# The interplay between EU and domestic counter-terrorism laws

## Introduction

Ireland's domestic counter-terrorism laws were largely fashioned to meet the threat to the State from organizations which did not recognize the legitimacy of the institutions of the State. Indeed for the most part those organizations regarded themselves as the legitimate heir to the Republic proclaimed in the General Post Office in Dublin in 1916 and subsequently established by the First Dáil[1], and sought to continue an armed struggle against what they saw as British occupation of the six north-eastern counties which constituted Northern Ireland. In doing so they posed a threat not only to the institutions of Northern Ireland but to the ability of the Republic to govern itself and conduct its own foreign policy.

More recently Ireland has also had to adopt to laws directed against international terrorism. Beginning in the 1970s with laws intended to deal with aircraft hijacking the international instruments designed to combat terrorism have multiplied especially since the events of 11 September 2001. These laws have been adopted alongside the existing anti-terrorist laws.

While Ireland has adopted the substantive laws needed to provide a body of appropriate offences which cover the range of terrorist activities, there is a

[1] The First Dáil Éireann in 1919 consisted of a majority of the members of the United Kingdom parliament elected for Irish constituencies on a programme of support for Irish independence who declined to sit in the parliament in London but instead constituted themselves the Irish parliament (Dáil Éireann) in Dublin.

pressing need to ensure that laws are in place to enable the degree of international cooperation which will be required to combat international terrorism in a world where, as stated by EUROPOL[2] "virtually all terrorist activities are transnational". In such a world no one country can on its own take the necessary measures to counter terrorism but rather international legal cooperation is required if we are to succeed inour objectives.

**Domestic Counter-Terrorism Laws**

Ireland has a long history of counter-terrorism laws enacted to deal with home-grown terrorism. Special anti-terrorist laws were already familiar when the Constitution of Ireland was adopted in 1937 and two provisions of that Constitution are of particular relevance to anti-terrorism laws. The Constitution authorizes the use of special courts "for the trial of offences where it may be determined in accordance with … law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order" (Article 38.3.1°). Article 28.3.3° gives sanction to the enactment of emergency legislation by providing that

"Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this sub-section "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict a national emergency exists affecting the vital interests of the State and "time of war or armed rebellion" includes such time after the termination of any war, or of any such

[2] TE-SAT 2007 – EU Terrorism Situation and Trend Report 2007, at p. 7.

armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist."[3]

The laws and measures introduced in Ireland to combat terrorism may be divided into four broad categories (a) laws which permit internment without trial (b) laws relating to the use of special courts (c) laws enacted pursuant to the emergency powers in Article 38 of the Constitution and (d) laws which are part of the permanent body of criminal statute-law directed against terrorism. In this paper it is intended only to refer in very general terms to these measures.

**Internment without Trial**

Internment without trial was operated between 1940 and 1945[4] and again between 1957 and 1962. The power to intern without trial may be exercised pursuant to Part II of the Offences Against the State (Amendment) Act, 1940, when those provisions are in force pursuant to a Government proclamation to the effect that internment powers "are necessary to secure the preservation of

[3] The original text of Article 28.3.3° of the 1937 Constitution read as follows:-

> "Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in pursuance of any such law."

The First Amendment of the Constitution Act, 1939, added the words that now appear in the second sentence down to and including the words "the vital interests of the State".

The Second Amendment of the Constitution Act, 1941, added the remaining words of the current text.

[4] Seosamh Ó Longaigh, *Emergency Law in Independent Ireland 1922-48,* Four Courts Press, 2006.

public peace and order". Internment was not used during the more recent period of conflict in Northern Ireland, almost certainly as a result of the experience with internment in Northern Ireland after 1972. The provisions permitting internment without trial, while still on the statute book, are not currently in force since no proclamation under the Act is currently in being.

**Special Courts**

Special Criminal Courts are provided for by Part V of the Offences Against the State Act, 1939. The key feature of the Special Criminal Court is that it is a three person court which sits without a jury, and is therefore of value in relation to offences in which jury intimidation or any unwillingness of jurors to do their duty may be apprehended.

