



Unrevised transcript of evidence taken before
The Select Committee on the European Union
Home Affairs Sub-Committee

Inquiry on

BREXIT: FUTURE EU-UK SECURITY AND POLICE CO-OPERATION

Evidence Session No. 1 Heard in Public Questions 1 - 10

WEDNESDAY 14 SEPTEMBER 2016

10.30 am

Witnesses: Dr Paul Swallow, Professor Steve Peers,
Tony Bunyan and Helen Malcolm QC

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.
3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.

Members present

Baroness Prashar (Chairman)
 Baroness Browning
 Lord Condon
 Lord Cormack
 Baroness Janke
 Lord Jay of Ewelme
 Baroness Massey of Darwen
 Lord O'Neill of Clackmannan
 Baroness Pinnock
 Lord Ribeiro
 Lord Soley
 Lord Watts

Examination of Witnesses

Dr Paul Swallow, Senior Lecturer, School of Law, Criminal Justice and Computing at Canterbury Christ Church University; **Professor Steve Peers**, Professor of Law, University of Essex; **Tony Bunyan**, Director, Statewatch; **Helen Malcolm QC**, The Bar Council

Q1 The Chairman: Good morning. We are very grateful to you for your time this morning. This session is being broadcast. You will be sent a transcript of your evidence and, if you wish to change it or make any corrections, please feel free to do so. If after this session you feel you want to give us more evidence in writing, that would be welcome, too.

I will start by giving you a bit of background. As you know, we are examining what aspects of EU-UK police and security co-operation it may be desirable to continue in some form following the UK's exit from the EU. It would be very helpful if you could briefly set out for us what you see as the main priorities the Government may want to pursue in this area in the course of the negotiations on the UK's future relationship with the EU.

Tony Bunyan: Thank you for the invitation. When I saw that the questions related to things such as JITs, the European arrest warrant and other specific matters, it struck me immediately that what is being discussed under Brexit is probably a lot wider than that. For my sins, I listened to David Davis giving his report to the House of Commons. It was a very long report but at a certain point he was asked a question by Yvette Cooper about Europol and he said, "We are going to make sure that security and intelligence is covered. Indeed, at this very moment my officials are looking at justice and home affairs to preserve as much as possible". He revealed something in that sentiment because it was the only point when he got specific. I doubt he would be allowed to do that in the future. It made me wonder whether we are going

to see tailored protocols; in other words, we are not going to accept the Norway or Switzerland model but something tailored to Britain, particularly in the field of justice and home affairs and CSDP. That is an instinct I have. It is almost going back to TREVI and early Maastricht.

The second broad point I would make is that we must remember that the security and intelligence side—GCHQ, MI5 and MI6 and all of the Snowden revelations—are not covered by the treaty so those relationships will just continue. We are talking there about law enforcement agencies even though there is a crossover regarding internal security.

Helen Malcolm QC: I am here on behalf of the Bar Council, but I probably ought to preface this by saying these are my personal views. My interests are practical. As a court user, at the end of an investigation process, I want to see efficient and fair extradition maintained. I want to see the ability to obtain evidence overseas and the ease with which currently we can use it. That is the sort of thing that Eurojust helps with; setting up a video link with a court in Germany so that I can call evidence whether I am prosecuting, defending, or indeed appearing in a judicial capacity. I want to be able to get hold easily of previous convictions of people appearing in front of me in other European states, as we can at the moment. I want to maintain what is called euro-bail, the European supervision order. Having been personally quite involved in that for so many years, I am reluctant to see it go but I also think, more importantly, it mitigates some of the problems with the European arrest warrant, so I want to see that maintained, and, at the end of the process, I want to see asset freezing and asset confiscation with the ease that we can do it at the moment. Personally I am less troubled by things such as prisoner transfer and the recognition of probation orders and fines throughout Europe, partly because we already have a prisoner transfer convention and partly because, as far as I am aware and have been able to discover, the probation and fines provisions are not used very widely at all, as yet at any rate. Those are my priorities.

