink-driving campaigns north and south of the border are also coordinated by the Garda and the PSNI in border areas. In March 2010 a pilot project was established through a memorandum of understanding between the respective Ministers in the two jurisdictions to exchange data on vehicle ownership in order to facilitate the enforcement of parking fines and unpaid traffic tolls on cross-border drivers.[46]

Up until recently, these examples of informal or local level cooperation did not normally involve officers from one force operating across the border on the ground with officers of the other force. It will be seen later that formal developments at the macro level, in Benyon et al.'s three-tiered typology, have resulted in a regular flow of temporary secondments between the two forces. In practice, these official assignments are outnumbered by the informal engagement of officers across the Irish border in operations on an ad hoc basis. In the investigation into the murder of Paul Quinn south of the border in October 2007, for example, gardaí and PSNI officers worked as a de facto team. Gardaí conducted door-to-door inquiries in Northern Ireland accompanied by PSNI personnel, while the latter attended Garda interviews with witnesses and suspects in the Republic of Ireland. Similarly, in a 2008 PSNI murder investigation, gardaí arrested a suspect in Donegal (ROI). The subsequent questioning in Garda custody was conducted with the assistance and presence of officers from the PSNI. Even through the murder was

45 BIPA, op. cit., n. 34.

46 Department of Transport (ROI), 'No escape for toll evaders and parking offenders', press release (3 March 2010).

committed in Northern Ireland, the suspect was subsequently charged in the Republic of Ireland under the extra-territorial legislation.[47]

This informal cooperation in operational matters is supported by, and blends into, the regular exchange of intelligence and criminal justice information. At a tactical level, many meetings take place monthly between superintendents, chief inspectors, and detective inspectors in the border region to share information on prolific offenders, burglars, vehicle crime, and other matters.[48] On a daily basis, contact occurs between stations and officers all along the border.[49]

It is important not to become blinded by these individual examples of success and the associated official declarations of 'excellence' in cross-border cooperation. Independent commentaries have offered a less sanguine assessment,[50] and there are still many unanswered questions over the role of cross-border cooperation leading up to the Omagh bombings in August 1998.[51] Moreover, for all its institutional convenience and benefits, the 'excellent' informal cooperation suffers from a very significant 'Achilles Heel' that becomes particularly apparent in a criminal investigation. When operating across the border on this ad hoc and informal basis, the police officers in question have no official status or police powers in the host jurisdiction. In the absence of formal statutory measures to the contrary, they will be constrained by having to work as the equivalent of civilian assistants to officers of the host state. In so far as police powers have to be deployed to seek out and put questions to potential witnesses, to question suspects in police custody, to obtain bodily samples, to enter and search private property, and to secure physical, forensic, and documentary evidence, they will be dependant on the goodwill of the host officers. Moreover, there is always the risk that evidence obtained in accordance with the laws of the

47 See n. 56, below.

48 Northern Ireland Affairs Committee, op. cit., n. 31.

49 The primary points of contact are: Crossmaglen, Newtownhamilton, and Bessbrook in Northern Ireland, and Drumadd, Castleblayney, Hackballscross, and Dundalk in the Republic of Ireland.

50 See, for example, A. Mulcahy 'The "Other" Lessons from Ireland: Policing, Political Violence and Policy Transfer' (2005) 2 *European J. of Criminology* 185, at 198. For an inside illustration of prolonged coolness in communications at the most senior level, see Hermon, op. cit., n. 36, ch. 13.

51 Inquiries into aspects of the subsequent police investigations on either side of the border did not directly or fully address the cross-border dimension; see Police Ombudsman for Northern Ireland (PONI), *Statement by the Police Ombudsman for Northern Ireland on the Investigation of matters relating to the Omagh Bomb on August 15, 1998* (2001); *Edited Report of Group established by the Minister for Justice Equality and Law Reform to examine matters arising from the 'Report raising concerns of the activity of An Garda Síochána officers during 1998' dated 22 March, 2002 prepared by the Police Ombudsman for Northern Ireland for the Minister for Foreign Affairs* (2003). The relatives of some of the victims have continued to press for a cross-border public inquiry; see <http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7233834.stm>.

host state will not satisfy the admissibility requirements of their own state. Legislation will be required to address these weaknesses. In addition, there is a risk that acts or omissions by police officers who are present and operating unofficially in the neighbouring state will give rise to diplomatic incidents and/or complex issues of civil liability.[52] As will be seen later, the prioritizing of informal cooperation methods also presents serious issues of transparency and accountability.

THE UNDERDEVELOPMENT OF REGULATORY AND ACCOUNTABILITY STRUCTURES

All significant official developments on police cooperation across the Irish border over the past 25 years have been tied closely to intergovernmental initiatives aimed at addressing the border conflict and promoting institutionalized cooperation between the two administrations across a broader sphere. Nevertheless, the policing dimension in these initiatives has always reflected a functionalist approach to cooperation.[53] Even now, there is little sense of it being developed as part of a grander scheme to diminish the political and jurisdictional dimensions of the border.

Although there was a policing dimension to political engagement between the two governments on Northern Ireland in the early 1970s,[54] it was not until the Anglo-Irish Agreement of 1985[55] that provision was made for a regular programme of work between the two police forces.[56] That Agreement established an Intergovernmental Conference through which the two sovereign governments would engage on political, security, and justice

52 In the *State (Quinn)* v. *Ryan* extradition case (op. cit., n. 38), the Irish Supreme Court found that the British police officers in question were guilty of contempt of court on account of their actions in the case within the state. If it was not for the fact that the officers were allowed to purge their contempt by an apology, the diplomatically sensitive issue of fining or imprisoning them would have arisen.

53 See Anderson, op. cit., n. 6, p. 21 for a functionalist approach to police cooperation and how that differs from neo-functionalist, pluralist, and federalist approaches in the context of the EU.

