

Police Cooperation in Europe, China and Australia: Does Trust Depend on the Political System?

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I. Introduction

The regulation of police cooperation across national and international jurisdictional boundaries differs significantly around the world. It ranges from formal, legally binding international treaties and agreements, to informal customs between agencies. While these are the two most extreme cases of formality and informality, many types of regulation are situated somewhere on a continuum between these two points, such as Memoranda of Understanding (MOU) between agencies or Associations of Chiefs of Police. There are hence different ‘stages’ of formalisation and enforceability of regulation. A customary good relationship between two police officers, two police stations or two agencies or departments can result in frequent exchange of information, mutual assistance and even joint investigations at an informal, unregulated level. In some instances, such informal cooperation has led to the establishment of more formalised initiatives, such as MOU between agencies, departments and nation states, or even to legally binding bilateral and multilateral treaties and

agreements. Nation states have also established international regulations governing police cooperation not instituted subsequent to developments in policing practice. This ‘top-down’ regulation can equally influence transnational policing. This chapter tries to determine what influences the different developmental stages of regulation and how they relate to levels of trust and legitimacy.

Police cooperation strategies between Member States of the European Union (EU), between Mainland China, Taiwan and the special administrative regions of Hong Kong and Macau, and between Australian federal, state and territory jurisdictions are an important aspect of their fight against crime. While the abolition of controlled borders is still a recent phenomenon in the EU, Australian states and territories effectively abolished border controls with the advent of Federation in 1901. Taiwan and – despite their return to Chinese sovereignty in the late 1990s – the two special administrative regions of Hong Kong and Macao participate like autonomous nation states in police cooperation in China. While formal police cooperation frameworks have evolved at EU level in recent years, police cooperation in Australia and China still relies predominantly on informal police-to-police strategies in border regions. This chapter explores whether formalisation of police cooperation (as in the EU) is a sign of trust, or whether formalisation might be spurred by a lack of trust. Different levels of influence of trust on the three (very) different systems that all require internal law enforcement cooperation within them are determined. The existence (or not) of trust will furthermore be linked to the concept of legitimacy and in particular whether the perception of an agency or system as legitimate influences the readiness to cooperate with it and whether systems cooperating on the grounds of legitimacy tend to formalise their interactions or not.

With a view to the regulation of cooperation strategies, such as cross-border incursions, information exchange and joint investigations, each region examined in this

chapter has developed differently. Australia has no formalised legal framework guiding law enforcement activity across borders, but a federal police with powers across all jurisdictions for a select number of offences. The EU has developed a significant number of rather detailed cooperation frameworks, whereas Greater China, as one nation state, still relies predominantly on international informal strategies, such as Interpol and liaison officers to cooperate across borders. At the international level, cooperation is still mainly informal and no legal framework has developed. When addressing trust between the jurisdictions and the impact on regulation, legitimacy needs to be discussed as a significant factor impacting on trust. The systems discussed here have therefore been chosen for their differences in the area of fundamental rights protection, which might impact on both trust between police and formalisation of cross-border law enforcement practices. Also relevant for the formalisation of police cooperation strategies are common approaches to fair trial rights. More broadly, the relationship between similarities and differences in human rights frameworks and the generation of transnational police regulation are likely to be interconnected.

The three systems are analysed with a view to the highest level of diversity at the international level as a benchmark. First, the EU is assessed as a region that has formed its own human rights framework applying to a number of significantly different systems and has developed a high level of formalisation through international (EU) treaties and agreements regulating police and justice cooperation. Second, the chapter addresses Greater China, which is composed of Hong Kong, Taiwan, Macao and Mainland China. The four states, while not being sovereign nation states, have distinctly different histories, legal systems and police organisations, which present challenges for cross-border law enforcement. Australia, the third system investigated, is a federal state and its states and territories are independent criminal law jurisdictions with separate police forces, making cooperation across their borders

necessary. However, the cooperating states and territories adhere to very similar procedural rules and human rights requirements. Australia has been chosen as an example for the impact of greatest similarity (but no uniformity) of procedural and human rights requirements in jurisdictions on police cooperation regulation. This chapter is the first to analyse cross-border legal regulation and its relationship to trust and legitimacy in the area of police cooperation in the three different systems.¹

II. Legitimacy in a Global Context

Jürgen Habermas was one of many who foresaw a legitimacy problem in Europe stating that ‘the democratic processes constituted at the level of the nation state lag hopelessly behind the economic integration taking place at the supranational level’.² The 1990s was a time where legitimacy was discussed in a broader context and in particular with a view to European integration. However, when focusing on legitimacy and international policing, much less

¹ These findings are based on an extensive literature review in the area of transnational policing: S Hufnagel, ‘Cross-Border Cooperation in Criminal Matters’ in T Carty (ed), *Oxford Bibliographies in International Law* (Oxford, Oxford University Press, 2014).

² J Habermas, ‘Citizenship and National Identity’ reprinted as Appendix II in J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg, Cambridge, MA, MIT Press, 1996) 491.

literature has been produced than on legitimacy and domestic policing.³ Habermas' fear was that the political systems of countries could not keep up with the pace of globalisation. While he was relating this to Europe, one could today ask whether this is not a problem that spans the globe rather than just one region of the world. However, we need to define legitimacy to make it applicable in a cross-border cooperation context. There is generally confusion around the definition of legitimacy and disciplines, such as law, sociology, political science and many others, have different views. To understand the concept of legitimacy better and to ultimately link it to trust in a transnational context, we therefore first need to determine which definition should be used.