Dr Paul Swallow: I lecture in this area now and I used to work in international police co-operation. In fact, many years ago I was a member of Lord Condon's staff developing it and working in this area. When we look at the position we had then and how bad it was, and how difficult it was to work, and the position we have now, as a general comment I would urge that we retain as much as possible, as Ms Malcolm said. A good relationship with Europol and Eurojust is perhaps the key priority as I see it; and then the European arrest warrant, recognising there are difficulties with it—when you look at the Rachid Ramda case, for example, which took 10 years—and how simple things are now with that warrant; and thirdly,

but less than the other two, the way that joint investigative teams facilitate and simplify cross-border investigations.

Professor Steve Peers: The first point I would make—and it is not in any of your questions but it will be practically important—is that the Article 50 agreement and the separate deal on the actual mechanics of leaving, although it will not deal with the future relationship, it has to deal with transitional issues and pending requests for European arrest warrants and exchange of data and evidence and so on. That issue is already arising. There are already some cases in the Irish courts which are trying to say, “Don’t execute arrest warrants coming from the UK because it is going to Brexit and will not have the various protections that come with the European arrest warrant in future”. I think it is the beginning of what we will see increasingly throughout the process, of people saying that there are transitional issues which could frustrate what they need to do. Of course, those transitional issues will have to be designed to link to our future relationship so they have to be negotiated in parallel, as Article 50 says.

In the future relationship we need to strike a balance between effective investigations and prosecutions, which the EU instruments obviously point us towards, and sometimes facilitate, and human rights and civil liberties protection, which is built into some of them but could be stronger in others—and in some cases is stronger in our law than in the legislation. The Extradition Act as amended has some protections which are perhaps hard to find in the text of the European arrest warrant on the EU side. It would be an important chance to address some of those issues of balance.

The Chairman: This Committee has looked in some detail, as you will remember because some of you gave evidence, at the 35 JHA measures that the UK opted back into in 2015. Do you think there is some repetition of arguments? Is there an overlap with the ones we opted into?

Helen Malcolm: I would say that there is an almost precise overlap. Those were the most important, for obvious operational and practical reasons, and they still are as far as I am concerned.

The Chairman: Would you all agree with that?

Professor Steve Peers: I would add that, of course, the whole exercise in 2014 was necessarily confined to pre-Lisbon measures. Since then there are several post-Lisbon measures that might be useful that we would want to consider staying part of, perhaps in some amended form. One of them—the European investigation order—has not begun operations yet but that would be quite significant because it would be the main means of getting evidence between member states and it will start applying in May 2017. At the time, the Home

Secretary opted in because she felt there was a risk that we would be at the back of the queue because it has deadlines in it to transfer evidence. She was thinking of the French or Germans, or whoever, who would always answer each other's requests and leave ours sitting in the back of the drawer somewhere with the file never opened for months afterwards. That would still be a risk and it would still be useful to participate in that in some form. That legislation has more human rights protections than some of the others. I would add the European protection order, which is about cross-border protection of victims from, primarily, domestic violence. I am assuming that we are not going to expel all the EU citizens in the country or vice versa, and so there will still be some domestic violence issues where we would want to have our protection orders recognised elsewhere and vice versa. That would be a useful thing to continue participating in.

Q2 Lord Condon: Dr Swallow, could I follow up your point about Europol? It has become more and more of the gatekeeper for formal police liaison in Europe. What might a new relationship look like between UK law enforcement and Europol post-Brexit? Are there any important precedents? How do you think we could create a model that could work for the UK and Europol?

Dr Paul Swallow: Europol has 14 operational and strategic relationships with other countries—Australia, Canada, New Zealand and so forth—and it has four strategic relationships with countries such as the Russian Federation and Ukraine. They seem to work extremely well. The least you could hope for is an operational and strategic relationship with them, which means they would post back liaison officers from the NCA to Europol and Europol may post liaison officers to the NCA if they deemed it important enough. I would hope we could go further than that.

Lord Condon: The mechanism for doing that would be what?

Dr Paul Swallow: It would apply to the two of them. They have to debate and agree it and then call the country to it, as they have with 14 with similar criminal justice systems to our own, mainly the ex-British Empire countries.