54 In the context of the Sunningdale intergovernmental talks in 1973, Garda and RUC officers met at a military airfield at Baldonnel outside Dublin where agreement was reached on setting up a series of study groups to examine, among other things, the improvement of radio communications, exchange of intelligence, and co-ordinated border patrols; see Dunn et al., op. cit., n. 10, p. 14.

55 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland 1985 (Treaty Series No. 62 of 1985).

56 Following the Sunningdale Agreement, legislation was enacted providing for cross-border trials and evidence taking in a court for certain criminal offences as a device to get around extradition difficulties. The legislation made no provision for cross-border policing; see Criminal Jurisdiction Act 1975 and Criminal Law (Jurisdiction) Act 1976.

matters affecting Northern Ireland and on cross-border cooperation generally.[57] Article 9 of the Agreement stipulated that:

> With a view to enhancing cross-border co-operation on security matters, the Conference shall set in hand a programme of work to be undertaken by the Commissioner of the Garda Siochána and the Chief Constable of the Royal Ulster Constabulary and, where appropriate, groups of officials, in such areas as threat assessments, exchange of information, liaison structures, technical co-operation, training of personnel, and operational resources.

While the Agreement itself was the work of the two sovereign governments, and as such constitutes macro-level cooperation in Benyon et al.'s typology, it should be noted that it did not result in any change in domestic law. Nor was it accompanied by transparent machinery for democratic oversight and accountability for the conduct and development of police cooperation. Instead the programme of work was to be developed and implemented under the auspices of the Intergovernmental Conference which, in this context, consisted of: the Garda Commissioner, the Chief Constable, the Justice Ministers, and their officials.[58] In other words, the police cooperation was to be conducted firmly on the meso-level where policy would be formulated and implemented behind closed doors by the police and justice ministries themselves. This approach was retained at the heart of the next significant development which came in 1999 with the publication of the Patten Commission report on the reform of policing in Northern Ireland.[59]

Part of the terms of reference of the Patten Commission required it to make proposals on the 'scope for structured cooperation with the Garda Síochána and other police forces'.[60] Patten acknowledged that cooperation on the ground between the two forces appeared to be excellent, but too heavily dependant on ad hoc arrangements and personal relationships. It was surprised to find, for example, that cooperation between the Kent Constabulary in south-east England and police forces on the other side of the Channel was much more advanced and structured than that between the PSNI and the Garda.[61] Accordingly, it strongly recommended the development of a more structured approach.[62] In particular, this should include:

- the adoption of written protocols between the two police forces covering all aspects of cooperation;
- the expansion of the present pattern of meetings at all levels to include an annual conference and working groups to drive forward cooperation in

57 T. Hadden and K. Boyle *The Anglo-Irish Agreement: Commentary, Text and Official Review* (1989).
58 Anglo-Irish Agreement, op. cit., n. 55, Art. 3.
59 *A New Beginning: Policing in Northern Ireland – The Report of the Independent Commission on Policing for Northern Ireland* (1999) (the Patten Report).
60 id., Annex 1. The terms of reference were set out in the Good Friday Peace Agreement.
61 id., para. 18.6.
62 id., ch. 8.

matters of common concern, such as drugs, financial crime, and paedophile rings;
- a programme of long-term personnel exchanges between the two forces;
- the posting of liaison officers from each force to the central and/or border headquarters of the other;
- structured cooperation between the two forces in training;
- the adoption of fast, effective, and reliable communications (radio links and information technology systems); and
- the development of joint databases in all the main areas of cross-border criminality such as drugs, smuggling, vehicle theft, and terrorism.

Patten was more coy about operational cross-border policing on the ground. However, it did strongly recommend the immediate development of joint disaster planning and joint actions. Significantly, this should be complemented by provision for an immediate exchange of officers and pooling of investigative teams after major incidents with a substantial cross-border dimension, including major terrorist or criminal acts.[63] Strangely, Patten made no express mention of the need for complementary developments in cross-border oversight and accountability.

Another two and a half years elapsed before any concrete plan was put in place to act on these recommendations.[64] In April 2002 the two governments published an Agreement on police cooperation on the island addressing most of the relevant issues identified in the Patten Report.[65] This has been expressed in practice in the form of: regular cross-border meetings between officers at comparable ranks,[66] an annual conference,[67] occasional joint training initiatives,[68] disaster planning,[69] and temporary personnel second-

63 id., paras. 18.12–18.13.

64 In the wake of the Patten Report, steps were taken within both the PSNI and the Garda Síochána to examine enhanced cooperation. In the South, this entailed the establishment of working groups within the Garda Síochána and an implementation strategy group composed of personnel from the Department of Justice and Law Reform and the Garda Síochána. In the North, it came under the auspices of the PSNI change-management team and the Oversight Commissioner appointed to oversee the implementation of the Patten recommendations. It was not until October 2001 that a joint North/South five-sided board (the two police forces, the two administrations and the North's Policing Board) was established to drive the project forward. See Dunn et al., op. cit., n. 10, p. 28.

65 Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland on Police Co-operation, at Belfast on 29 April 2002.

66 See Dunn et al., op. cit., n. 10, pp. 25–6 for details of the nature and extent of these meetings post-Anglo-Irish Agreement 1985.

67 The first of these was held at the Garda College in Templemore in April 2002.

68 An example of this was a three-week joint training exercise of PSNI and Garda personnel at Templemore Garda College prior to their embarking on a peacekeeping mission to Kosovo. See Dunn et al., op. cit., n. 10, p. 65.