The first necessary observation is that legitimacy in the transnational policing context does not apply between the state and the citizen, but between agents of the state. Between these agents, however, the same basic notions of cooperation exist as between the state and its subordinates, namely that the more legitimate the respective other authority is believed to be, the more cooperation with this authority will ensue.⁴ In the context of 'inter pares' cooperation, this concept cannot be stretched to the point of there being a 'ruler' and a 'ruled', but the concept of cooperation still depends on the acknowledgement of legitimacy. Some authors would however argue that in the context of inter-agency cooperation there is an aspect of 'coercion' and 'ruler' and 'ruled' and 'power' and 'acceptance of power' and even

³ Of course with prominent exceptions, such as M den Boer, C Hillebrand and A Nölke, 'Legitimacy under Pressure: The European Web of Counter-Terrorism Networks' (2008) 46 *Journal of Common Market Studies* 101; B Bowling and J Sheptycki, *Global Policing* (London, Sage, 2012).

⁴ TR Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (Princeton, NJ, Princeton University Press, 2006).

of the loss of legitimacy of the partnership in the face of coercion.⁵ However, studies on the relationship between police underlying the latter assumption were not drawn from cooperation within the systems addressed in this chapter. Evidence for coercion between police of ‘stronger’ states towards ‘weaker’ states could not be observed between the entities of the systems assessed here. The most ‘coercive’ relationships in the present context exist between the ‘old’ and ‘new’ Member States of the EU and between Mainland China and other administrative regions of China. Forms of coercion are nevertheless rarely mentioned as an impediment to cooperation by practitioners working in the systems addressed in this study, while the issue is frequently claimed to bar cooperation in the wider context of international police cooperation.⁶

This chapter conceives of the concept of legitimacy as linked to the implementation of international human rights, as enshrined in the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR). This is in itself a questionable way of constructing legitimacy when legitimacy is usually attributed by a society as a whole.⁷ Linking it to certain standards like human rights that state agents, such as the police, have to meet is, however, a way of determining legitimacy when it is not possible to gauge whether ‘society as a whole’ perceives its state agents as legitimate. This is justified

⁵ Bowling and Sheptycki, above n 3, 7, 17–18.

⁶ Interviews for a previous study (S Hufnagel, *Police Cooperation Across Borders – Comparative Perspectives on Law Enforcement within the EU and Australia* (Farnham, Ashgate, 2013)) and a current study on international law enforcement conducted by the author, predominantly interviewing international liaison officers, police involved in peacekeeping missions, Interpol and Europol staff.

⁷ See, eg, J Jackson, B Bradford, M Hough, A Myhill, P Quinton and TR Tyler, ‘Why Do People Comply with the Law?’ (2012) 52 *British Journal of Criminology* 1051.

for the purposes of this chapter as the view of society is of limited relevance, while the view of another state's agent is paramount. Those agents, in this study of the police, have to make sure they comply with their own state's standards. This compliance could be endangered if the state they are cooperating with, for example, giving information to or getting information from, is not abiding by equivalent or similar standards.

When recalling earlier notions of legitimacy, usually attributed to the writings of Max Weber on the social dynamics of authority,⁸ it appears that legitimacy is deliberately not linked to a power dynamic (or coercion as discussed above), but to the cooperation that ensues outside this power dynamic. Legitimacy is the 'other' reason why cooperation with an authority eventuates. Legitimacy is a quality that is attributed to and results in voluntary cooperation with the authority displaying this quality. In cross-border police cooperation, as in the relationship between a state and its subordinates, authority for certain actions is delegated to another state actor. This can be rather specific in the area of police cooperation, such as the carrying out of an arrest, search or seizure, or more oblique, like the transfer of information. As such acts have to be carried out in a way that is acceptable for the commissioning party, there needs to be a similar benchmark as to what a 'legitimate' act is. This, by contrast, can be perceived very differently in the people-to-state relationship rather than in the police-to-police relationship. In the former the act has to protect the rights given to the state's subjects; in the latter the act has to be fast, efficient and leading to benefits for investigators. Human rights could therefore be the wrong benchmark when looking at international police cooperation. Legitimacy in transnational law enforcement should then

⁸ M Weber, *Economy and Society: An Outline of Interpretive Sociology* (eds G Roth and G Wittich, New York, Bedminster, 1968).

rather be defined as efficiency, but this would require the complete separation of the notion of legitimacy in the police-to-police context from the people-to-state relationship. This is, however, not possible as the police are part of the state and hence part of the people-to-state relationship. If legitimacy in police-to-police cooperation were to be solely judged by efficiency, the relationship between the citizens and the state could be violated.

Furthermore, the rules binding the state and its agents function as regulators of state behaviour. If they protect the individual and are enforceable, they can prevent the interaction of law enforcement agents across borders. This strengthens legitimacy in the state-to-people relationship but can inhibit cooperation between state actors. We therefore have to choose which notion of legitimacy should apply. What is legitimate in the state-to-people relationship, and at the same time in the state-to-state relationship? Is the legitimate state actor more trusted by another state actor? Do the variants in this relationship shape the regulation developed to formalise it? These are the core questions that shall be considered in this chapter.

A. Linking Trust to Legitimacy in the Area of Police Cooperation

In the various studies the author has undertaken in the field, all practitioners interviewed have mentioned trust as a major positive impact factor on cooperation. Trust therefore seems to be crucial in law enforcement cooperation. Psychological research has shown that shared moral norms and values form a basis for trust. The more we perceive others as having a similar

value system, the more we consider them trustworthy.⁹ Applied to an organisation such as the police, bound by legal frameworks, this should permit a conclusion that a shared adherence to fundamental rights obligations leads to common norms and values, which in turn lead to trust. The opposite could however equally be true. Another factor that can lead to value commonalities is the need to produce results, to be efficient and to pursue a common goal. On many occasions, this might complicate the maintenance of legal values. However, it is important in the case of police to distinguish shared legal values and shared goals. The distinction might explain why cooperation happens not only between agencies with similar human rights frameworks, but also with those that have very different legal restraints.