In order for Special Criminal Courts to be established the Government must first issue a proclamation declaring that it is satisfied that the ordinary courts are inadequate (in the terms set out in Article 38.3.1° of the Constitution) and bringing Part V of the 1939 Act into force. Special Criminal Courts can then be established.[6]

Special Criminal Courts have been established on three occasions: between 1939 and 1946, between 1961 and 1962, and from 1972 to date.

[6] Offences Against the State Act, 1939, section 38.

Under the legislation Special Criminal Courts are to consist of an uneven number of members, not less than three, who are judges, barristers or solicitors of seven years standing, or officers of the Defence Forces not below the rank of commandant.[7]

Special Criminal Courts have power to try such offences as are scheduled by the Government under section 36 of the 1939 Act. At present the scheduled offences are offences under the Offences Against the State Acts themselves, the Firearms Acts and the Explosive Substances Acts. Scheduled offences are tried in the Special Criminal Court unless the Director of Public Prosecutions otherwise directs[8], and non-scheduled offences can be tried there on foot of a certificate from the Director as to the inadequacy of the courts to try the person charged on the question.[9]

In the two earlier periods army officers sat on the Court. Since 1972 the Court has been staffed only by serving or former judges; the latter are eligible by virtue of being barristers or solicitors. However, the power to appoint army officers to the Court remains on the statute book.

The laws of evidence which apply in Special Criminal Courts are in principle the same as those which apply in the ordinary courts.[10] Unlike in a jury trial the court gives a reasoned decision for its finding of fact. The Court's function

[7] Ibid, section 39.
[8] Ibid, section 45.
[9] Ibid, section 46.
[10] In principle, because in practice charges of membership of an unlawful organization, on which opinion evidence of a Garda Chief Superintendent is admissible, are invariably dealt with in the Special Criminal Court.

is to deal with cases where the inadequacy of the ordinary courts is determined on foot of a Government proclamation combined with the Government's decision to schedule offences, or the Director's certificate where the offences tried are not scheduled. It is not essential that cases tried be terrorist cases once the ordinary courts' inadequacy is determined in this manner.[11] During the 1939-49 period black-market profiteering cases were dealt with in the Special Criminal Court as well as cases involving the IRA. Since 1972 most of the cases have related to terrorism but a number of high-profile organized crime cases have also been heard there, particularly in the late 1990s.[12]

The existence of the Special Criminal Court does not depend on a state of emergency under Article 28.3.3° of the Constitution but rather on the Government proclamation already referred to.

**Emergency Measures**

A state of emergency pursuant to Article 28.3.3° was declared on 2 September 1939. This state of emergency was not rescinded at the end of the Second World War[13] but continued until 1976 when it was rescinded and replaced with a fresh state of emergency arising from the Northern Ireland

[11] *The People (Director of Public Prosecutions) v Quilligan* (No. 1) [1986] IR 495; *The People (Director of Public Prosecutions) v Quilligan* (No. 3) [1993] 2 IR 305.
[12] For example the cases of *People (Director of Public Prosecutions) v Gilligan,* Special Criminal Court, unreported, 15 March 2001and *People (Director of Public Prosecutions) v Ward,* unreported*,* Special Criminal Court, 27 November 1998.
[13] Or "The Emergency" as it was called in Ireland.

conflict. This second state of emergency was rescinded in February 1995 following the IRA ceasefire.[14]

A number of emergency measures were introduced during these states of emergency which were expressed to be for the purposes referred to in Article 28.3.3° of the Constitution.

In 1976 the existence of a state of emergency was used to justify the introduction of the Emergency Powers Act, 1976, the principal feature of which was to permit detention in Garda custody for seven days. [15] These powers lapsed in 1977 and were not renewed.

There is no state of emergency in being at present and consequently no emergency powers dependent on the existence of such a state. The Emergency Powers Act, 1976, expired on the rescinding of the 1976 state of emergency in 1995.