Lord Condon: Would there be any inhibition on databases and joint intelligence in that sort of relationship? Is it a second or third-league tier of co-operation?

Dr Paul Swallow: It is definitely a second-league tier. It is not being at the table or having an input into it. Members of the British public will not be able to apply for jobs working in it. The way it works is you have a central core of Europol and around that you have what you might term 28 little embassies, all of whom communicate with each other, and that would include the 14 operational countries such as Canada and Australia. To get that referred into

the central database, and for that information to be provided, is more problematic that way. A member country would supply the information to the Europol central database, the European analytical work files, and it would then come back and say, “Yes, we have a hit on this. We will discuss it with the supplying countries”, and the work is built up. That is more problematic with the other 14 operational countries that I discussed earlier.

Lord Condon: Are there any other views on the relationship with Europol?

Professor Steve Peers: I do not know if you will be talking to Rob Wainwright, the director of Europol, at some point, but he wrote an article during the referendum that summarised the difference between a member of Europol and an associated or affiliate country in the way that was just described. First, a non-member of the EU cannot be a member of Europol. The people on the leave side are certain that it can, but it cannot. However, it can be an affiliate member and participate in a lot of what Europol does. The limits are that it cannot be on the management board, even absent having the director, as we have at the moment. We would have less access to databases and less involvement in joint investigation teams. We could try to argue, “Our participation has been historically so valuable; why do you want to lose it? Please let us try and overcome some of those difficulties”. I do not think you can get a compromise on the management issue, because it seems logical that only member states are involved in that, but we ought to be able to make a strong case for access to information. I think you would have to amend the legislation as well, so we would have to go back to the drawing board a little on that.

One point to observe—we will come back to it in some of the other questions—is our data protection framework has to be assessed if we want to participate in Europol. It is built in if you are an EU member state, but there is a separate assessment of it if you are a non-member applying to participate. We have to make sure that our data protection law is roughly equivalent to European Union standards. This is across the board but particularly for policing in this context, otherwise there will be problems in police co-operation in general and for Europol, and indeed in the digital industry and economy in the non-policing area as well. As you may know, loads of people are already bringing litigation about the current legal framework for data processing in the UK. I know there are a load lining up—“lawyering up” as they say—to challenge the IT Bill once it becomes law, so those are all issues that have to be taken into account and cannot be ignored. The EU cannot easily negotiate that away because the case law says it is the EU charter of rights that requires high levels of data protection, plus there is the primary law of the European Union, which is in effect a written constitution. They are not going to amend it just to make it easier to co-operate with the UK.

That would require treaty amendment and so on. We cannot anticipate that. We can anticipate challenges and we must be aware of that data protection issue throughout the whole of the negotiations in this area.

Lord Jay of Ewelme: I have a follow-up question to Dr Swallow. If you were a member of a law enforcement agency here, what, in practical terms, would you see as the disadvantages of having an operational and strategic relationship? Leaving aside the membership, what in practical day-to-day terms would you be losing out on, if anything, if you had an operational and strategic relationship rather than full membership?

Dr Paul Swallow: It is a massive operational intelligence resource available to us, and it has really grown to this position. Underneath Europol there is also a mass of informal police co-operation that goes on through informal police bodies such as the Cross-Channel Intelligence Community and the European Association of Airport and Seaport Police. These are police officers who meet on common interests and discuss informally among themselves.

Lord Jay of Ewelme: Would that not happen if you had the operational and strategic relationship that you described?

Dr Paul Swallow: That would still continue, in my view. Were it not for Brexit I could see in a few years that Europol would gradually absorb all these bodies into it, because it is beginning to win the trust and confidence of these operational police officers. Presently we are not obliged to provide Europol with any information, although the recent regulations put a greater requirement on us to share information with it. Europol has built up very slowly and it is really gaining trust. It has had some notable successes, particularly against the animal rights movement for example. We may have formal ready access, were we to be given an operational liaison contract with them as the other 14 countries have.

Q3 Lord Soley: This follows on from the exchanges a moment ago. Britain is one of the biggest users of Europol; we are heavily involved and I think most people would say it is to the benefit of the EU and the UK. Is it not in the interests of both the EU and the UK to make sure we have a structure that enables that co-operation to continue working?