The legitimacy of an institution might rest on the legal standards they abide by. However, research in the area of inter-agency cooperation has shown that it also often comes down to who is known in the other organisation personally.¹⁰ It follows that there are three broad reasons for the establishment of a trust relationship between agencies: common norms, common goals and personal contacts. Trust indicators hence only partly conform to the concept of legitimacy, defined as adherence to human rights standards. Some authors have argued that trust affects legitimacy and legitimacy affects trust, as the more legitimate agencies are, the more they are likely to trust each other.¹¹ This chapter aims to look into this

⁹ GM Breakwell, *The Psychology of Risk* (Cambridge, Cambridge University Press, 2007) 160.

¹⁰ See, eg, Hufnagel, *Police Cooperation Across Borders*, above n 6, 86–87.

¹¹ M Fichera, 'Mutual Trust in European Criminal Law' Working Paper Series 2009/10 (University of Edinburgh, 2009).

assertion in the context of inter-agency cooperation. While an indicator for trust is the troika of common norms, goals and personal contacts, the indicator for legitimacy is the respect for human rights. Whether the two are connected shall be assessed through observations of the formation of regulation between state entities.

A question that could be asked is whether trust was the basis for cooperation mechanisms in the EU, Greater China and Australia. If it was, this should have led to greater legitimacy. Alternatively, legitimacy could have contributed to the establishment of the mechanism(s) and greater trust. There could hence be two types of mechanism that need to be distinguished, one based on trust, or the cooperation between practitioners leading to regulation/legitimacy, the other established at the (supra-)national level with a view to engendering trust and enabling cooperation between practitioners. A further question is whether the creation of regulation in itself can create legitimacy, for example, protecting suspects from informal circumvention of their rights, such as privacy. While the relationship between the agencies could be legitimised, do the agencies themselves gain legitimacy through the regulation as a manifestation that another agent trusts them to the extent that they enter into a formal relationship? Could this not be the antithesis to trust, as regulation should not be needed when there is trust? To answer the question, this chapter now examines the different relationships to shed light on the interconnection between trust, legitimacy and regulation in police cooperation.

B. EU Legal Frameworks

A significant number of bilateral and multilateral cooperation strategies exists between the Member States of the EU.¹² They shall not be outlined in detail, as there are more than 133 EU-level security provisions that highlight more impressively the level of formalisation in this region of the world.¹³ However, it should be noted that bilateral and multilateral cooperation initiatives influenced EU-wide formalisation. Some of them spread throughout the Member States of the EU, leading to a de facto harmonisation of policing strategies, such as the Common Centres (or Police and Customs Cooperation Centres).¹⁴ Others started at a multilateral level and were then taken up at EU level, such as the Schengen Convention. With regard to the trust analysis it should be noted that all mechanisms were based on a common goal: the fight against cross-border crime. Seeing that they were first established between neighbouring countries, they were very likely also fostered by personal contacts. For some cooperation mechanisms between EU Member States personal contacts were even the driving force and more crucial than the common goal, like in the Cross-Channel Intelligence Conference between the United Kingdom, France and Belgium.¹⁵ While there was a clear need to cooperate in this region and hence a common goal, the personal and political

¹² Hufnagel, *Police Cooperation Across Borders*, above n 6, ch 2.

¹³ There were already 133 EU-level security provisions encompassing both substantive criminal law and procedural measures before the entry into force of the Lisbon Treaty in 2010.

¹⁴ O Felsen, 'European Police Cooperation: The Example of the German–French Centre for Police and Customs Cooperation Kehl (GZ Kehl)' in S Hufnagel, S Bronitt and C Harfield (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (London, Routledge, 2012).

¹⁵ F Gallagher, 'Sheer Necessity: The Kent Experience of Regional Transfrontier Police Cooperation' (2002) 12 *Regional & Federal Studies* 111, 121.

animosities were too pronounced to lead to advanced cooperation. This changed when the head of the Kent police was replaced by a chief of police with diplomatic skills. The personal contacts thereby enabled the trust the common goals could not achieve alone.

Furthermore, it could be assumed that between EU Member States a common value system is inherent through the implementation of the European Convention on Human Rights. Accession without implementation is not possible. However, the situation is more complicated than this as even the same fundamental supranational right might be implemented differently in national criminal procedure, leading to de facto incompatibilities when it comes to cross-border cooperation.

While EU-level legislation in the area of policing and security is extensive, it can be questioned whether this legislation has the power to create legitimacy. Too much and overlapping legislation might even lead to the opposite outcome: a lack of trust towards the system imposing them and a lack of coherence. The recent opt-out of some EU countries with regard to EU security provisions and, most prominently, the United Kingdom 'Brexit' decision might be indicators that extensive supranational regulation can destroy the trust in the supranational entity, which in turn might affect its legitimacy. This does, however, not mean that the trust between the nation states or their legitimacy with regard to police cooperation is affected. The question is, however, whether the implementation of the supranational regulation in the bilateral context creates more trust and legitimacy. It is unlikely that 133 instruments will do so. Studies by other authors have already concluded that most of the measures have no relevance in practice.¹⁶ Considering that the number of

¹⁶ L Block, *From Politics to Policing: The Rationality Gap in EU Council Policy-Making* (The Hague, Eleven International Publishing, 2011) 55.

instruments is vast, only a few and only those that have been considered relevant in practice shall be addressed here.