**Ordinary Legislation**

The principal provisions dealing with offences which might, broadly speaking, be described as terrorist are to be found in the Offences Against the State Acts, 1939 -1998. Apart from the internment provisions in Part II of the 1940 Act and the provisions relating to Special Criminal Courts, which depend on

[14] See Report of the Committee to Review the Offences Against the State Acts, 1939-1998 (Dublin, May 2002) Chapter V.
[15] By virtue of section 3 of the Act itself.

the relevant Government proclamations being in place, the remaining provisions of the Offences Against the State Acts are part of the ordinary criminal law of the State.

The Acts do not attempt to refer to terrorism, much less define it. Instead the principal focus of the Acts is to establish the concept of an unlawful organization. By section 18, a wide variety of activities *ipso facto* render an organization unlawful. These range from engagement in, promotion or encouragement of treason, advocating or attempting the violent alteration of the Constitution, the raising of an unlawful military or armed force, to the advocacy or engagement in the commission of any criminal offence[17], the encouragement of *any* object (even lawful objects) by violent, criminal or unlawful means, or the encouragement or advocacy of the non-payment of taxes.

The Government may by order declare an organization to be unlawful by means of a suppression order.[18] Such an order may in effect be appealed to the High Court by any person claiming to be a member of the suppressed organization within 30 days seeking a "declaration of legality". [19] A suppression order is, however, proof for all purposes, other than an application for a declaration of legality, that an organization is an unlawful organization. Over the years a wide variety of subversive organizations on

[17] Thus organized criminal gangs are unlawful organizations within the meaning of section 18 of the Offences Against the State Act, 1939.
[18] Offences Against the State Act, 1939, section 19.
[19] *Ibid*, section 20.

both sides of the Northern Ireland conflict have been the subject of suppression orders.

Membership of an unlawful organization is a criminal offence carrying a maximum penalty of seven years.[20]

A key provision permits the opinion of a Garda officer not below the rank of Chief Superintendent to be treated as evidence that a person is a member of an unlawful organization.[21] It is for the trial court to decide on the weight to be attached to such opinion evidence. Prior to 1976, when the maximum penalty for the offence was raised from two to seven years, it was the practice of the Provisional IRA to refuse to recognize the courts, and during this period many persons were convicted of IRA membership on such evidence alone. Following the increase in penalty the IRA changed its practice and the section ceased to be as effective a method of securing convictions.

Under section 30 of the Offences Against the State Act, 1939, a person suspected of committing an offence which is scheduled under Part V of the Act may be detained for up to 48 hours, together with a further period of 24 hours where authorized by a judge.[22]

Under the Offences Against the State (Amendment) Act, 1998, enacted following the Omagh bombing, directing the activities of an unlawful

[20] *Ibid*, section 21, amended by section 2(6) of the Criminal Law Act, 1976.
[21] Offences Against the State (Amendment) Act, 1972, section 3(2).
[22] Offences Against the State (Amendment ) Act, 1998, section 10.

organization is made an offence,[23] as are the unlawful collection of information[24] and the withholding of information concerning certain serious offences.[25] That Act also provided for certain inferences to be drawn from failure to answer questions (including failure to account for movements, or failure to mention facts relied on by the accused in his defence.[26]

The Acts contain numerous other provisions, notably a requirement on detained persons to give an account of their movements.[27] However, this provision has been found to be incompatible with Article 6 of the ECHR[28]**.** Other provisions range from obstruction of government, unlawful drilling[29], and administering unlawful oaths.[30]

It may be noted that these Acts are targeted against domestic terrorism. The emphasis is on usurping the functions of the Government of Ireland and of the State institutions or overthrowing the Irish constitutional order, but the Acts (before the enactment of the Criminal Justice (Terrorist Offences) Act 2005) had nothing to say about organizations which direct their activities against Governments abroad. Nor is there any emphasis on activities intended to intimidate or coerce a population as distinct from Governments and institutions. Indeed during much of the period of the recent Northern Ireland troubles the Provisional IRA, whose activities were clearly intended to