69 The first cross-border disaster-planning seminar took place in the Garda College in February 2002. Since then, a programme of formal strategic planning has been

ments and exchanges.[70] As yet, there has been no final agreement on the posting of liaison officers to each other's central headquarters and/or border headquarters.[71] However, a Fiscal Liaison Officer with the full capacity to exchange direct tax information with his counterparts in Dublin has been assigned to the British Embassy in Dublin. He has the authority to engage with the Garda Síochána and any other agency about direct tax (including evasion) and customs and excise matters.[72] There is also a high level of practical cooperation between the forensic science services in the two jurisdictions.[73]

Only the temporary exchange and secondment arrangements have been supported by the enactment of legislation.[74] They have resulted in a number of officers serving across the border.[75] Initially, these were confined to the exchange of trainers to deliver short courses,[76] but they now range much more widely to include information technology, road traffic, crime operations (drugs and smuggling), and community policing. For the most part, the exchange periods tend to be two to three months as it is considered that short exchanges targeted at particular needs have more practical value than longer exchanges for the sake of exchange.[77] A more unusual example is the deployment of a member of the Garda Síochána in the PSNI's 'Historical Inquiries Unit' which is conducting a thorough independent reappraisal of unresolved homicide cases.[78]

established between the two forces at commander level and below, and joint major incident reaction plans have been developed and practised. It would appear that there is now a formal protocol on joint disaster planning; see *Strategy*, op. cit., n. 41, para. 8.1.

70 There have been more than 70 exchanges since 2005, usually limited to periods of 2–3 months.

71 Office of the Oversight Commissioner, *Report 19* (2007) 198–9. Hebenton and Thomas, op. cit., n. 1, p. 97, claim that the British Police Scientific Development Branch has a detective superintendent as a liaison officer in the Garda Technical Bureau.

72 Northern Ireland Affairs Committee, op. cit., n. 31.

73 This includes a division and exchange of expertise across a number of specialisms; id.

74 Garda Síochána Act 2005, ch. 8; Police Service of Northern Ireland (Secondment) (Garda Síochána) Regulations 2004.

75 It had been envisaged that there would also be lateral transfer between the forces. While promotion positions within one force have been advertised to personnel in the other, they have not yet generated any transfer applications. The primary obstacles would appear to be the lack of a pension transfer facility and the absence of a comparable rank in the Garda Síochána to that of chief inspector in the PSNI.

76 Dunn et al., op. cit., n. 10, p. 65.

77 See the views of the PSNI Chief Constable giving evidence to the House of Commons Northern Ireland Affairs Committee, op. cit., n. 31, Ev. 2.

78 This Unit is divided into three teams, one of which is composed exclusively of externally seconded officers from United Kingdom mainland forces and the Garda Síochána. This team deals with those specific cases where independence is essential and where sections of the community or individuals are not yet comfortable working with the PSNI.

Significantly, the Agreement does not address hot pursuit, surveillance across the border or exchange of criminal records and intelligence. Given the physical, social, and cultural context of the border it might be expected that there would be a regular demand for such operational activities should they be available. While joint investigations are adverted to in the Agreement, the relevant provisions are distinctly tentative. Apart from requiring the two forces to make full use of existing EU arrangements (see later) as appropriate, it merely provides for the two governments to establish an expert group to review existing arrangements and to make recommendations on legal and administrative measures that could be taken to facilitate further joint investigations.

It is also worth acknowledging that cross-border police cooperation is being shaped too by developments in the broader criminal justice context. The *Review of the Criminal Justice System in Northern Ireland*, published in 2000, included several recommendations on structured cooperation across the border. In particular, it recommended the establishment of a group of criminal justice policymakers from the two jurisdictions to identify and advise on the opportunities for cooperation at government level and between the criminal justice agencies north and south.[79] This was implemented in July 2005 with the signing of an agreement providing for regular meetings at ministerial level supported by a working group of officials from the two justice ministries. Their role includes overseeing the implementation of the Review's recommendations on structured cooperation and identifying other areas in which cooperation on criminal justice matters can be enhanced. Although the ministerial meetings and working group clearly have the capacity to shape the development of cross-border police cooperation, they work behind the scenes in conditions of minimum transparency.[80] They are rooted in the professional and administrative processes of cooperation, unregulated by transparent legislation and external machinery.

It follows that, with the limited exception of secondments, the Patten recommendations and the 2002 Agreement have not spawned comprehensive legislation or transparent machinery to address police cooperation. It will be seen later that while important EU instruments have been implemented,[81]

79 *Review of the Criminal Justice System in Northern Ireland* (2000) para. 17.30 and rec. 278.

80 See, for example, the brief statement on the 2010–2011 work programme agreed between the Irish Minister for Justice and the Northern Irish Justice Minister, *North/South Cooperation on Criminal Justice Matters: Work Programme 2010–11*, <www.justice.ie/en/jelr/work%20programme%202010-2011.pdf/Files/work%20programme%202010-2011.pdf>.

81 The primary examples are: Europol, joint investigation teams, mutual assistance in criminal matters, and the European arrest warrant. Ireland has proceeded in these matters through primary legislation: Europol Act 1997; Criminal Justice (Joint Investigation Teams) Act 2004; Criminal Justice (Mutual Assistance) Act 2008; and European Arrest Warrant Act 2003. The United Kingdom has adopted primary

they have had little impact on the Irish border. The formal procedures have not progressed much beyond those established consequent on the Anglo-Irish Agreement of 1985. Instead, the two police forces and their respective administrations have preferred to build on and reinforce the informal functional arrangements that have been nurtured on the ground over the years. This is reflected in the 2002 Agreement itself which makes provision for cooperation to be advanced on the basis of written protocols between the two police forces. So, for example, in February 2005, the Garda Commissioner and the PSNI Chief Constable signed protocols on the administrative arrangements for personnel exchanges.[82] Similarly, in October 2008, they signed protocols on the sharing and exchange of information on sex offenders in their respective jurisdictions.[83] There is also a protocol on joint disaster planning, and it seems that a memorandum of understanding is being developed in relation to the sharing of information on fingerprints, DNA, and footprints.[84]