The most prominent formalised cooperation mechanism so far is the ‘Europol Convention’ (signed by the then 15 EU Member States on 26 July 1995), which came into effect on 1 July 1999 and has, since 2010, been replaced by a Council Decision.¹⁷ A new Europol Regulation will enter into force on 1 May 2017. Europol can be divided into four different parts. It has a board of management, consisting of representatives of the Member States and a representative of the Commission.¹⁸ It therefore employs an intergovernmental structure of governance. The head of Europol is its director. Europol further consists of the actual database, a liaison officer network and the national units. Falling short of operational powers is the EU-wide network of liaison officers, who exchange information and intelligence on transnational crime.¹⁹ A liaison officer from each of the EU Member States is situated at Europol to enable easier access to information.²⁰ In addition to liaison officers, there are national units of Europol established in each Member State, which are the only competent liaison bodies between Europol and the Member State authorities. Direct contacts between Europol and designated competent authorities in the Member States, governed by

¹⁷ Council Decision of 6 April 2009 Establishing the European Police Office (Europol) [2009] OJ L121/37; also ‘Europol Decision’, previously Europol Convention: Council Act of 26 July 1995 Drawing up the Convention based on Article K.3 of the Treaty on European Union on the Establishment of a European Police Office (Europol Convention) [1995] OJ C316/2.

¹⁸ See Article 37 Europol Decision.

¹⁹ I Loader, ‘Policing, Securitisation and Democratisation in Europe’ (2002) 2 *Criminal Justice* 126, 128.

²⁰ Article 9 Europol Decision.

national law, have been allowed since 2004.²¹ This indicates a growing ceding of sovereignty concerns by the Member States in relation to Europol. This is not only advantageous in relation to efficiently providing information and accessing the database, but also in relation to face-to-face contacts and informal information exchange between the officers stationed at Europol. Europol's liaison officer network is of particular importance, as the exchange of sensitive information requires a high level of trust not only between the Member States, but also between the police practitioners on the ground.²² The liaison officers of all Member States, and even non-EU Member States, are co-located in one building to encourage the establishment of close working relationships. The liaison officers are not supervised by Europol, which gives them greater freedom to cooperate informally.²³ Practitioners accepted this network immediately and appreciate the opportunity to know their counterparts from other Member States personally, as it enhances trust.²⁴ In addition, the possibility to cooperate formally, as well as informally, within this network was stated to be an advantage.²⁵

²¹ See the Protocol Drawn up on the Basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), Amending that Convention (Danish Protocol) [2004] OJ C2/3.

²² V Mitsilegas, *EU Criminal Law* (Oxford, Hart Publishing, 2009) 165.

²³ *Ibid.*, 165–66.

²⁴ Interview with Europol Practitioner conducted for 2013 study.

²⁵ *Ibid.*

Another important strategy is the 2000 EU Convention on Mutual Assistance in Criminal Matters.²⁶ Apart from other aims, it established joint investigation teams (JITs) in the EU. JITs were included in the Convention as a new mechanism to coordinate cross-border investigations, which aims at changing the established practice of parallel investigations. While initially a resisted mechanism by practitioners, they are today a commonly used strategy to investigate cross-border crime.²⁷ According to Article 13 of the Convention, a JIT is an ‘operational investigative team consisting of representatives of law enforcement and other authorities from different member states and possibly from other organisations like Europol and Eurojust’. The purpose of a JIT is jointly to investigate a criminal case; the teams are bi-national or multinational, likely operating from one location, possibly multidisciplinary and are set up for a single investigation within an agreed time frame. An important aspect of the introduction of JITs was their advantage compared with ‘traditional’ cross-border investigations, the so-called ‘parallel investigations’. Parallel investigations focus on cooperation through exchange of international letters of request (ILOR) in cross-border investigations, commonly based on the 1959 Council of Europe Convention, but specified in bilateral and multilateral agreements.²⁸ When a parallel investigation is set up between two or more Member States, investigation teams can work on the same case within their respective jurisdiction simultaneously. Information exchange and the coordination of the

²⁶ EU Council Act of 29 May 2000 Establishing in Accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2005] OJ C197/3 (entered into force 23 August 2005); also ‘2000 Mutual Legal Assistance Convention’ or simply ‘Mutual Legal Assistance Convention’.

²⁷ Hufnagel, *Police Cooperation Across Borders*, above n 6, 221.

²⁸ See, eg, Articles 39 and 40 of the Schengen Convention.

investigation are conducted through ILOR exchanges between the participating countries.²⁹ In the best case scenario, ILORs establish a legal basis for the direct and immediate exchange of intelligence and determine the preliminary measures necessary in the course of the investigation that can be taken. If particular investigative measures become necessary in one jurisdiction, such as communication interception, searches, interrogations or confiscation, additional ILORs can be issued.³⁰ This cumbersome back and forth of requests is not needed with JITs established under the 2000 Convention, which makes them a useful tool in cross-border cooperation. While practitioners were initially reluctant to use them, they have since become a frequent tool in EU cooperation.³¹ JITs are furthermore assisted by Eurojust, which is legally based on the Eurojust Decision.³² Eurojust national members can, for example, assist in the setting up of JITs, provide resources and help determine under which rules of procedure evidence needs to be gathered to be applicable in the relevant trial jurisdiction. Eurojust also has further competences in the area of judicial cooperation.

