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Introduction

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Our legal system is here to protect our citizens, and that protection should be given up only if we can really trust *the legal systems of other states.*[1]

ALL FORMS OF human cooperation and collaboration require mutual trust. It is integral to maintaining stable relationships and is fundamental to ensuring effective cooperation between individuals and groups, large or small. Sociologists have long attempted to define and conceptualise trust, along with economists, philosophers and latterly, lawyers. O'Neill explains that trust is 'a matter of judgement and action, in conditions of less than perfect information'.[2] Bauer meanwhile conceives of trust as 'The subjective judgement that a trustor makes about the likelihood of the trustee following through with an expected and valued action under conditions of uncertainty'.[3] Trust is widely considered formed on the micro level and concerns expectations and predictions of future behaviour, hence individuals rely on trust in order to take a 'leap of faith' about present and future performance of roles. Legitimacy meanwhile is a property possessed by an institution, when others believe that the institution holds and exercises power rightfully.[4]

Both trust and institutional legitimacy are closely intertwined and equally essential within the process of building cooperative relationships within criminal justice systems. Public trust in the state is vital to ensure compliance and maintain law and order through governance by consent, rather

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[1] David Cameron MP, HC Deb 25 March 2003, vol 402, col 196, emphasis added by the authors.

[2] O O'Neill, *Autonomy and Trust in Bioethics* (Cambridge, Cambridge University Press, 2001).

[3] PC Bauer, 'Conceptualizing and Measuring Trust and Trustworthiness' (2015) Political Concepts: Committee on Concepts and Methods Working Paper Series 61, 1.

[4] J Jackson and J Gau, 'Carving up Concepts? Differentiating Between Trust and Legitimacy in Public Attitudes Towards Legal Authority' in E Shockley, TMS Neal, L Pytlik Zillig and B Bornstein (eds), *Interdisciplinary Perspectives on Trust: Towards Theoretical and Methodological Integration* (New York, Springer, 2015).

than by force. Accordingly, the study of trust has focused on public trust in authority both at the individual and institutional level. So while we have witnessed in the last two decades 'a surge in research devoted to the role of legitimacy in governance',[5] the focus has been on the legitimacy of institutions and the trust that they elicit from citizens. For example, a recently launched (European Union) EU Barometer on Justice asks citizens of Members States how well informed they feel about their national justice system, and the level of trust they have in it.[6] Yet, there has been barely any equivalent consideration of trust between those wielding and exerting authority— such as police officers and policing and judicial agencies. This is despite the fact that police and judicial cooperation is not novel and EU Member States started to evolve cooperation strategies after the 1950s, culminating in the 1985 Schengen Agreement.

Today, the 1990 Schengen Convention can be regarded as the most comprehensive regional cooperation framework. Since Schengen, many more 'soft' and 'hard' law instruments have been created in the EU context with a view to supporting police and justice cooperation. The 'Principle of Availability' under the Hague Programme advocated the automatic sharing of law enforcement data between agencies across the EU by 2008. Such access relies on enhanced mutual trust between competent authorities. Further, the 2009 Stockholm Programme promised 'An Open and Secure Europe Serving and Protecting Citizens', with the EU Council stressing that mutual trust was the basis for 'efficient cooperation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future'.[7] The establishment of trust is thus recognised as necessary between operational law enforcement agents to enable cooperation, coupled with the legitimacy of institutions. For example, with policing bodies, 'true legitimacy also encapsulates the conviction that police can be trusted to use [that] authority judiciously and for the greater good'.[8] Consequently, criminal justice cooperation, such as that required within the EU judicial area and the EU Area of Freedom, Security and Justice promulgated by the 2009 Treaty of Lisbon, cannot be accomplished without trust.

It is undeniable that the policing of cross-border crime demands collaboration between law enforcement authorities from multiple jurisdictions, and an efficient system of information exchange. However, while efforts to ensure effective cooperation are laudable, and may increase the safety of

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[5] ibid, 49.
[6] Flash Eurobarometer 385, *Justice in the EU Report*, November 2013, available at europa. eu/public_opinion/flash/fl_385_en.pdf.
[7] EU Council, The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 1.2.1.
[8] Jackson and Gau, above n 4, 51.

citizens, human rights protection can be put at risk. Commentators since 9/11 have warned of the serious threat to civil liberties by an overbearing concern with securitisation policies. In addition, there has been 'a move towards de-territorialisation and securitisation beyond borders … On top of this, the discourse of insecurity seems to have proliferated and security actions that used to be considered as exceptions to the rule are now more widely used'.[9]

This move from exception to rule in the area of security has been criticised for creating a slippery slope into justifications of human rights abuses.