[23] *Ibid*, section 6.
[24] *Ibid*, section 8.
[25] *Ibid*, section 9.
[26] *Ibid*, sections 2 and 5.
[27] Offences Against the State Act 1939 , section 52.
[28] *Heaney and McGuinness v. Ireland* (2001) 33 E.H.R.R. 264; Quinn v. Ireland (2001) 33 E.H.R.R. 264.
[29] Offences Against the State Act 1939, section 15.
[30] *Ibid*, section 17.

intimidate and coerce the unionist population in Northern Ireland, were able to rely on the proposition that their offences were political in nature in order to avail of the political offence exception and thereby escape extradition to Northern Ireland or to Britain.

**Responses to International Terrorism**

Irish law took account of terrorism outside the State only to the extent that it was required to do so by virtue of international treaties and conventions. For example, the Montreal Convention was agreed in response to the problem of aircraft hijacking, and was given effect in Irish law by the Air Navigation and Transport Act, 1975. In fact, the problem of aircraft hijacking never impacted to any significant extent on Ireland. Even the one incident where an Aer Lingus aircraft was hijacked in 1981 had a non-political motive when the hijacker's demand turned out to be that the Pope should reveal the third secret of Fatima.

While it is beyond the scope of this paper to deal with the question of extradition, the increasing tendency of terrorism to operate across frontiers led in 1977 to the European Convention on the Suppression of Terrorism, under which terrorist offences were no longer to be regarded as coming within the political offence exception to extradition. Ireland made the Convention part of its domestic law in the Extradition (European Convention on the Suppression of Terrorism) Act, 1987, thus ending the political offender status for those engaged in the civil conflict in Northern Ireland.

**9/11**

Then everything changed on 11 September 2001. Or did it? Commentators have argued that the events of 9/11 were not unique. Doris Lessing has recently pointed out that more people were killed in the Northern Ireland conflict than in the twin towers attack. One might even argue that the numbers killed in the Dublin and Monaghan bombings of 1974 or the Omagh bombing of 1998 constituted a greater proportion of the Irish or Northern Irish population than the proportion of the American population who died in the World Trade Centre. Such arguments, however, miss the point that, whatever the scale of the atrocity in relative terms, it was probably the largest single terrorist atrocity carried out in modern times if one leaves out of account the many atrocities which have been carried out by governments and armies. The attack, by using two of the greatest symbols of modern life, the jet aircraft and the skyscraper, as weapons to kill and maim vast numbers of people, symbolized its nature as a blow against modern society. Who can ascend to the top of a very tall building or travel on an aircraft without being reminded of 9/11? Furthermore, the manner in which the terrorists showed total ruthlessness towards others as well as total disregard for their own lives, for motives which, insofar as one can comprehend them, appear to seek to restore an age of theocracy, to deny religious freedom and reject liberal values, all mark this attack out as a milestone. It would be simplistic to say that all the event showed was that America had joined the rest of the world in its vulnerability to terrorism. In truth, the scale and enormity of the event was

unparalleled both in its intent and in its effect, against a target which represented not just America but the civilized world as a whole.

The response of the international legal community was swift. Within a very short period both the United Nations and the European Union effected a number of practical measures.[31] Instruments which were long in gestation and might still be under discussion had 9/11 not happened were passed in what some at the time criticized as indecent haste. In Europe, the Framework Decision on the European Arrest Warrant was agreed in June 2002.[32]

**The EU response: the Framework Decision on Combating Terrorism**

The Framework Decision on Combating Terrorism defines terrorist offences in Article 1. In order to amount to a terrorist offence an act has to be intentional. Its purpose has to be that of seriously intimidating a population or unduly compelling a government or international organisation to perform or abstain from performing any act or seriously destabilising the fundamental political,