The question arises whether the above cooperation mechanisms have increased trust between the participating agencies or were themselves born out of trust. In the case of Europol and Eurojust, the fact that they gather together practitioners from all Member (and even non-Member) States is an important factor as it establishes personal contacts, which in

²⁹ L Block, 'Combating Organized Crime in Europe: Practicalities of Police Cooperation' (2008) 2(1) *Policing: A Journal of Policy and Practice* 76.

³⁰ *Ibid.*

³¹ Hufnagel, *Police Cooperation Across Borders*, above n 6, 218–19.

³² Council Decision of 15 July 2009 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14.

turn can lead to greater trust. JITs could be said not to initiate personal contacts for further cooperation, but to enable personal interaction during an investigation that crosses borders. Another element of trust, common norms/values, is also fulfilled to a certain extent by all three mechanisms as they prescribe a certain way of engaging with each other (eg, competences and data protection regimes). All agents participating in these instruments have to adhere to the same rules even though they might come from different systems. Finally, the common goal defined for these instruments is cross-border law enforcement within the EU. While this broader goal will be inherent to all agents cooperating through these mechanisms, the more specific goals might nevertheless be different. Consideration in one country might also be given to protecting the identity of a source, or not endangering a further domestic investigation. This could then lead to conflicting goals between agencies. The interesting observation on the three above mechanisms is, however, that they provide the forum to harmonise these goals. For example, the Netherlands and the United Kingdom overcame their major differences in disclosure regimes by resorting to the Europol mechanism. Under UK law, sensitive information about police operations, such as the identity of informants or operational technique, can be exempt from disclosure to the defence (the doctrine of public interest immunity),³³ while Dutch practitioners are bound to potentially disclose all information in criminal proceedings.³⁴ If information is therefore classified as sensitive, it cannot be disclosed by the United Kingdom to the JIT with the Netherlands. Faced with this major impediment, the UK authorities used the Europol channel to provide sensitive

³³ See Criminal Procedure and Investigations Act 1996 (UK) ss 1–21; Criminal Justice Act 2003 (UK) ss 32–39.

³⁴ C Rijken, ‘Joint Investigation Teams: Principles, Practice, and Problems. Lessons Learnt from the First Efforts to Establish a JIT’ (2006) 2(2) *Utrecht Law Review* 99, 113.

information to the JIT and the source of information remained protected.³⁵ The shortcomings of the 2000 Convention were overcome by innovative ad hoc practitioner cooperation efforts, using another EU cooperation mechanism.³⁶ What proved to be important in carrying out the investigation was not the legal framework, but ‘good personal contacts, the ability to bridge cultural differences, a shared interest and a good knowledge of the legal system of the cooperation partner’.³⁷

Another initiative that is worth mentioning here is CEPOL, the European Police College, which was founded in order to create a network of police officials from all Member States and harmonise European policing standards through training.³⁸ CEPOL promotes training and education through seminars, workshops and the exchange of police officers at senior levels; they can work for a limited amount of time in other countries and learn about another system.³⁹ Cooperation mechanisms with a focus on training and more generally knowledge exchange can be found in all three systems examined for this study. They are not only crucial in promoting trust between practitioners, but can also contribute to the harmonisation of practice and enhance cooperation. Practitioners participating in CEPOL seminars stressed that the major advantage of the events was getting to know practitioners

³⁵ Ibid, 114.

³⁶ See Hufnagel, *Police Cooperation Across Borders*, above n 6, ch 2, subsections 3.2.2.1 and 3.2.2.2.

³⁷ See the interview with UK–NL JIT member cited in Block, *From Politics to Policing*, above n 16.

³⁸ European Police College, *About CEPOL* (2016), available at www.cepola.europa.eu/who-we-are/european-police-college/about-us.

³⁹ Ibid.

from other Member States who could then be contacted directly in cross-border investigations.

The knowledge we gain by looking at the different cooperation mechanisms with regard to trust and legitimacy is rather limited. First, the fact that practitioners trust each other if they work more closely together does not prove that the jurisdictions cooperating trust each other more or are becoming more legitimate. No conclusion can be drawn from the above examples with regard to the trust between the systems more generally. What could be inferred is that the fact that practitioners are brought together in the different initiatives under a supranational framework is in itself a sign of trust as it fosters informal cooperation that should not be encouraged between systems that do not acknowledge each other's legitimacy. The fact that formalised legal frameworks exist enabling practitioner engagement and fostering cooperation could therefore be a sign of trust. This would certainly hold true if it could be observed that systems that do have a legitimacy discrepancy are not formalising their cooperation and are not fostering practitioner contact and training. The next system to be evaluated is therefore Greater China, which encompasses fewer systems, but a greater diversity of values and norms than the EU.

C. Strategies of Police Cooperation in Greater China

While Greater China only includes four distinctly different jurisdictions, the differences between them are great and the challenges to police cooperation significant. Article 2 of the

Basic Law for Hong Kong⁴⁰ provides the ‘one country, two systems’ political settlement. However, there are more than two systems at play in the region. The Mainland Chinese system draws heavily on foreign legal models.⁴¹ The Chinese criminal code⁴² and the code of criminal procedure⁴³ in particular borrow from both the Soviet and German civil systems.⁴⁴ Hong Kong, as a former British colony is governed by the common law system, which continues even after reversion to the PRC in 1997.⁴⁵ Macau, the other special administrative region (SAR) in Greater China and until 1999 under Portuguese rule, has a ‘potpourri’ system similar to the mainland, mainly based on Portuguese law, which in turn borrowed from

⁴⁰ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (April 1990) (‘Basic Law’) adopted on 4 April 1990 by the Seventh National People’s Congress of the People’s Republic of China at its Third Session.