Internationally, police cooperation relies predominantly on the creation of 'trusted' relations and practitioner networks, such as formalised 'liaison' networks, but more frequently informal police-to-police contacts. However, increasingly there are mandated exchanges of information and obligations upon law enforcement bodies to collaborate and coordinate with bodies from beyond their operational borders. Furthermore, cross-jurisdictional police and justice cooperation has become a central part of many criminal investigations in particular in the areas of organised crime and terrorism. With such collaboration it is recognised that 'Mutual trust and mutual recognition are an essential condition for the exchange of law enforcement information'.[10] To outbalance potential negative effects upon civil liberties, the increase in international cooperation needs to be coupled with an increase in domestic accountability, judicial control and efficient decision-making processes.[11] However, despite the efforts of legal regulation in the EU context, both European and international policing networks are frequently established outside governance and accountability frameworks. While some EU and international 'soft' data protection measures are in place, there is yet to be any systematic consideration of the multifaceted issues raised by direct access and/or exchanges of intelligence. As stated with specific regard to the EU:

> So far, there has been a lack of European peer review/evaluation mechanisms as regards for example the quality of justice … These elements, however, have huge repercussions concerning some of the essential AFSJ ingredients, such as the functioning of European cooperation on criminal justice as well as to the quality of the exchange of information between law enforcement authorities.[12]

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[9] European Commission, *Crime and Deviance in the EU—Key Findings from EU Funded Social Sciences and Humanities Research Projects* (Luxembourg, Publications Office of the EU, 2011) 11.

[10] N Scandamis, F Sigalas and S Sofoklis, 'Rival Freedoms in Terms of Security: The Case of Data Protection and the Critierion of Connexity' CHALLENGE Research Paper No 7/2007, 11.

[11] E Guild and F Geyer, 'Justice and Home Affairs Issues at European Union Level' (2006) November *CEPS—Written Evidence to the Select Committee on Home Affairs*, available at www.ceps.eu/system/files/book/1404.pdf, 6.

[12] E Guild, S Carrera and AF Atger, 'Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme' CEPS Working Document No 313/2009, 9.

In light of such laxity, in 2013 the EU introduced 'Judicial Scorecards' to attempt some preliminary monitoring of the preconditions for trust, such as creating a committee to oversee the application of the Schengen *Acquis*. There are encouraging signs too, that the neglect of inter-institutional and interpersonal trust among law enforcement agents and judicial personnel is moving up the political agenda. In 2013 the EU Justice Commissioner stated that the 'whole EU legal system … is based on mutual trust'.[13] The 2014 'EU Justice Agenda for 2020—Strengthening Trust, Mobility and Growth within the Union', posited 'enhancing mutual trust' as the most urgent goal of the EU:

> Mutual trust is the bedrock upon which EU justice policy should be built. While the EU has laid important foundations for the promotion of mutual trust, it needs to be further strengthened to ensure that citizens, legal practitioners and judges fully trust judicial decisions irrespective of the Member State where they have been taken.[14]

The EU Commission aims to bring about a 'fully functioning European area of justice' via a combination of consolidating what has already been achieved, codifying EU law and practice, and complementing existing frameworks.[15] There remain major challenges ahead however, even with this acknowledgment that mutual trust must be strengthened: 'with only 24% of people trusting their own national justice system for example in Slovenia, or 25% in Slovakia, it appears hardly possible to continue presuming a sufficient level of trust, let alone mutual trust'.[16] Is the 'bedrock' of mutual trust still more myth than reality?[17] What is clear is that the belief that mutual trust is fundamental to policing and judicial cooperation is now so widely held and high enough on political and public agendas that its neglect by academia cannot continue. While research on citizen–authority trust continues to be relevant and important, the inter-institutional and interpersonal trust of agencies and actors within international criminal justice systems is vital if truly international policing and law enforcement can be at all effective.

  This book addresses the potential contradiction between effectiveness and respect for human rights when policing agencies are cooperating across

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[13] EU Justice Commissioner Viviane Reding, European Commission—Press release, Building Trust in Justice Systems in Europe: 'Assises de la Justice' forum to shape the future of EU Justice Policy (Brussels, 21 November 2013).

[14] European Commission, 'The EU Justice Agenda for 2020—Strengthening Trust, Mobility and Growth within the Union' (Communication) COM (2014) 144 final, 3.

[15] ibid, 4.