[31] These included: the adoption of Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA); theimplementation of UN Security Council Resolution 1373 targeting through EU external funding priority third countries where counter-terrorist capacity or commitment to combating terrorism needed to be enhanced; enhanced bilateral cooperation with the US and Canada; the signature by Europol of a Strategic Cooperation Agreement with the United States on 4 December 2001 and a further specific agreement on 20 December 2002 allowing for the transfer of personal data; the introduction of anti-terrorism clauses in agreements with third countries; an international policy on weapons of mass destruction; a centralised system of information exchange; enhanced cooperation between Member States on a common list of international terrorist organisations; the exchange of information on visas; agreement on a common definition of terrorist offences; the creation of Eurojust; the creation of an anti-terrorist unit in Europol improving the Schengen Information System (SIS); agreement and legislation on the European Arrest Warrant (formally adopted on 27 December 2001).

[32] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. *Official Journal L 190 , 18/07/2002 P. 0001 - 0020.*

constitutional, economic or social structures of a country or an international organisation. The acts which amount to terrorism where these conditions are met are attacks upon a person's life which may cause death; attacks on the physical integrity of a person; kidnapping or hostage taking; causing extensive destruction to public facilities, systems or infrastructure, or to other property where it is likely that human life will be endangered or major economic loss caused; seizure of aircraft, ships or other means of transport, manufacture, possession, acquisition, transport, supply or use of weapons, or explosives or research into or development of biological and chemical weapons, the release of dangerous substances, causing fires, floods or explosions the effect of which is to endanger human life; interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life, or threats to carry out any of these acts. Member States were required to take the necessary steps to criminalize these acts.

In addition the Framework Decision required Member States to create the offences of directing terrorist groups or participating in the activities of terrorist groups, defined as structured groups of more than two persons established over a period of time and acting in concert to commit terrorist offences.

Member States were also required to criminalize terrorist linked offences, which included aggravated theft, extortion and drawing up of false administrative documents with a view to committing the terrorist offences already referred to. Aiding, abetting and inciting offences were also to be criminalized.

**The Irish implementing legislation**

This legislation was given effect in Ireland by the Criminal Justice (Terrorist Offences) Act 2005. Section 6 of the Act creates a new offence of engaging in terrorist activity or terrorist linked activity or attempting or threatening to do so in the terms set out in the Framework decision. Section 6 applies to acts committed within the State, and to acts committed outside the state if committed on board an Irish ship or aircraft of by a citizen or resident of Ireland, or committed for the benefit of a legal person established in Ireland, or directed against the State, an Irish citizen or an institution of the European Union based in the State. Furthermore, by virtue of section 43 of the Act where offences are committed outside the State in other circumstances and a request for extradition or a European Arrest Warrant is received and refused there is jurisdiction to try the case in Ireland.

As already remarked, the existing body of Irish domestic terrorist legislation was drafted largely with domestic terrorism in mind, and this new offence effectively stands alone and separate from the earlier body of legislation. However, section 5 of the 2005 Act does provide a link to the existing body of Irish law by providing that terrorist groups that promote, encourage or advocate the commission of terrorist activities are unlawful organizations within the meaning of the Offences Against the State Acts, 1939 -1998.

There are a number of exceptions to the offence created by section 6(1). Subsection (4) creates exceptions in respect of the activities of armed forces during an armed conflict insofar as those activities are governed by international humanitarian law, and in respect of other activities of the armed forces of a state in the exercise of their official duties insofar as those activities are governed by other rules of international law. Subsection (5) creates an exception permitting protest, advocacy, dissent, strikes, lock-outs or other industrial action. Where an offence is directed against the government of a state other than a member state of the European Union with the intention of unduly compelling it to perform or abstain from performing an act the offence cannot be proceeded with without the consent of the Attorney General. However, it may be noted that this provision does not apply to acts committed with the intention of seriously intimidating a population of persons outside the State or the Member States of the European Union.