⁴¹ PB Potter, ‘The Chinese Legal System: Continuing Commitment to the Primacy of State Power’ (1999) 159 *The China Quarterly* 673.

⁴² The Chinese Code of Criminal Procedure adopted at the Second Session of the Fifth National People’s Congress on 1 July 1979; revised at the Fifth Session of the Eighth National People’s Congress on 14 March 1997; and promulgated by Order No 83 of the President of the People’s Republic of China on 14 March 1997.

⁴³ The Chinese Code of Criminal Procedure adopted at the Second Session of the Fifth National People’s Congress on 1 July 1979; amended pursuant to the Decision on Amending the Criminal Procedure Law of the People’s Republic of China adopted at the Fourth Session of the Eighth National People’s Congress on 17 March 1996; and amended on 14 March 2012.

⁴⁴ Potter, above n 41, 674.

⁴⁵ Y Ghai, ‘The Intersection of Chinese Law and Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?’ in J Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution* (Berlin, Springer, 2009)13–14.

German law.⁴⁶ Macau, like Hong Kong, does not apply the death penalty, which distinguishes the two administrative regions from the Mainland and has the potential to complicate police and justice cooperation between these jurisdictions.⁴⁷ Taiwan, like Mainland China and Macau, is a civil law (inquisitorial) system.⁴⁸ It contains a mixture of Imperial Chinese law, contemporary Chinese law, principles and concepts of civil law systems, such as Germany and Japan, as well as the United States. These differences in systems and legal heritage also have an impact on the regulation and structure of policing within them.

Furthermore, the international and national human rights situation in Greater China is complicated. China is a signatory to the ICCPR, but has not ratified it. For this reason, Taiwan can equally not ratify it. Hong Kong and Macao have granted adherence to the ICCPR in their Basic Laws and therefore to some extent implemented it without being able to be a party to the Convention.⁴⁹ There is hence a far greater legitimacy discrepancy between the systems in China than in the EU, at least according to the definition of legitimacy relying on common human rights requirements. If the regulation of cooperation mechanisms was a sign for trust between systems, there should be no formalised cooperation relationships between the systems adhering to the ICCPR and those not doing so within Greater China.

⁴⁶ FM Luke, 'The Imminent Threat to China's Intervention in Macau's Autonomy: Using Hong Kong's Past to Secure Macau's Future' (2000) 15 *American University International Law Review* 731.

⁴⁷ Ibid.

⁴⁸ H Chiu and J-P Fa, 'Taiwan's Legal System and Legal Profession' in MA Silk (ed), *Taiwan Trade and Investment Law* (Oxford, Oxford University Press, 1994).

⁴⁹ G Greenleaf, *Asian Data Privacy Laws – Trade and Human Rights Perspectives* (Oxford, Oxford University Press, 2014) 474.

Unsurprisingly, a common legal framework on police cooperation does in fact not exist in Greater China. However, a number of formal agreements were established bilaterally. An example of a bilateral cooperation framework is the 1988 Mutual Case Assistance Scheme (MCAS) between Mainland China and Hong Kong.⁵⁰ MCAS was established to investigate cross-border corruption cases. The agreement was first limited to Procurator Departments in Guangdong, but in 2000 was further extended through collaboration with the Supreme People's Procurator Department to other provinces.⁵¹ This manifests a harmonising effect of this agreement on other regions within Mainland China. It also shows that a common goal seems to overcome the general rule that regulation is only established between systems that trust each other. The goal of fighting corruption was here stronger than the distrust created by divergent value systems.

An example for trust between systems that have similarly limited application of international human rights standards is the 2009 Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement, which was concluded between Taiwan and Mainland China. It is a formal agreement⁵² and to a higher degree binding than, for example, an MOU. This agreement is the most comparable to EU mechanisms and encompasses measures similar to those available through the Schengen Convention, such as cross-border incursions

⁵⁰ DW Choy and H Fu, 'Cross-Border Relations in Criminal Matters' in MS Gaylord, D Gittings and H Traver (eds), *Introduction to Crime, Law and Justice in Hong Kong* (Hong Kong, Hong Kong University Press, 2009) 227.

⁵¹ *Ibid.*

⁵² Exchange Foundation and the Association for Relations Across the Taiwan Straits, *Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement between the Taiwan Straits* (25 July 2009).

and mutual legal assistance. The closeness of Taiwan and Mainland China in the area of police cooperation is very surprising as Taiwan is not recognised by the PRC as a sovereign nation state. However, under the Cross-Strait Agreement both sides had established diplomatic organisations through which cooperation, for example, in criminal matters, could be conducted.⁵³ A possible explanation is that the PRC and Taiwan both apply the death penalty and have a similar approach to fair trial rights. Cooperation between them, despite political discrepancies, relies on jurisdictional similarities, considering that both systems rely more on Imperial and contemporary Chinese law than Macau and Hong Kong. This stresses that a common value system can lead to closer cooperation, which could be a sign of trust. However, legitimacy is here put to the test as it could be established that both the existence, as well as the lack of legitimacy can lead to greater trust between organisations as long as they are situated within relatively similar legal systems.