[16] M Weller, 'Enhancing Mutual Trust—Codification of the European Conflict of Laws Rules: Some of the EU Commission's Visions for the Future of EU Justice Policy' (2014) *Conflictoflaws.net*, available at conflictoflaws.net/2014/enhancing-mutual-trust-codification-of-the-european-conflict-of-laws-rules-some-of-the-eu-commissions-visions-for-the-future-of-eu-justice-policy/.

[17] M Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) 11(1) *Journal of Private International Law* 64.

jurisdictional boundaries, while ascertaining the place of 'trust' between the policing agencies, and between the police and citizens. The continued exist-ence of exclusions to criminal justice cooperative strategies and priorities, and the sustained demand for greater safeguards however, demonstrates 'the limits of mutual trust'.[18] Yet without mutual trust, the principle of mutual recognition, essential to EU judicial cooperation if resisting full harmonisa-tion of systems

> is doomed as the latter builds on the first. It is furthermore not enough that mutual trust is gained between judicial authorities and their officials. In order to realise the common area of freedom, security and justice, trust into each others' legal systems that guarantee civil liberties, fundamental freedoms and rule of law must exist between the citizens of Europe.[19]

As not particularly eloquently put by British MP Dominic Raab in relation to the EU exchange of data:

> Of course we want to exchange criminal records information, but we do not want the personal data of innocent British citizens washing around Europe, particularly with Governments—let us be honest about this—whom we would not trust to safeguard it. I have to say that I am not sure about trusting our own Government and Whitehall with lots of our personal data. If we do not trust Whitehall, what hope is there when it gets shipped off to Warsaw, Sofia and places like that?[20]

As this book reveals, significant obstacles to ensuring mutual trust and engaging in effective cross-border policing cooperation have yet to be overcome. Immediate practical difficulties such as language differences, time limits and technical legal constraints (eg, the doctrine of double criminality in extradition law) preoccupy policymakers, at the expense of more fundamental considerations of proportionality, necessity and pub-lic acceptability. The Stockholm Programme did acknowledge that '[i]n order to improve cooperation based on mutual recognition, some mat-ters of principle should also be resolved'.[21] Yet principled considerations have largely been absent from much subsequent debate. This book not only addresses the benefits and downsides of formalising police coopera-tion networks inside and outside the EU, but discusses issues relating to international law enforcement data exchange. It also evaluates the added benefit of legal regulation to international police and justice cooperation. Considering that the process of formalisation is already advanced in the EU, its regional strategies are used to assess the advantages and challenges of legal regulation in this area.

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[18] V Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?' (2009) 34(4) *European Law Review* 523, 541.

[19] Guild and Geyer, above n 11, 11.

[20] Dominic Raab MP, HC Deb 15 July 2013, vol 566, col 828.

[21] EU Council, The Stockholm Programme, above n 7, para 3.1.1.

The complex interrelationship between trust, professional discretion and legal regulation in the area of police and justice cooperation and the significant role that these relationships have in ensuring integrity of data and processes are rarely discussed in parliamentary debates or academic literature. The European Commission often advocates the alignment of national initiatives with international standards and protocols. Yet in most instances relevant international standards are scarce, minimalist and lack enforcement. The recently announced EU–US Privacy Shield, which took two years of negotiation before another two years is expected for implementation, is intended to ensure high data protection standards for data transfers across the Atlantic for law enforcement purposes. At its launch, the EU Vice-President Ansip claimed that 'Trust is a must', while Commissioner Jourová declared: 'These strong safeguards enable Europe and America to restore trust in transatlantic data flows'.[22]

Further, there has been a dearth of academic scrutiny of new international security regimes with regard to integrity and ethics: 'There is an academic void as far as ethics research into emergent hybrid and transnational security practices is concerned'.[23] Yet, integrity is essential to create trust among law enforcement agencies, as well as the wider public. Recent research emphasises the necessity of trust in judicial bodies and systems in order to maintain commitment to the rule of law and normative compliance with social order.[24] The Euro-Justis project confirms that an effective justice system 'must assess itself not only against narrow criteria of crime control, but against broader criteria relating to people's trust in justice and their sense of security'.[25] This potentially rich seam of research now requires mining:

> There is an urgent need to expand the scope of ethics research to new security arenas, including international intelligence-led policing, cross-border policing, peace-keeping missions, international counter-terrorism, co-operation and information sharing between different intelligence organisations and security reform projects. There is also the need for specific research into the European context.[26]

The first part of this book focuses on the concept of trust in international policing. It establishes the concept in three different contexts in particular: the interrelationship between individual police officers across jurisdictional borders; the cooperation at national and agency level; and last, the

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[22] European Commission—Press release, Restoring trust in transatlantic data flows through strong safeguards: European Commission presents EU–US Privacy Shield (Brussels, 29 February 2016).