Dr Paul Swallow: Yes, I feel that.

Lord Soley: If we do that, there are a number of ways in which it could be done. One is by putting some of the things we might need into British law to match the situation in Europe, and vice versa. You can also do it by an international treaty, or what would in effect be an international treaty. Do you have a view on what would be the best way forward to make sure that co-operation continues?

Dr Paul Swallow: We are, as you say, very fortunate that Mr Wainwright has done a fantastic job over his tenure. Part of the reason that we are so well respected there is the slightly different judicial system in the UK, where the police are far more independent in conducting investigations than some of their European colleagues, who at a very early stage would give the dossier, the case file, to their crown prosecution service—le parquet in France and the Staatsanwalt in Germany. Here the police would give it at a very late stage to the Crown Prosecution Service which would then take it on. They have much more experience in investigating things. That is one of the reasons we are doing it. As for the rest of your questions, I do not know.

Lord Soley: In fact, the process could be in the negotiation to decide whether or not we wanted to do it by law or by agreement in some way.

Dr Paul Swallow: Yes, indeed. I think if it were by law, that would be ideal. We would know exactly where we stood. Its being by informal agreement is much less flexible. That is the position we have had up until Europol began to concretise.

Lord Soley: Could I ask a similar question about Eurojust?

Dr Paul Swallow: It is because of this difference between the UK and European justice systems. At a certain moment it will be a UK police officer, a senior investigating officer, who will be present with a Crown Prosecution Service lawyer; but the rest are represented by their judicial systems. It is very important we keep in with that.

Lord Soley: So the same sort of process could be applied?

Dr Paul Swallow: The same sort of process could be applied.

Lord Soley: Are there any other views on that?

Professor Steve Peers: On the point about informal agreements and data protection law, exceptions to the right to privacy must be set out and regulated in law. That points towards a formal agreement that someone could point to. It would have to be officially approved by this Parliament and on the European side as well, to set out what the details are. If you are getting into the exchange of personal data, you need something relatively formal to regulate that. Meeting and having discussions in a general sense is not a problem, but getting access to databases is going to be more legalistic.

Lord Soley: Despite everyone's views on Brexit, we have to make this work, both in the interests of the EU and the UK. Have any of you given any thought to similar situations between other countries and units, the most obvious one being Canada and the United States, where presumably there has been very close co-operation on security and strategic matters? Do you have any ideas?

Tony Bunyan: We have not touched on it yet but it is referred to in later questions about bilaterals. Knowing what has been negotiated bilaterally is very difficult because both sides treat it as restricted and confidential. Even now, the bilateral treaties which the United States had with EU member states are very hard to get hold of. We have managed to find six of them but we know there are 13, and they are really very extensive regarding co-operation. When you get to the bilateral world you are going to have a real problem with not only what has been negotiated but what has been agreed and how it has been used. The biggest problem is getting reports back on how often this bilateral is being used. To some extent the United States is bypassing Europol and going to member states under bilateral agreements.

Lord Soley: What about between Canada and the United States, which is a more similar example; have you any idea?

Tony Bunyan: Europol is not very happy.

Lord Soley: No, between Canada and the United States, the two countries. The co-operation is clearly very close.

Tony Bunyan: I do not know.

Lord Soley: I will leave it there, thank you.

Dr Paul Swallow: But at an informal level, my Lord; it is done informally. The states know it is happening and they know it has to happen, and they kind of let the cops get on with it provided they do not cause any trouble.

Lord Soley: Because it is in the interests of both to co-operate.

Dr Paul Swallow: Because it is in the interests of both.

Helen Malcolm: On the subject of Eurojust—and I will be corrected if I am wrong—I am not aware of associate members of Eurojust in the way that there are of Europol. From a practical point of view, I would be enormously keen to keep access. In the past I have been able to say in court in the course of a bail application, “I will give you 20 minutes. Go and ring the Romanian counterpart and find out whether this gentleman has previous convictions before I decide whether I am going to give him bail”. That is a facility that I would be very loath to see disappear. Allied to what Professor Peers has said, there are of course—and quite rightly—enormously stringent personal penalties for breaches of data which are unauthorised. For somebody to take upon themselves the responsibility to say, “I will tell you anyway that he has previous convictions” is not feasible. I would want to see a formal agreement which provides for both penalties and enforcement. It is the twin sides.