From a transparency and accountability perspective, these protocols are an improvement on cooperation based on informal personal relationships and unregulated ad hoc arrangements. Nevertheless, they still suffer from significant shortcomings. They are agreed and signed directly between the two police forces, with no provision for prior independent input, scrutiny or oversight. Moreover, it would appear that they are not published as a matter of course beyond a press statement to mark the event. Copies must be forwarded to the Minister for Justice and Law Reform, the Secretary of State for Northern Ireland, and the Northern Ireland Policing Board.[85] Nevertheless, they do not have the status of international agreements and do not have binding effect on the governments.[86] In effect, they are little more than administrative instruments formulated, implemented, and reviewed behind closed doors by the police forces themselves. Where the context is ongoing anti-terrorist operations and proactive investigations of organized crime networks, a degree of secrecy and police exclusivity is understandable. There is no obvious reason, however, why that should apply across all aspects of operational cooperation. There is surely an argument for these protocols to

legislation for the European arrest warrant (Extradition Act 2003) and mutual assistance in criminal matters (Crime (International Co-operation) Act 2003), but has relied primarily on orders in council and Home Office Circulars for the police cooperation instruments (The International Joint Investigation Teams (International Agreement) Order 2009).

82 Northern Ireland Affairs Committee, op. cit., n. 31, para. 37.

83 McKay, op. cit., n. 43. This represents a development on the memorandum of understanding signed by the Irish and United Kingdom governments in November 2006 on information sharing between the Garda Síochána and United Kingdom police forces on the movement of sex offenders between the jurisdictions.

84 *Strategy*, op. cit., n. 41.

85 2002 Agreement, op. cit., n. 65, Art. 3(2).

86 id., Art. 3(3).

be located within a clear statutory framework which includes provision for external input, scrutiny, and accountability. It is disappointing that the 2002 Agreement is silent on this particular aspect and, indeed, on issues of oversight and accountability in cross-border policing matters generally.

The most recent development is the publication of the *Cross-Border Policing Strategy* by the two forces in December 2010. Launched in a fanfare of publicity and grandiose statements by the respective Ministers for Justice, the glossy brochure addresses operations; cross-border investigations and operations; intelligence sharing and security; communication and information technology; training; human resources; emergency planning, and review, under those precise headings. Unfortunately, the document reveals very little of actual strategies, priorities, policies, procedures, and practices of cooperation on the ground. It consists of little more than a bland and vague set of intentions to review and/or build upon existing practice, while rarely offering any substance on what the aim or outcome of those reviews and further developments, or even their timescale, are likely to be. A typical example is the first of only two statements under the heading of intelligence sharing and security which reads: 'Building on existing practical cooperation, continually review the effectiveness of the intelligence sharing and identify further ways to maximise its effectiveness.'[87] Even when the strategy does refer to concrete developments, it offers little of substance on them. The very first commitment, for example, refers to the establishment of a joint An Garda Síochána/Police Service of Northern Ireland Tasking and Coordination Group,[88] but says nothing further about the composition, remit or modus operandi of this group. Equally frustrating are the references to finalizing a memorandum of understanding in relation to the sharing of information relating to fingerprints, DNA, and footprints,[89] and a manual of guidance in relation to cross-border investigations.[90] Unless such memoranda and manuals are to be made public, which they are not, their finalizing has little contribution to make to our understanding of cross-border police cooperation.

Overall, the strategy document could reasonably be described as little more than an attempt to convey the appearance of openness and accountability on cross-border policing while avoiding the substance. Significantly, there are no statements on mechanisms or procedures to deliver democratic scrutiny, community engagement or remedies for persons who suffer injury or loss as a result of cross-border operations. There is some irony in the fact, therefore, that the Ministers hailed the strategy as a commitment to 'openness, accountability and continuous improvement'.[91] It might be more

87 *Strategy*, op. cit., n. 41, para. 4.1.
88 id., para. 2.1.
89 id., para. 3.4.
90 id., para. 3.5.
91 id., p. 3.

accurate to describe it as an attempt to re-reassure the public that cooperation is being delivered at an advanced level, without revealing much about its substance.

MARGINALIZING THE EU INITIATIVES

It might reasonably be considered that the apparent lack of progress in the development of domestic structures and formal processes for cross-border police cooperation would be offset through the implementation of EU initiatives. Certainly, many of the old third-pillar developments on police and judicial cooperation in criminal matters appear particularly suited to the needs of cross-border criminal investigation in Ireland.[92] These include the Schengen provisions on hot pursuit and cross-border surveillance, the Prüm provisions on joint operations, the EU provisions on joint investigation teams (JITs), the Convention on Mutual Assistance in Criminal Matters, and a rapidly growing body of secondary legislation covering diverse aspects of cooperation.[93] In the rape case illustration outlined earlier, for example, it would seem that a JIT composed of local officers from Armagh and Monaghan on either side of the border would be an appropriate response. This would alleviate the need to operate through the cumbersome letter of request procedure,[94] and would open up the possibility of using the sexual assault unit at Portadown, instead of Dublin. Once a suspect has been apprehended, the European Arrest Warrant (EAW) offers the prospect of a simplified and expedited surrender across the border for the purpose of charging and prosecuting him where appropriate.[95]

The case for regular resort to JITs is supported by compelling evidence to the effect that joint investigations are most likely to succeed in their objectives if they grow from the bottom up.[96] In other words, the initiative for the establishment of a JIT should come from the constituent police forces where they already have a clear view of the matter under investigation and of the potential benefits to be gained from working on it together through the

92 For an outline of some of the relevant provisions, see EU Council, *Manual on Cross-Border Operations* 10505/4/09 REV 4 (2009).

93 The secondary legislation includes: Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the member states of the EU; Council Framework Decision 2008/841/JHA on the fight against organized crime; and Council Framework Decision 2008/919/JHA on terrorism.