[23] J van Buuren, 'Security Ethics: A Thin Blue-Green-Grey-Line' (2009) November No 1 WP3 *INEX Policy Brief* 3.

[24] M Hough and M Sato, *Trust in Justice: why it is important for criminal policy, and how it can be measured: Final report of the Euro-Justis project* (London, Institute for Criminal Policy Research Birkbeck, University of London, 2011).

[25] European *Commission*, *Crime and Deviance in the EU*, above n 9, 7.

[26] van Buuren, above n 23, 3.

cooperation between police and policed in environments of international policing. The different jurisdictions assessed encompass the EU and other regions of the world as well as the truly 'international' policing context, such as cooperation with jurisdictions outside border or political regions and international peacekeeping missions. The admissibility of evidence in extraterritorial jurisdictions may be open to question, particularly when evidence may have been gathered in breach of human rights. It remains the responsibility of states to prevent harm and if attempting to prosecute cross-border crime, evidence must be fit to be admitted in courts in all jurisdictions. This book thus informs the search for a 'balance' between harnessing the power of international policing cooperation, and at the same time, ensuring it is viable, legitimate and accepted by the public. The first three chapters thus refer to the sociological and psychological trust literature, while also taking into account policing and legal research.

In the first chapter, Ludo Block explores the impact of trust on cross-border police cooperation practice. This contribution focuses in particular on the police-to-police cooperation and trust between individual officers and addresses their relationships with a view to risks that need to be balanced against the gains of international cooperation. International Liaison Officers (ILOs) are highlighted in this context as they embody an important 'go-between' for agencies, even if the trust between jurisdictions is relatively low. Counter-intuitively, he concludes that the trust between nations or agencies at the macro level is not necessarily reflected at the micro level where individual officers can in fact establish trust independent of common (negative) perceptions of the relevant agencies.

The next chapter by Saskia Hufnagel addresses trust and legitimacy constraints on a number of different systems. These include Greater China, Australia, the EU and the international community at large. While academic literature in the fields of law, politics, criminology and sociology has frequently focused on international police cooperation and specific mechanisms applied in the EU, few authors have addressed (at least in the English-speaking literature) cooperation strategies in other parts of the world. Cooperation within federal states has also rarely been discussed.[27] This chapter is the first socio-legal comparative analysis of cross-border legal regulation and its relationship to trust and legitimacy in the area of police cooperation in the three different systems. Similar to the chapter by Block it is concluded that the trust at the personal level can differ from the trust at institutional level, but the formation of regulation will be influenced significantly by the perceived legitimacy of the respective other system.

The last chapter of the first part of this book by Andrew Goldsmith and Vandra Harris sheds light on trust in international policing from a significantly

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[27] See S Hufnagel, 'Cross-Border Cooperation in Criminal Matters' in T Carty (ed), *Oxford Bibliographies in International Law* (Oxford, Oxford University Press, 2014).

different perspective, that of international peacekeeping missions. While all chapters in this part of the book address the predominant trust literature, the chapter by Goldsmith and Harris goes beyond applying the concept of trust to police-to-police cooperation and also looks at the relationship between the cooperating agencies and the citizens policed by them. This is particularly complex in the international peacekeeping environment as peacekeepers and the local police can form a relationship that is not particularly conducive to trust by and/or towards citizens. If cooperation works very well, it might even jeopardise policing by the local police after the peacekeepers move on. The authors shed light on this very complex interaction through extensive empirical data and in particular interviews with Australian officers involved in peacekeeping missions.

The second part of the book deals with trust and international policing agencies. It moves away from the concept of trust as described in the relevant (theory) literature and focuses on institutions, strategies and security mechanisms of international police cooperation and the trust invested in them. The institutions discussed in this part encompass international and regional mechanisms of police cooperation, such as Interpol, Europol and Eurojust. The strategies this part of the book deals with are non-operational police and judicial cooperation networks, which are often informal, but can be formalised, for example in the EU context. A particular branch of cooperation that is highlighted is international forensic data exchange. Light is also shed on a probably less well-known security mechanism, the 'trusted traveller'. This part of the book deals with the trust invested into institutions and strategies by citizens and police as well as inter-institutional trust, which makes data exchange between institutions possible.

The second part of the book starts with Chapter 5 by Monica den Boer on the concept of the 'trusted traveller'. This mechanism is employed to make it easier for some people to travel, while others are subject to more intrusive security screening. A number of 'trusted traveller' initiatives and how they operate are highlighted. Steps to become 'trusted' and the security objectives behind them are discussed. It concludes by pointing out the discrimination that is involved in trusting some and not trusting others and calls for trusted traveller programmes to evolve into a rights-based direction in which the free movement of persons principle is the rule, rather than the exception.