Lord Soley: That is very helpful, thank you.

Professor Steve Peers: Eurojust has an external relations framework. It has liaison officers working with non-members and of course we should look into doing that and continuing the sort of co-operation that has just been described.

The Chairman: I think it would be very helpful if we had some other examples of the practical implications of how it would affect the way you work. If you could let us have those in writing, we would be very grateful for that.

Q4 Baroness Massey of Darwen: Could I ask about joint investigation teams? Should the UK look to maintain participation in some form? If so, how could we go about making new ad hoc arrangements and funding agreements? Would there be a link to the outcome of negotiations with Europol and Eurojust?

Tony Bunyan: The arrangements are a bit the same as with Europol. In other words, the UK could not be a member of all the infrastructure beneath—the liaison committee and everything else, part of the planning and writing the manuals and everything else—but it could be an associate member. In the last report they had 14 applications from non-EU member states for support, whereupon that non-EU member state will work with member states on the joint operation. One could argue it is the same tenuous relationship, compared to the current situation, as it would be with Europol.

Professor Steve Peers: I would add that it is related to Europol and Eurojust, and it has led to the EU mutual assistance convention which sets out roles on joint investigation teams and a separate framework decision on the issue which applies in the meantime. Obviously, we would seek to continue to participate in those laws, and the joint investigation teams come with it. Again, you would need something fairly formal because the exchange of personal data is involved, which needs to be properly regulated. There is a framework already for Norway, Iceland and Switzerland. The precedent is already there and it makes sense that we can simply ask for continued participation. Non-EU countries are already involved, so it is not a particularly surprising or outrageous thing to suggest we could have.

Q5 Baroness Janke: You have talked about data sharing and my question is about the practical impact of losing that. I was wondering about cybersecurity, for example, and the sharing of information and data. Is it possible for the Government to negotiate continued access to databases and to information shared on cybersecurity?

Dr Paul Swallow: Europol has its European Cybercrime Centre, the EC3, which is gaining ground. Part of the new regulations would have required member states to share information systematically. That would be extremely useful because we would have access to the other

information supplied by other people. Hopefully, that will be part of any negotiation we could arrange with them afterwards, but yes, it is vitally important.

Professor Steve Peers: The first point I would make is the general point about data protection: that we will not have access to these databases unless we have equivalent laws to the European Union on data protection. There is a risk of people challenging that in the courts, as they have, and the EU have that arrangement and arrangements with the United States and so on, so we have to be aware of that. There are four EU databases and there are other EU rules on cross-border exchange between police forces that are useful, but I will say a little about each of them.

The Customs Information System has stopped producing statistics, but that is probably because each year it was used a tiny number of times in the policing context and, for whatever reason, people use different frameworks. Naples II is much more frequently used by customs officers for policing that we should seek to participate in from that perspective. The Customs Information System has another part to it which is mainly used from a commercial point view, checking on, “Do these goods really come from China?” and that kind of thing, and we might still be participating in that, depending on how close a link we have with the single market, on which there is a separate debate. We are about to start participating in the Prüm decisions, so it is hard to judge how significant they are. Obviously, the Government were very keen to participate and last year they produced a detailed assessment which strongly recommended participating, so there is no reason to doubt that that would continue to be the case. Norway and Iceland have a treaty on access to Prüm, so there is a precedent there.

On the European Criminal Records Information System, the Government produced a 10-page summary on the EU and security during the referendum, which you may have seen. There is a lot of operational detail and statistics in there, and the additional amount of data we have on criminal records from other member states under ECRIS is enormous. There is no precedent of a non-EU country having access, so here we would be asking for something unprecedented. Even from the very beginning, I remember meeting police officers who were very anxious to have this data, and clearly they have used it since. I am sure the UK would want access to that.