94 This is one of the major attractions of the JIT; see Rijken and Vermeulen, op. cit., n. 2, ch. 4.

95 See M. Forde, *Extradition Law in Ireland* (2005, 3rd edn.).

96 Rijken and Vermeulen, op. cit., n. 2, chs. 2 and 7; Anderson, op. cit., n. 6, p. 18.

machinery of a JIT. This contrasts with the situation where the establishment of a JIT is triggered by a direction from the respective political administrations or pressure from external bodies such as Europol or Eurojust. The prospects of success are also enhanced if there are strong personal relationships between members of the team.[97]

There can be little doubt that the policing situation on the Irish border offers a fertile environment for the establishment of successful JITs on a regular basis. The close working familiarity between the two police forces, together with the common cross-border policing challenges they face on a daily basis, provide the necessary criteria for the growth of JITs from the bottom up. It should come as some surprise, therefore, that the PSNI and the Garda have yet to establish a single formal JIT to advance a cross-border criminal investigation.[98] The PSNI has attempted to explain this away on the basis that JITs are not suitable for reactive investigations in which the police forces must move quickly to apprehend suspects and/or gather evidence. In their view, the time-consuming and bureaucratic procedures involved in establishing and operating through a JIT will only hamper the investigation. JITs should be used only where they will give added value. This is most likely to arise in the context of organized crime investigations and other such proactive operations.[99] While there may be substance to this perspective, it does not explain why no JITs have been established to tackle organized crime activities straddling the border or, indeed, why none have been established for investigations that require a long-term focus.

A similar reticence is evident in the application of the other EU measures, with the possible exception of the European Arrest Warrant (EAW). To a limited extent, this can be attributed to the fact that neither Ireland nor the United Kingdom has implemented the Schengen hot-pursuit provisions, while only the United Kingdom is applying those on cross-border surveillance.[100] Another reason is that some of the measures do not represent a major new departure compared to existing arrangements between Ireland and the United Kingdom. The EAW, for example, bears strong similarities with the 'backing of warrants' extradition arrangements that prevailed between the Republic of Ireland and Britain prior to the introduction of the EAW.[101] A more fundamental explanation is that there may be little enthusiasm on either side of the Irish border, especially among police officers on the

97 Rijken and Vermeulen, id., chs. 5 and 7.

98 It seems that the United Kingdom takes the view that informal cooperation in a cross-border operation amounts to a JIT; id., p. 45.

99 Northern Ireland Affairs Committee, op. cit., n. 31, para. 46.

100 J. Crosbie, 'UK and Ireland Seek Opt-out from Cross-Border Police Pursuits' *EuropeanVoice.com*, 22 February 2007.

101 O'Higgins, op. cit., n. 37. On the 'backing of warrants' generally, see J. Spencer, 'The European Arrest Warrant' (2003–2004) 6 *Cambridge Yearbook of European Legal Studies* 201.

ground, for resort to the EU measures. When giving evidence in 2009 to the House of Commons Northern Ireland Affairs Committee hearings on cross border cooperation, for example, the PSNI Chief Constable expressed the view that the hot pursuit provisions were more relevant to lower-scale criminality such as drunk drivers making a run for it.[102] For serious criminality, police cooperation was more dependant on intelligence cooperation which, in turn, was not dependant on the formal EU machinery.[103] Significantly, this view was shared by the Minister of State for Northern Ireland.[104] Indeed, it would appear that there is a serious mismatch between official policy as expressed through the EU instruments, domestic legislation, and the Police Cooperation Agreement, and what is actually desired and applied in practice on the ground. The strong preference among the two police forces and the political administrations is to rely on the informal arrangements and personal relationships among officers at the coalface.[105]

Presumably, one of the major attractions of the informal cooperation from the police perspective is that it enables them to produce results in a manner that serves their own immediate institutional interests. In particular, it leaves them largely free to determine their own priorities from the cooperation and, to a significant extent, the methods that they will use to secure them. In effect, it frees them from the formal structures, processes, and external scrutiny associated with the JITs. It allows them to operate beneath the radar of public scrutiny and accountability. There is more than a hint of this in the recommendation from the House of Commons Northern Ireland Home Affairs Committee to the effect that greater use should be made of JITs in response to major cross-border incidents:

> JITs are intended to provide a proper legal framework for cross-border cooperation-by ensuring for example, that the correct legislation is used to ensure the integrity of investigations and the evidence gathered. *There is clearly a potential role for Joint Investigation Teams involving PSNI and Garda Síochána officers in investigating major cross-border incidents that require a long-term focus and that allow for the comparatively slow and sometimes bureaucratic process of forming such a team*.[106] (Emphasis in original.)

So, while the informal cooperation may serve the immediate interests of police officers on the ground, it cannot be assumed that their choices and performance will reflect the needs and interests of individuals and communities living along the border, or even the broader public interest. The prioritization of informal cooperation over the more formal and transparent

102 Northern Ireland Affairs Committee, op. cit., n. 31, para. 33.
103 id.
104 id.
105 Dunn et al., op. cit., n. 10, pp. 26, 41–2.
106 Northern Ireland Affairs Committee, op. cit., n. 31.

procedures may have long-term costs for victims, individuals under police investigation, and the broader community. It also sits uneasily with the Patten Commission's emphasis on the central importance of transparency in enabling the police to 'command public confidence and active cooperation.'[107]

LIMITS AND WEAKNESSES OF INFORMAL COOPERATION

Despite the obvious benefits of informal cooperation, there are several fundamental weaknesses from the perspectives of effective law enforcement, transparency, and accountability. In Ireland, for example, it remains the case that a major criminal or terrorist incident with a strong cross-border dimension will normally trigger parallel investigations on either side of the border. While these will be the subject of informal cooperation between the respective police forces, the absence of a single coherent organization, strategy, and focus can often mean wasteful duplication, and useful leads not being identified or pursued. Ultimately, it can happen that both investigations fail when a single investigation would have succeeded. The Omagh bombing in 1998 might be considered as an extreme example. Despite extensive cooperation between the two police forces, there is no sense in which it can be claimed that either was successful.[108]