However, the level of engagement between all four systems forming Greater China is more comparable to international cooperation than to the close and regulated EU cross-border law enforcement. The '1994 Agreement' established between Mainland China and Hong Kong confirmed the principle established previously, creating three different channels for mutual legal assistance. The first was Interpol, the second a direct link between Hong Kong and Guangdong province and the third were liaison officers of the Ministry of Public Security (MPS) stationed in Hong Kong.⁵⁴ Cooperation through Interpol had been the long-established practice of operational police cooperation between the two parties during the 99-year British

⁵³ S Lo, *The Politics of Cross-Border Crime in Greater China – Case Studies of Mainland China, Hong Kong, and Macao* (New York, ME Sharpe, 2009)173.

⁵⁴ Choy and Fu, above n 50, 228.

lease on Hong Kong and the 1984 Sino–British Joint Liaison Group decided in 1989 that cooperation through Interpol should persist even after the return of Hong Kong to Chinese sovereignty in 1997.⁵⁵ The fact that the two systems chose international cooperation mechanisms (Interpol and liaison officers) rather than measures more tailored to a regional context shows that the assumption of differences is greater than in regions such as the EU with more coherent value systems.

While several bilateral regulated mechanisms exist in Greater China to enhance police cooperation across borders, cross-border law enforcement in this region is still predominantly based on informal and semi-formal cooperation mechanisms. However, between Taiwan and Mainland China a formalised framework can be observed. At the same time both of these entities have not ratified the ICCPR and still apply the death penalty. It appears that similarities in legitimacy foster the formalisation of cooperation mechanisms. More important than the legitimacy of systems seems to be the sharing of a common value base. Also, if the common goal is considered a priority in the systems, differences in the value base do not hinder cooperation as the anti-corruption cooperation between Mainland China and Hong Kong shows. China therefore provides a very good case study. Between all four systems in Greater China, formalisation did not occur, but bilateral formal cooperation exists between systems with greater similarities or with common goals. It also needs to be mentioned that despite the differences between the four systems there are common education and training initiatives, for example, between Mainland China, Macao and Hong Kong. These initiatives

⁵⁵ Lo, above n 53, 177.

were described by officers to generate trust and enhance cooperation.⁵⁶ Different from the EU case study, this is here a dangerous endeavour as cooperation could lead to human rights infringements. The concept of trust seems to be therefore independent of human rights standards and a common value system in the police cooperation context.

D. Australia

Australia's nine jurisdictions (six states, two territories and federal) are not sovereign nation states, but are comparable in this context as each has distinct criminal laws and procedure as well as a separate police force. Furthermore, the Australian territory is bigger than the EU with 28 jurisdictions; hence there are unique policing problems in remote border regions that have the potential to be tackled by police cooperation mechanisms. Australia has no national human rights charter, but is a party to the ICCPR. Some states have created human rights legislation, but it is of little relevance to fair trial rights. With regard to legitimacy, the states forming the Australian federation should be more homogenous than the EU. All systems derive from the common law and more precisely the British and Irish legal systems. As Australia is a signatory to the ICCPR, it is applicable in all states. Considering the prominent similarities of the systems, trust should exist, based on common norms/values, goals and personal context (joint training). The existing similar levels of legitimacy should therefore,

⁵⁶ S Hufnagel, 'Strategies of Police Cooperation along the Southern Chinese Seaboard: A Comparison with the EU' (2014) 61(4) *Crime, Law and Social Change* 394.

following the EU example, have led to cross-border legislation facilitating police cooperation.

However, while close informal cooperation between the nine jurisdictions exists in border regions, this has not generally led to the creation of bilateral and multilateral legislation facilitating cross-border police cooperation, nor has it impacted on Australian federal, or the harmonisation of state, territory and Commonwealth legislation. It has also not led to the creation of any legal cooperation frameworks. Advanced cooperation in Australian border regions, unlike in the EU, is also in turn not influenced by federal or harmonised legislation. Furthermore, federal agencies, within the limits of their competences, perform a number of cross-border tasks, which have made such developments less necessary. Australia's top-down attempts to harmonise criminal law and procedure or introduce systems of mutual recognition of laws have rarely led to harmonised implementation and cooperative practice. This lack of harmonised legal frameworks and clearly defined competences presents challenges. While the predominant informality of cooperation can have advantages, it also leads to divergent approaches between state and territory on the one hand and the more formal federal agencies on the other and makes a clear determination of competencies difficult.⁵⁷

The only 'formal' strategy that exists in Australia is limited to three jurisdictions: South Australia, Northern Territory and Western Australia. In the Ngaanyatjarra Pitjantjatjara Yankuntjatjara (NPY) lands, which are the sparsely inhabited border region in the centre of Australia, problems of domestic violence, child abuse, sexual abuse, substance abuse, and other forms of offending behaviour became apparent through a women's initiative

⁵⁷ Hufnagel, *Police Cooperation Across Borders*, above n 6, ch 3.

in the region. The cooperation measures created to counter these issues are probably the most advanced of all Australian border areas. The Western Australia Cross-Border Justice Act 2008, the South Australia Cross-Border Justice Act 2009 and the Northern Territory Cross-Border Justice Act 2008 allow police to exercise their powers (within certain limits) in each of the three jurisdictions under recognition of the laws of their state or territory. In other Australian border regions a police officer must be sworn into the other system to exercise his or her power in the other jurisdiction (typically they are assigned the powers of a 'special constable' as in the Police (Special Provisions) Act 1901 New South Wales. However, while this strategy has the clear potential to grow beyond the three jurisdictions, attempts to apply this strategy to other states have not been made.⁵⁸ The cooperation mechanism is nevertheless far more advanced than anything that has been established in the EU, which shows that similarities (and presumably the underlying trust and similar levels of legitimacy due to these systemic similarities) do create close cooperation.