The Schengen Information System took a while; we have had access for a year or two. It is the extradition data, the European arrest warrant data, which is particularly useful, as well as stolen objects and cross-border surveillance in European anti-terrorism or organised crime cases. There are civil liberties concerns about some of these issues and accuracy in that database. I do not know how often it is used; I think there are some statistics saying the UK

has used it fairly frequently in the brief period since we have had access, so there would be a reason for that. Again, Norway and Iceland have access, but that is linked to them being fully part of Schengen, so it will be asking for something which is not normally given since we will not be joining Schengen, of course, as a non-member. You can ask for it, but it might be difficult.

There is an advantage the other side: where they are sending us a lot of European arrest warrants, it clearly makes it easier to find people, and there is a risk that we will be the kind of Brazil of Europe if we do not have access to these European databases; it would be more attractive for criminals to come here and less easy to find them without these databases—their situation is easier without the European arrest warrant. That is the argument that we could try and use if we are asking for something unprecedented.

Baroness Janke: There is mutual self-interest in this. We were speaking with the French Ambassador a week or so ago and, clearly, in view of what has happened in France, there is a real mutual self-interest that might give an incentive to overcome the unprecedented nature of what we might be trying to do. Do you believe that is a factor that needs to be considered?

Professor Steve Peers: I assume there might be cases where someone under surveillance in France, let us say, makes a visit to the UK and back the other way and you would want to keep them under surveillance. That is the kind of argument you would want to make. The Poles want lots of people here and other countries too on the basis of the European arrest warrant. It is easier for us to process those arrest warrants if we get them through the Schengen Information System. It is not just us wanting to get people abroad; there is a greater number of European arrest warrants coming the other way. Given the link between the European arrest warrant and its operational effectiveness in the Schengen Information System, that is the argument, as well as the many others about stolen cars and stolen objects, et cetera—the sort of data that goes in the Schengen Information System. The usefulness of them having information on British criminal records, as well as the other way round, justifies access to the ECRIS system.

Baroness Browning: I want to pick up on the last comment that Baroness Janke made. The EU has, fairly recently, signed up to bilateral agreements with countries on passenger name records. Some moons ago when I was at the Home Office, I was involved with this in a small way, and there was very a noticeable reluctance on the part of countries which had not had the experience this country has had in terrorist attacks to sign up, although they have now done so. Given that the Lisbon Treaty is, I think, 10 years ago now and a lot of these measures, the opt-ins and opt-outs on policing and security, are coming from the Lisbon Treaty, and the fact

that the Secretary of State indicated he rather thought we would continue as we were but under a new agreement, when we come to renegotiate all these matters, do you think there is a lot more momentum across the European states to make this work and get round some of these very tricky legal situations you have identified this morning? Do they not now have a strong imperative to make this work across borders, whether we are a member of the EU or not?

Tony Bunyan: My view is they do, and this is one area where both sides very much want to do it. The infrastructure invested by the UK in, particularly, justice and home affairs, with UKREP in Brussels with their six to 10 specialists working as CJEU councillors examining every new measure going through and the infrastructure in British embassies throughout the EU, is enormous. It is not just a question of justice and home affairs. It is a question of the knock-on, particularly since more recently there is a lot of funding going into security-industrial research under new programmes in the Commission, which comes under the same commissioner in DG Home. This is enormous infrastructure to support research, surveillance mechanisms, drones and everything else. For the UK, it is not only terrorist and criminal law. Also, in that nexus of security where the agencies are involved as well and all the dozens of conferences they go to, there is a security-industrial complex in which the UK is also a very big player, and this is one area where it works both ways. Whether they can find a way of constructing a package as complete as indicated today, which goes further than we have even got round to discussing here today, is the big question because they would have to spell it out.

Baroness Browning: Do you sense a mood change in this since the Lisbon Treaty was drafted?

Dr Paul Swallow: The nation states had to co-operate with their neighbours and there was no mechanism for them to do it, so the police forces did just get on with it. This kind of information is often passed on an intelligence basis, but, when you need it to be passed on a judicial basis for use in prosecutions, you have to get involved in the principal agreements. In that case, I would be concerned. The Americans can certainly get hold of this information through their own networks very quickly and, were it a direct threat, they would almost certainly act upon it; but, were they to prosecute those people involved, they would need to have that same information on a judicial basis. Have I explained that clearly?