The lack of formal structures and processes is also being felt in the context of tackling organized crime. As noted earlier, the SOCA and CAB are increasingly active in targeting the criminal assets of organized crime gangs. While they meet on an informal basis twice a year, and share information with each other regularly, SOCA has expressed some unease about the uncertainty surrounding the legality of these activities.[109] A more structured legal framework for cross-border cooperation between the two agencies would remove this uncertainty and help ensure that the fruits of their cooperation would not be vulnerable to legal challenge.[110] It seems that

107 Patten Report, op. cit., n. 59, para. 5.14; and, generally, chs. 5 and 6.

108 An internal review revealed numerous serious deficiencies in the RUC investigation; see, on the Omagh Bombing, PONI, op. cit., n. 51. Separately, allegations that gardaí had failed to pass on relevant information to the RUC were investigated on the direction of the Irish Minister for Justice, Equality and Law Reform and found to be without foundation; see *Edited Report*, op. cit., n. 51. The report found that there was exceptionally close cooperation between the two forces in the investigation. However, it would appear that in an unpublished part of the report, the Group recommended better record keeping of north-south contacts and exchanges in intelligence matters, and a written code of instructions and guidelines on intelligence gathering and agent handling; see Statement from the Minister for Justice, Equality and Law Reform on the Report, 577 *Dail Debates*, col. 422 (16 December 2003).

109 Typically, SOCA conducts its intelligence-gathering cooperation on the basis of protocols agreed with the other agencies in question.

110 Northern Ireland Affairs Committee, op. cit., n. 31, para. 32.

a memorandum of understanding is currently being developed between SOCA and CAB.[111] While that in itself cannot confer legality on methods of cooperation, it can at least prescribe methods that satisfy the legal requirements of both jurisdictions. As noted below, however, unless it is published and contains within it a procedure for review and external scrutiny, it will do little to promote transparency and accountability in this sensitive area of cross-border cooperation.

Another fundamental weakness in the informal methods of cooperation is that they are extremely limited in their capacity to deliver evidence and witnesses from one side of the border for use in a prosecution on the other. The rape victim in the illustration outlined earlier, for example, will feel little benefit from the excellent quality of informal cooperation between the Garda and the PSNI. The gathering of material evidence in one jurisdiction for use in criminal proceedings in the other will continue to be hampered by the differences in legal standards and by the bureaucratic machinery applicable to cross-border evidential requests. Seemingly, progress was made during 2009 to resolve some of the bureaucratic procedures responsible for the delays,[112] but it would appear that they have not yet been resolved.[113] Requests and responses must be routed through the police and sovereign political administrations before they can be acted on. As yet, there is no clear evidence that the recent devolution of policing and justice responsibilities to the Stormont administration in Northern Ireland is making a difference in this area.

Progress in tackling the obstacles associated with procedural and evidential differences is proving more difficult. While both jurisdictions have implemented the cross-border evidence gathering and transmission provisions of the Convention on Mutual Assistance in Criminal Matters,[114] they have yet to resolve the thorny admissibility issues that will arise in respect of such evidence.[115] For some time now, officials on both sides of the border have been preparing procedural manuals to guide police officers in such cases.[116] These will prescribe how the PSNI (or the Garda as the case

111 id., para. 54.

112 713 *H.L. Debs*., col. 1270 (29 October 2009).

113 The *Cross-Border Policing Strategy* (op. cit., n. 41) does not address this aspect directly, although it does say that a memorandum of understanding on the sharing of information on fingerprints, DNA, and footprints is being finalized, as is a manual of guidance on cross-border investigations: paras. 3.4 and 3.5.

114 Crime (International Co-operation) Act 2003; Criminal Justice (Mutual Assistance) Act 2008.

115 The framework decision on the European Evidence Warrant also includes provision for the authorities in one state to request the authorities in the other state to gather and transmit evidence; see framework decision 2008/978/JHA. There are plans to replace all of these provisions with a directive establishing a European Investigation Order: see EU Council 2010/1817/(COD).

116 713 *H.L. Debs*., cols. 1270–1 (29 October 2009).

may be) should gather evidence in a given situation in a manner that would satisfy the admissibility requirements in the Republic of Ireland (or Northern Ireland as the case may be) where it will be used. It was envisaged that the manuals would be completed by the end of 2009. As they have still not been completed at the time of writing, it might be assumed that the exercise has proved more convoluted than originally envisaged.

Ultimately, it can be argued that informal cooperation is objectionable because it tends to operate beneath the radar of external oversight and accountability. In constitutional states, there must be transparency and accountability in the use of public powers and resources, especially where the application of those powers and resources impact coercively on the rights and freedoms of the individual. Police officers on the ground cannot be left to decide for themselves what laws will be enforced and how they will be enforced, and whose interests will be served and whose will be overlooked. Their decisions on cooperation across the border, for example, must be subject to the same public laws, policies, procedures, and standards as their decisions on domestic policing and law enforcement matters. Achieving this requires transparency and accountability in cross-border cooperation decisions. Informal networks of personal contacts and relationships, by contrast, operate beneath the radar of public accountability. They render it very difficult for external bodies (and even internal management) to determine essential matters such as their nature and extent, whether they are operating in accordance with law and public policy and, most importantly, whether they are operating in a manner that respects the privacy and due-process rights of the individual.

In his study of cooperation between the Kent Constabulary and police forces on the other side of the Channel, Gallagher sees accountability issues as lying at the core of a balanced and efficient system of cooperation.[117] At the very least, he argues, the local agreements should be subject to strict, self-regulating guidelines. As yet, however, the current structures of police governance and accountability on either side of the Irish border are not sufficiently developed to deliver even this basic requirement. The formal machinery makes no specific provision for the publication of protocols on operational cooperation between the forces, nor is there provision for external scrutiny of their contents or application in practice. Moreover, the police and political authorities on both sides of the border are compounding the problem by sidelining formal transparent structures and processes, associated with instruments such as JITs, in favour of opaque informal methods.