The Criminal Justice (Terrorist Offences) Act 2005 also took the opportunity to give effect to a number of other conventions to which Ireland is a party and which create offences in or relevant to the area of terrorism. These include the International Convention against the taking of Hostages, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of the Financing of Terrorism.[33]

[33] http://untreaty.un.org/English/Terrorism/Conv12.pdf, cited as the International Convention for the Suppression of the Financing of Terrorism (document A/C.6/54/L.16), adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.

**International Criminal Procedural Law**

The effect of all this legislative activity is that there now exists a substantial body of substantive law which makes criminal almost every conceivable form of terrorist activity. This has the result that if a terrorist offence is conceived, planned and carried out entirely within Ireland we have ample legal means to deal with the matter.

The real problem, however, is that, as reported by EUROPOL, "virtually all terrorist activities are transnational"[34]. It is not at all unlikely that a terrorist activity might be planned in one jurisdiction, financed perhaps from funds obtained in a second jurisdiction, carried out by persons who come from a third or fourth jurisdiction, and executed in a fifth by perpetrators who are later found in a sixth. In these circumstances a high degree of international cooperation both in the investigation of the crime and in the subsequent prosecutions will be required if the prosecution is to succeed. Do we have the instruments of international cooperation to enable this to be done?

It is not without significance that the Framework Decision on the European Arrest Warrant, which had been under discussion for a considerable period of time before the Twin Tower attacks, was ready for presentation by the European Council 8 days later.[35] Despite the fact that in Irish legal circles

[34] TE-SAT 2007 – EU Terrorism Situation and Trend Report 2007, at p. 7.
[35] Hans Nilsson, "Judicial Cooperation in Europe against Terrorism," in *The European Union and Terrorism,* John Harper Publishing, 2007, at p 82. Nilsson says: "… the Commission

there was considerable scepticism about and indeed opposition to the European Arrest Warrant, in my opinion it has so far been highly successful. My Office is aware of a number of cases in which a person has been extradited to Ireland within two weeks of an EAW being issued. Ireland issued 40 European Arrest Warrants in 2006, while the Attorney General, who deals with incoming requests from abroad, dealt with 118 European Arrest Warrants issued to Ireland in the same year. Its success to date illustrates that cooperation in criminal matters is workable and possible if we focus on our similarities instead of our differences and look to what is possible instead of dwelling on obstacles. It is unfortunate that it took terrorism to shock and shake us into action. Terrorism had illustrated significant gaps in European criminal procedural cooperation which were obvious long before suicide bombers set their sights on the Twin Towers and the London and Madrid transport systems. While significant European and domestic measures are necessary they are likely to be ineffective if the foundation of criminal procedural cooperation remains unlaid. The European Arrest Warrant is a key block in this foundation but other necessary blocks have yet to be laid.

As a general observation the greatest barrier to criminal cooperation is the conviction that one's own system is the best possible, together with a lack of trust in the systems operated in other jurisdictions. Very often this conviction and lack of trust are coupled with a significant degree of ignorance as to what is in fact the system in the other jurisdiction. Christine Van Den Wyngaert has

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would deposit its proposals on 19 September, only 8 days after 9/11… the European Council of 21 of September decided that this Framework Decision and the Framework Decision on fighting terrorism, should be approved by the meeting of the Justice and Home Affairs Council on 6 December."

commented that criminal procedure has been the one area in the European Community which has remained "almost completely immune to thegeneral pattern of integration that has affected most other legal disciplines" and that while "the problems states face nowadays are largely identical" "the (real or perceived) gulf" between civil law countries and common law countries "may be greatest in criminal procedure".[36]

Let me give a hypothetical example of the sort of problem which can arise. The example is a simple one which could arise between the systems of Ireland and England, which are very similar. Even between similar systems problems can arise. A British citizen resident in Dublin commits a murder and subsequently flees to England. Because he is a British citizen, not only does the Irish court have jurisdiction to deal with the crime, but so does an English court. Ireland is unable to seek the return of the suspect because there is insufficient evidence at that stage against him. The case is one of suspicion, albeit very strong suspicion, but not sufficient to issue an arrest warrant. There is no such thing as extradition of suspects and effectively an arrest warrant cannot be issued until the case is ready to proceed. If the suspect's return is requested and if he is returned, it will be necessary to charge him straight away and there will be no possibility of prior questioning by the police.