The next chapter by James Sheptycki looks into the trust invested in the international police cooperation mechanism Interpol. He does so through the lens of the sociology of 'branding'. In particular, this chapter discusses the question whether Interpol is what it wants us to believe it to be. The history, legal set-up and strategic and operational (if any) capacity of Interpol are outlined in depth and contrasted with often diverging popular beliefs. The chapter concludes that trust is most likely invested in Interpol on the basis of the persuasive capacity of the brand itself that has put world order

under the influence of a policing power with no democratic basis. Brand Interpol accomplishes something at the symbolic level that does not exist at the practical level of political reality.

After the discussion of an international police cooperation mechanism Celine Cocq and Francesca Galli discuss the trust invested in two regional—EU—policing and judicial cooperation agencies, Europol and Eurojust. While analysing in depth the applicable accountability mechanisms pertaining to the initiatives and whether they deserve the trust of citizens and EU Member States, the chapter goes further into the actual relationship between the two mechanisms and whether there should be trust in inter-agency cooperation. Another rarely discussed aspect, the interrelationship between Europol and external agencies, is also investigated. The chapter concludes by pointing out that the lack of trust towards Europol in particular is the most important hurdle to overcome for the agency to work efficiently.

Moving away from the 'formalised' international and regional institutions and agencies, Toine Spapens provides insight into the work of informal regional networks. The chapter addresses the different 'circles of trust' and whether informal transnational networks fall within any of the conceptual categories.[28] Particular examples discussed with regard to policing networks include the European Tispol, Aquapol and Envicrimenet. The potential impact of informal networks on formalised legal frameworks is discussed. The chapter concludes that informal networks contribute to a widening of the circles of trust as defined by Sztompka and are a crucial building block to trust between EU Member State police organisations and officers more generally.

The last chapter of the second part of this edited volume is by Carole McCartney and addresses the exchange of forensic information in particular within the EU. This chapter focuses on the compliance of evidence exchanges with applicable human rights requirements. The question of trust is addressed in two ways. First, whether the citizen can trust in the legitimacy of forensic data exchanges and second, whether police can trust the data received as well as that the data they provide to other agencies is treated within the necessary legal safeguards. The chapter concludes that more attention needs to be paid to the benefits/risk analysis in the increasingly complex field of exchange of forensic information and that the existing EU databases in particular need to be compliant with human rights safeguards.

The third part of the book provides three more in-depth case studies of international policing and cooperation. The first chapter most specifically

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[28] P Sztompka, *Trust. A Sociological Theory* (Cambridge, Cambridge University Press, 1999).

looks at a case study of international police cooperation between the United States and New Zealand. The second chapter addresses North American cases of police cooperation and the last chapter investigates yet another category of cases—intelligence exchange.

In the first chapter of this part of the book, Neil Boister sheds light on the legally extremely complex case of Kim Dotcom. In this case US law enforcement had been cooperating with New Zealand police to extract evidence for a prosecution in the United States. The evidence included a high volume of data from Kim Dotcom's computers. This episode provides a very good example of an extension of domestic policing power under external influence and how securitisation of law enforcement cooperation can remove existing domestic legal barriers and penetrate the enforcement of domestic law and order. A very interesting aspect highlighted in the context of the Kim Dotcom case is that trust itself might not be an issue in international policing, but the lack of knowledge of legal and procedural requirements in the respective other country can lead to vague warrants and police actions, leaving the decision as to the legality of cross-border policing up to the courts to decide.

In her comparative chapter on police cooperation in Europe and North America, Chantal Perras uses her empirical research from a previous study to highlight 'what works' in international policing. Two concepts that are highlighted are flexibility and trust. Counter-intuitively, major databases, such as Interpol and Europol were not at the focus of practitioner attention in international policing, while flexibility and trust are perceived as the essential tools required to complete investigations of international reach like those in drug-trafficking operations. The chapter highlights the differences, but more impressively the similarities of police cooperation in North America and the EU.

The final chapter by Denise Sulca focuses on police cooperation and trust with regard to forensic data. The case study used here is Switzerland as a non-EU country. It highlights the problems of databases used at an international and transnational level and in particular the complexity of data exchange. Without discriminating from which countries data is requested (within a multinational database) Sulca argues, responses will overflow and it will be difficult to decide which responses may or may not be useful. She therefore advocates a more intelligence-led approach to data processing and requests to receive better police investigation outcomes.