Accountability for acts and omissions in cross-border policing is left to the standard legal, disciplinary, complaints, and democratic processes applicable in each state. In recent years, these have undergone significant reforms

117 Gallagher, op. cit., n. 3, p. 126.

in both jurisdictions, especially in Northern Ireland.[118] The old Police Authority for Northern Ireland has been replaced by the more representative and powerful Policing Board, while consultative District Policing Partnerships have been established at local level. These are complemented by the Police Ombudsman for Northern Ireland (PONI) which has established itself as a respected police complaints mechanism. The net result is the delivery of a policing service that is generally considered more representative, transparent, and responsive than its predecessor, the RUC. The Garda Síochána has also benefited from significant improvements to its governance and complaints structures,[119] although it has been suggested that these still fall significantly short of their counterparts in Northern Ireland.[120]

While the reforms may be producing transparency and accountability benefits with respect to domestic policing within each jurisdiction, they are generally silent and impotent with respect to cross-border policing matters. With the exception of officers who are formally seconded to the neighbouring force, neither jurisdiction makes special accountability provision for officers engaged in cross-border operations. This omission can prove fatal to an investigation into allegations of police corruption or abuse being conducted in one jurisdiction where relevant information is in the possession of the police in the other jurisdiction. It might be thought that the excellent standards of informal cooperation currently prevailing between the two forces would ensure that such information would be readily exchanged. Ironically, this is one situation in which the cooperation may not always meet expectations. PONI, for example, is on record as saying that investigations can be hampered by legal restraints on what information can be passed between one jurisdiction and another.[121] In some very serious investigations involving loss of life in Northern Ireland, the Garda cited national security grounds for their inability to supply relevant information requested by PONI. Given that the security of the state is one of the statutory functions of the Garda,[122] and that the authorities in the Republic of Ireland are now increasingly viewing organized crime as a threat to the security of

118 See, generally, Mulcahy, op. cit., n. 11; Ellison and Smyth, op. cit., n. 11.

119 See, generally, D.P.J. Walsh, *Human Rights and Policing in Ireland: Law, Policy and Practice* (2009).

120 See, generally, V. Conway, *The Blue Wall of Silence: The Morris Tribunal and Police Accountability in Ireland* (2010); V. Conway and D.P.J. Walsh, 'Current Developments in Police Governance and Accountability in Ireland' in (2011) 55 *Crime, Law and Social Change* (DOI: 10.1007/s10611-011-9269-6, February 2011); V. Conway, 'A Sheep in Wolf's Clothing? Evaluating the Impact of the Garda Síochána Ombudsman Commission' (2009) 43 *Irish Jurist* 109; D.P.J. Walsh, 'The Proposed Garda Complaints Procedure' (2004) 14(4) *Irish Crim. Law J.* 2; D.P.J. Walsh, 'The Proposed Garda Síochána Ombudsman Commission: a Critique' (2004) 14(1) *Irish Crim. Law J.* 2.

121 Northern Ireland Affairs Committee, op. cit., n. 31.

122 Garda Síochána Act 2005, s. 7(1)(d). See, also, Walsh, op. cit., n. 12, pp. 160–3.

the state,[123] there is clearly a major weakness in the capacity of the existing machinery to deliver accountability in cross-border policing cooperation.

CONCLUSION

Despite the deep-rooted political sensitivities associated with the border separating Northern Ireland and the Republic of Ireland, there has always been informal practical cooperation between the two police forces on either side. This has been based essentially on the growth of personal relationships and ad hoc arrangements on the ground. The general consensus would appear to be that these have been thriving in recent years. Some commentators suggest that this provides the ideal environment in which to construct more formal and transparent machinery for the regulation and delivery of comprehensive police cooperation.[124] Unfortunately, this is not borne out by the Irish experience. On the establishment and maintenance of cross-border teams, for example, the police forces on either side have continued to display a marked preference for proceeding on an informal basis as the need arises. As yet, there is no evidence of a willingness to adopt a more regulated structure incorporating formal rules of establishment, modus operandi, and accountability. Significantly, they have positively eschewed resort to EU initiatives such as the JITs. A consequence, presumably intended, is that the teams can operate flexibly and underneath the radar of external oversight. Resort to the JIT mechanism, by contrast, requires a more regulated and transparent approach in which there must be specificity on why a team is being established, the period of its establishment, and its composition. Critically, these details must be recorded in the form of a written Agreement between the parties. In addition, there are prescribed statutory limits on the modus operandi of a team and positive provision for criminal and civil liability for its actions on either side of the border.[125]

The distinct lack of enthusiasm for the EU JITs approach in Ireland is also reflected in the failure to develop a transparent domestic framework for the regulation of cross-border cooperation generally. While there have been domestic initiatives on the intergovernmental and legislative levels, these have tended to emphasize the centrality of direct engagement between the police chiefs and have been expressed largely in the form of protocols and memoranda of understanding, virtually none of which are published. Such material as is published tends to take the form of glossy publications that are

123 See, for example, the comments of the Minister for Justice, Equality and Law Reform when introducing legislative proposals to tackle organized crime gangs in 2009; 681 *Dail Debates*, col. 337; 687 *Dail Debates*, cols. 177–83.

124 See, for example, Anderson, op. cit., n. 6; Gallagher, op. cit., n. 3.

125 On all of these, see Criminal Justice (Joint Investigation Teams) Act 2004 (ROI); Police (Northern Ireland) Act 1998, s. 29(6); and Home Office Circular 53/2002.

rich in generalities and light on substantive detail. In other words the cooperation is stuck firmly in a mixture of the micro and meso levels of cooperation in Benyon's typology.