At this stage the English police decide to arrest the suspect on suspicion of committing the murder which is an offence under English law as well as Irish. The two prosecution authorities then have to consider where the ultimate trial is likely to take place if in fact sufficient evidence is forthcoming. If the

[36] *Criminal Procedure in the European Union,* Butterworths, 1993, foreword.

suspect is cautioned according to the English form of caution, he will be told not that he is not obliged to answer any questions, but that certain questions must be answered otherwise adverse inferences can be drawn. If the suspect is cautioned in this form, which differs from the Irish caution, and is subsequently returned to Ireland on foot of an arrest warrant, any statement he makes may be inadmissible. Assuming it is possible for the English authorities to waive their rights to rely on the possibility of drawing inferences and instead to caution the suspect in terms which are similar to the Irish caution, that is to say, that he is not obliged to answer any questions, should this be done? If it is and the suspect is subsequently returned to Ireland, is it possible that a court, either in England or in Ireland, will draw the inference that the English authorities never seriously intended to charge him in England but that the intention all along was that he would be returned to Ireland, as evidenced by the way in which the caution was administered? In such a situation, is it possible to argue that his arrest in England was not made in good faith but was a colourable device to make him available for return to Ireland to face charges? All these matters have to be considered before the suspect is even arrested or cautioned.

The fact that such difficulties can arise as between two jurisdictions where the differences between the substantive and procedural criminal law are relatively small indicate how difficult matters can be where more than two jurisdictions are involved and where the differences between the systems are more substantial.

In my view the key obstacle to successful international investigations is likely to be that of gathering evidence which will be admissible in the place of trial. If an investigator does not know at the time of gathering the evidence what jurisdiction the final trial is likely to take place the ability to conduct an effective investigation is compromised and may be ineffective. The obvious and necessary solution is to ensure that where evidence is taken in accordance with the formalities of the place where it is taken, it is admissible in other states provided that the rights of the suspect under the European Convention on Human Rights are respected and provided that the nature of the evidence is itself not fundamentally incompatible with the legal system in which it is sought to be used. To give an example, if a statement is taken in a place which permits detention for two days rather than one then it should be admissible in the jurisdiction of trial unless that period is deemed to be in excess of what would be allowed under the European Convention. However, if the nature of the evidence is such that it would not be admissible at all, for example because it is hearsay and hearsay evidence is not admissible in the jurisdiction of trial, then the fact that no such rule exists in the other jurisdiction would not make the evidence admissible at the trial. At the moment it is entirely unclear in what circumstances evidence gathered in one jurisdiction may be admissible in another where different rules apply in the two jurisdictions.

The proposed draft European Evidence Framework Decision is, I believe, a very important proposal and one which starts a process which urgently needs to be completed. However, I understand that negotiations on this Framework

Decision have been taking place for quite sometime and do not appear to be going anywhere very fast. Notwithstanding the decision of the Irish Government to opt out of EU activity in the field of justice and home affairs it is important that we should opt in concerning decisions which will make evidence more freely transferable between the different Member States of the Union. It would be unfortunate if ever a vital prosecution was precluded from proceeding by reason of failure to adopt appropriate measures of cooperation.

**Common Law and Civil Law – An Unbridgeable Divide?**

While I accept that the existence of different systems gives rise to practical difficulties I fundamentally disagree with the idea that judicial cooperation within the European Union is made impossible by the divide between civil and common law systems. It is of course true that we have a common law system, together with England and Wales, Northern Ireland and Cyprus. Malta and Scotland have systems which are somewhere between civil and common law. The other 23 member states have systems which are broadly categorized as civil law systems.