Q6 Baroness Pinnock: As the starting point, I am not a lawyer. I think I have heard you say several times there is a need for data protection to be of a similar standard between us and the European Union if we wish to make these agreements post-Brexit. Is there an easy way of

explaining the difference and how big that difference is? Is it a big gap to close or would it be easy?

Tony Bunyan: I am not a lawyer either, but I know the practice. The existing agreements are in concurrence with data protection in EU standards, but it has this big hole in it; it is only looking at the reports that come along on which they go ahead and have co-operation agreements based on what the law says. In other words, does the law in that country match EU law? In most cases, it does not get round to the practice in that country, which has been contentious in the EU, particularly with Russia and Israel having co-operation agreements with Europol. They said, “The law might say this, but what is the practice? What has the court said? What has civil society said?” If Britain were in this situation, we would have to have a law which is equivalent to EU law and the new General Data Protection Regulation, which is now EU law, which will require us moving into line with the 1998 Act over here and changing it in line with EU law if we were to join Europol, although there is a separate directive on the exchange of information between law enforcement agencies.

Q7 Lord Condon: I wonder if I can ask Professor Peers to say a little more about access to databases through Prüm. One of the reasons UK law enforcement urged the Government to opt into Prüm was that it enables formal access to fingerprints, vehicle registration numbers and DNA samples electronically within seconds, minutes or hours, as opposed to—sometimes, at the moment—weeks and months. You mentioned Norway. We will not be part of Schengen, so can you see a mechanism where we could have formal Prüm access within seconds and minutes to these databases? What would be the mechanism to allow that?

Professor Steve Peers: The treaty between the European Union and the UK, which could include other policing and criminal law issues as well, could allow for the continuation of that. Again, there would be a check on our data protection law before they went ahead and approved it, but they have just assessed our application to join Prüm as a member state and said it was fine, so, provided there are no changes or doubts about the law in practice in the way that Tony Bunyan explained, we ought to be approved as a non-member to join. Yes, Norway and Iceland are Schengen members, but in the case of Prüm there is not the direct link with Schengen as there is in the case of the Schengen Information System, where it is obviously in the title. That makes it more arguable that the fact we are not in Schengen should not count against us in access to Prüm.

Talking to police officers, they do not say that it is normally within minutes that you get something because you have to double-check with fingerprints and so on, which adds to the cost and is why we delayed our participation for a couple of years from 2014. Indeed, it does

take extra resources to double-check things under Prüm, but I am sure, as you say, it will be much quicker than getting that access otherwise. There are a few fingerprints in the Schengen Information System and there will be more access soon, but that is linked to a European arrest warrant request and is not the same as finding a fingerprint at a crime scene and saying, “We think this person might be a Czech national. Let’s ask the Czech police if they have this guy’s fingerprints in their records”. That kind of very useful thing which you will be able to do under Prüm is a good idea to maintain, but of course it works both ways. I am sure there will be some British nationals who are suspected of crimes on the continent, or people who have a prior history in Britain whom we have data on, and it is useful for them to be able to make the request to us; plus we have a huge DNA database which I am sure is very attractive to other member states.

Helen Malcolm: Could I come back to one thing on data protection? I am a lawyer, but I am not a data protection specialist, and my understanding is that our current Data Protection Act was based on the then existing European directive, which obviously was 1998. There has been a recent sea change in Europe on something you brought in called the general regulation, but there is a very strong view on data protection across Europe which involves not just EU states but the Council of Europe and, since we are making absolutely no suggestion that we should come out of the Council of Europe, I suspect we will always, practically speaking, be required to maintain the same level of protection as the EU. After all, it is not just things like fingerprints and the rest of it; it is the entire online economy every time you buy something by credit card over the internet, so there is a real necessity for us to keep our rules at the same level. You will be aware that, after Snowden and the Safe Harbor decisions, there was panic about the safety of data in the US, which has given rise to new US-EU provisions, so we would have to have at least that level of provision.