Arguably, a direct consequence of this preference for the micro and meso levels of cooperation is a serious legal and democratic deficit in a most sensitive area of policing. Local communities, and the public as a whole, are entitled to know and have an input into the objectives, priorities, strategies, and processes of cross-border police cooperation, and the capacity to call the police forces to account for their performance in these matters. Equally, those who feel victimized by police methods or actions in cross-border operations should have access to a remedy through, where appropriate, the civil process and/or an effective complaints procedure. The criminal process must also be seen to be applied in response to police actions that traverse the criminal law. Where cross-border operations are conducted on the basis of internal networks and informal relationships, and in accordance with unwritten policies and procedures, it is difficult for any of these mechanisms to operate effectively on either side of the border. The difficulties will be compounded where, as will often be the case, the remedy or accounting is being sought on one side of the border and relevant personnel and information are on the other side. In the absence of formal transparent and independent structures to pursue such matters, the prospects of securing adequate democratic scrutiny and legal accountability are surely low.

Tackling this deficit will require concerted action at both EU and domestic levels. The Irish experience suggests that the JITs framework is little more than a facility for cross-border cooperation among states which, for some reason or reasons, cannot secure the necessary cooperation through their own lateral arrangements. It will not necessarily impact on the transparency and regulatory standards observed by those states which can pursue cross-border cooperation without resort to its requirements. Given that internal cross-border police cooperation is now a major industry within the EU, this is surely an unsatisfactory situation. If the EU is to play a substantive role in shaping the form and quality of cross-border cooperation, it cannot be comfortable with legislating in terms that will have little or no impact in practice or that merely reflect what is already happening in practice. In particular, it might be argued that the EU should be focusing more attention on setting minimum standards of transparency and accountability to be observed on cross-border policing generally, and on the procedures that should be adopted to give effect to those standards. So, for example, where two or more member states establish a cross-border team to pursue a policing operation or objective, the sort of requirements that apply to JITs should be compulsory. Failure to adopt such a directive approach enhances the risk that the EU measures will be marginalized as police forces and national administrations fashion their own approaches to cross-border cooperation in a manner that prioritizes policing and law-enforcement interests over those of transparency and accountability.

EU measures will hardly be sufficient on their own to overcome the legal and democratic deficit. Ultimately, they will have to be supplemented by domestic machinery tailored to the particular needs of the communities on either side of the border. To this end it can be argued that policing across the Irish border will have to be brought out into the open and subjected to the norms that apply to domestic policing and other executive activities. The functionalist approach that has dominated cross-border police cooperation up to now undoubtedly served a useful purpose in that it allowed cooperation to progress in difficult times without arousing the political sensitivities that would have been fanned by subjecting it openly to formal governance and accountability machinery. While the sensitivities have not wholly gone away, the environment may now be ripe for a bold and imaginative leap in redressing the transparency and accountability gap that was allowed to grow under the functionalist approach. It is now 13 years since the Good Friday Agreement was adopted, cross-community indigenous government has stabilized in Northern Ireland, the PSNI enjoys levels of cross-community support that always eluded the RUC, and police and justice powers have been devolved to the government of Northern Ireland.

Perhaps it is now time to develop police cooperation more as an integral part of the larger project to promote a common political and economic space on the island, a space in which the jurisdictional dimensions of the border would lose much of their practical significance. A convenient model already exists in the shape of the cross-border implementation bodies established by the Good Friday Agreement. Composed of the relevant Ministers and support staff from either side of the border, these bodies provide a vehicle for the development, implementation, and scrutiny of cross-border policy on discrete subject areas such as inland waterways, food safety, and trade and business development.[126] Admittedly, these are a long way from policing in the political sensitivity stakes. Nevertheless, they have set a precedent. If the inherent political sensitivities can be overcome, there seems no fundamental reason why something similar could not be developed for policing. The existing machinery in which the two police forces meet on a regular basis could be complemented with a cross-border body composed of community and elected representatives from either side. The role of the latter would be to oversee and contribute to the development of the policies, strategies, and priorities of the former including, in particular, the adoption of more transparent procedures and evidence-gathering methods that satisfy the admissibility requirements of the jurisdiction in which it will be used. The cross-border body will also have to be complemented by a complaints

126 See, for example, M. Mansergh, *Cross-Border Bodies and North-South Relationships: Laying the Groundwork*, Institute of British Irish Studies working paper no. 12 (2001); N. Faris, 'Juggling the Jurisdictions: the Legal Basis for the Irish Cross-Border Implementation Bodies' (2001) 49(2) *Administration* 58; Tannam, op. cit. (2004), n. 28.

mechanism with the competence to operate on either side of the border in the investigation and determination of complaints concerning cross-border policies and operations.

Inevitably, any such developments would have ramifications for legal and political sovereignty, and they would have to overcome considerable institutional resistance and practical difficulties. Reform of the EU instruments in the manner outlined above could have a useful role to play to this end by presenting the developments as a natural and necessary progression of the broader European project. In any event, it can be argued that legal and political sovereignty are already being pegged back by the growth of operational police cooperation on an informal basis. Given that that cooperation is now being conducted openly and extensively, the real focus of concern should be on trying to match it with a parallel growth of formal structures for external scrutiny and accountability. A continuing failure to address this deficit will allow the two police forces to pursue their own institutional agendas in policing and security, and these may not always serve the interests of crime victims, individuals under investigation, and the communities on either side of the border. This sits uneasily with the commitments of the two governments in the Good Friday Agreement to enhancing accountability and human rights provisions in their respective police forces.[127]

127 See, in particular, the sections on 'Rights, Safeguards and Equality of Opportunity' and 'Policing and Justice' in Strand 3 of the Annex to the Anglo-Irish Agreement, op. cit., n. 55.