Some common lawyers seem to see a constant struggle by civil law countries to impose their values on an unwilling common law world. I have to say that I believe this way of looking at things is completely unreal. In the first place there is a great variety both of substantive and procedural law between the systems within the broad civil law tradition. Anyone who has regular contact with lawyers from other jurisdictions quickly learns that there are major

differences between one state and another. The division between common and civil law is not the only significant division between criminal legal systems. For example, Ireland, along with many other countries, including civil law countries operates what is called the "opportunity" principle, under which prosecution is discretionary. Other countries operate what is called the "legality" principle under which once a criminal offence is reported and investigated a prosecution must take place and the prosecutor is left with no discretion. In some states prosecution is a judicial function while in others it is executive. Another distinction which can be troublesome is between countries which allow the possibility of a criminal prosecution against a company or corporation, and those countries which cannot admit of such a possibility. These other divides do not correspond to the division between civil and common law.

Furthermore, there has been a great deal of cross-fertilization between different systems with civil law systems borrowing from the common law world and common law systems borrowing from the civil law world. For example, the common law originally had no concept of a public prosecutor. Prosecution was essentially in the hands of private individuals. We, along with the rest of the common law world long ago borrowed the system of a public prosecutor from the civil law world. Common law used to be judge-made law and civil law used to consist of written codes but nowadays most of our criminal law is enshrined in statutory form. And, to take an example moving in the opposite direction, a number of civil law countries have borrowed the idea of the jury from the common law world and there is a tendency more and more in

countries within the civil law system to adopt adversarial rather than purely inquisitorial practices.

The real point is that the differences between our systems – and I am not suggesting those differences are not real – are reasons why we need greater cooperation not less, and it is simplistic to analyse these differences solely as differences between the civil and common law world.

The decision of the Government to review its opt-out from the area of justice and home affairs after three years is an important one. In my view this must be done in a thorough manner. The first object of such a review should be to identify which features of our existing criminal law system we regard as non-negotiable and in need of protection. The second should be to identify what if any threats there are to such features. Thirdly, where European Union instruments are proposed which would require us to modify or abandon our system, we need to ask ourselves seriously whether they way we do things is in fact the best way of doing things or whether there might not be advantages in change. It is not sufficient for us simply to say that something is incompatible with the way we do things and leave it at that. In practice changes such as the introduction of the European Arrest Warrant have done nothing other than to improve the delivery of justice across the European Union. I do not believe that we should assume that every last element of common law should be defended at all costs but instead we should proceed on a case by case examination of what changes are actually proposed.

**Conclusion**

In a particularly prescient address in 2003 Paul O'Mahony identified the Irish approach to European criminal cooperation as being 'minimalist', and stated that it was likely that

> "stubborn attachment to sovereignty in criminal justice matters will perpetuate much of the current diversity between the 25 EU criminal justice systems and thereby raise cripplingly obstructive barriers to initiatives such as the European Arrest Warrant and the European Prosecutor and to inter-operability more generally. The minimalist approach will almost certainly diminish the chances of forging a shared vision about how to design and implement effective human rights safeguards in the novel criminal justice environment that will inevitably confront both minimalists and maximalists. In other words, a stance, ostensibly adopted to defend traditional safeguards and trusted conventions, may actually lead to a chaotic situation in which vital human rights issues are not fully addressed at the EU level with negative consequences for the actual human rights climate in the various Member States."

The Lisbon Treaty lays a solid foundation for mutual recognition to be enshrined as a cornerstone of the European Union, replacing the looser concepts of cooperation and approximation so as to avoid any doubts about the legitimacy of EU action in this sphere. While Ireland has a comparatively

long political and legal history of dealing with home-grown terrorism, the international dimension of the new terrorism as characterised by Al Qaida, requires more than ever an interplay between domestic and European measures, and mutual assistance and mutual recognition is the key to an effective interplay between the Member States. These are the keys, in practical terms, to successful prosecution of cross-border terrorism. It is vital that Ireland plays an active role in the years to come in bringing this about.