More important than the NPY lands cooperation is the fact that Australia is, apart from the state and territory police, also policed by federal agencies, such as the Australian Federal Police (AFP) and the Australian Crime Commission (ACC). Giving a superior entity the power to establish common agencies with enforcement powers might not show trust between the systems, but trust in the superior entity. Comparing this situation with the EU, trust between the EU Member States has led to the establishment of the common supranational agency Europol, but has fallen short of giving this agency enforcement powers. It could

⁵⁸ J Fleming, 'Policing Indigenous People in the Ngaanyatjarra Pitjantjara Yankunytjatjara Lands' in S Hufnagel, S Bronitt and C Harfield (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (London, Routledge, 2012).

therefore be concluded that the higher the levels of similarity with regard to legitimacy are within an entity (Australia has different jurisdictions, but they all derived from one system, while the EU encompasses very diverse civil and common law systems within one human rights framework), the more likely they will be to cede power to the superior entity. This is not to say that there is not a constant quarrel between the Australian state and territory and the federal levels regarding competencies.⁵⁹ However, as a system, the trust is here advanced to the point that a common representative agency can be tolerated. This seems to be an even further stage of trust than in the EU.

Furthermore, similar to both the EU and Greater China formal and informal practitioner forums and agencies or education and training initiatives have developed in Australia encompassing all systems and often initiated by the federal level. This is a consequence of harmonised laws not necessarily translating into harmonised practice. Harmonised and regional laws have not been able to overcome all differences between constituent jurisdictions, which makes personal level trust building necessary. It is interesting to see that these trust building initiatives can even be identified in the Australian context, despite the pronounced similarity of legal systems and organisational structures among the states. Common training and knowledge exchange therefore seems to be necessary in all systems.

Australia could, apart from the similarity in establishing training initiatives, be seen as a system with great similarities and little formalisation at the bilateral and multilateral levels. Interviews with practitioners for a previous study,⁶⁰ indicated that formalisation would be

⁵⁹ Hufnagel, *Police Cooperation Across Borders*, above n 6, ch 3.

⁶⁰ *Ibid.*

welcomed and that the case-by-case approach can be tiring and highly dependent on single individuals. However, the systems were mostly seen as so legally similar that a real necessity for formalisation from a legal perspective did not exist. Furthermore, when cases cross borders within the Australian federation, they theoretically do fall within the competences of the AFP (at least if they are drug crimes, telecommunication or terrorism related). This has also contributed to a certain reluctance to formalise cooperation frameworks at the multilateral level.

III. Conclusion

The interrelatedness of trust, legitimacy and regulation in the area of police cooperation has proven to be rather different from the 'traditional' views of trust and legitimacy discussed in the first part of this chapter. While the legitimacy debate was shortened by simply assuming that legitimacy levels are related to the implementation of international and regional human rights standards, this has not made the assessment of trust and its effect on legitimacy any easier.

It can be concluded that trust is established in all systems by common goals, common norms/values and personal contacts. This becomes particularly apparent through the fact that all systems foster personal contacts through education and training. However, the three trust indicators do not have to be present at the same time. A common goal can be the driver of trust and even ensuing regulation despite major differences of legitimacy levels between the

cooperating systems. It also became very clear that the trust established to promote cross-border law enforcement is not necessarily related to trust between the systems or the other agencies in general. So, other than the assertion by Fichera that ‘trust affects legitimacy and legitimacy affects trust, as the more legitimate agencies are the more they are likely to trust each other’,⁶¹ the analysis of police cooperation strategies resulted in the view that legitimacy affects trust, but trust does not affect legitimacy in the area of police cooperation.

While police in all three systems addressed can trust each other, even to the point of formally regulating their engagements across borders, this has absolutely no effect on the legitimacy of the other system or how police view that system with regard to legitimacy. The common goal and personal contacts can create the trust independently of the legitimacy of the system. This is likely to produce outcomes detrimental to safeguarding the rights of the defendant. Put differently, if Fichera’s assertion is true, we need to redefine ‘legitimacy’ in the police cooperation context. If we detach legitimacy from the notion that people have to accept the state and twist it to the notion that police as a state agent need to accept the other police, we can rid the legitimacy concept of its human rights component and replace this with common (good *or* bad) values and goals. This brings to the fore the quintessential dilemma of policing.

What can be asserted is that legitimacy (applying the human rights definition) does influence trust. The common human rights frameworks in the EU have impacted on how police can cooperate and this could similarly be observed in the Australian context. Where a common norm/value basis is present, cooperation mechanisms are more likely to exist. This was also confirmed in the Chinese case study as similar systems were more likely to

⁶¹ Fichera, above n 11.

cooperate through a formalised legal basis. If fundamental rights were not an inherent part of legitimacy in the police cooperation context, these observations could not have been made. However, it must be concluded that similarities of legitimacy levels are just as important in the establishment of trust and cooperation as human rights.

Finally, the stages of trust within an entity comprised of different systems could be categorised as:

1. Bilateral and multilateral treaties and agreements based on situational trust (common goals, personal contacts, common norms, but not necessarily all three need to be present to create regulation) when systems show major differences in legitimacy levels.
2. Supranational frameworks as well as multilateral frameworks between all systems within an entity based on trust both between the systems and towards the supranational level (multilateral frameworks being more influenced by common goals and personal contacts, while supranational frameworks are initiated by common goals and related values/norms) when systems show differences at the criminal justice level, but not at the human rights level.
3. Superior agencies established to represent the group of systems based on both the trust between the systems, but also the superior (federal) level (trust between systems based on common goals and personal contacts, trust towards the superior level based on the common norms/values) when systems are similar both at the criminal justice as well as at the human rights level.