Q8 Lord Watts: We have touched on a number of the issues I was going to raise, but I would like to give you the opportunity to say something more on them. What are the options for re-establishing some form of mutual recognition in criminal matters with countries in the EU following a UK exit? What are the precedents for bilateral treaties with the EU in this area? What are the benefits and drawbacks of falling back on relevant Council of Europe treaties? You have touched on some of that, but I wondered if you wanted to say anything else?

Dr Paul Swallow: The problem is we are going to be back to what we had before. I referred to the case of Rachid Ramda, which took 10 years from 1995 to 2005 to extradite, using the Council of Europe mutual legal assistance treaty. What we have now is far better.

Lord Watts: Is that the view of everyone?

Professor Steve Peers: Yes. If you look at the British Government paper during the referendum, which I have already mentioned, they give the statistics on the significantly greater number of European arrest warrants than there were extradition requests, and they are dealt with significantly quicker than they were before. We can go back to a Council of Europe system, of course. There is a convention there with four protocols and there will be transition literature about how we will do that, but be aware that it will mean not only transitional challenges, which we are getting already, but significantly fewer people extradited, taking significantly longer and quite possibly more expensive in each case.

With other issues, it is not quite so clear that the EU measures add a lot to co-operation under the Council of Europe anyway. In some cases though, if we went back to the Council of Europe measures, there are things which we and a number of other member states have not ratified, such as the recognition of judgments and fines. In some cases, such as the transfer of sentenced persons, there is quite an elaborate Council of Europe framework. The EU maybe does not add a huge amount to that. It is meant to simplify it somewhat, but on the most recent information not a lot of member states were applying the EU measure yet, so it is hard to work out exactly how much added value it has at the moment.

In the case of Eurobail, which Helen Malcolm mentioned, there is no Council of Europe fall-back at all and we would have to negotiate one from scratch, like the European Protection Order. There is a little bit in the Istanbul convention on domestic violence about that, but not a full framework for recognition of protection orders against domestic violence, which is another useful thing to have. In the case of mutual assistance, which is a very large part, as I understand it, of the day-to-day co-operation between states in getting evidence in criminal trials from other countries, the EU has not added much so far, but the European Investigation Order which applies from next May is meant to add significant value, speed things up and get access to more evidence. It may take a while until it is fully running because states usually delay their application of EU law a bit, but it has the potential at least to be significantly more than we have at the moment. There is the potential, as the Home Secretary recognises and as I mentioned before, that, because the European Investigation Order has deadlines, the requests of other countries which are not part of it will go to the back of the queue. Of course, the same thing arises as a non-member state and we may be even more likely to go to the back of the queue if we do not participate in the European Investigation Order in the future. Those are the reasons why we should continue to participate.

Lord Watts: Given what you have just said, how long do you think it would take to negotiate those new treaties? Is there any precedent?

Helen Malcolm: I am told it takes two years to negotiate one treaty. That was simply what I was told by somebody in the Home Office. I do not know if that is right. When I gave evidence before, I calculated 234 man-years would be needed just to negotiate the 35 criminal justice provisions that we thought were essential. Of course, I may be wrong and, if you are copying an existing treaty, I assume it is much quicker.

Professor Steve Peers: Some of them have been longer. The EU-Japan negotiations were longer and the EU-US were a little shorter with the 9/11 pressure quite soon after the terrorist attacks, so it could be longer or shorter. I agree that, if we are simply going to copy things and say, “Here’s this list of EU law we will continue to apply”, it should be relatively straightforward. If we say, “We would like some exceptions from those EU laws, we would like to negotiate some changes”, which Norway and Iceland did with extradition and the European arrest warrant and which we might want to do as well, it adds to the negotiation. We could do a transitional deal where at the end of the Article 50 period, we keep some things in force while we are still negotiating. That may have to happen anyway with a lot of the single market issues if we want to respect that deadline and not be having elections in Britain to the European Parliament in 2019, which would be very odd. This will be one area where maybe we would want an extra year by way of continuing *de facto* while we negotiate any changes we might want to make. That is the crucial factor. To sign up to a list of 35 or 38 measures, fine, that should not take two years to negotiate; but to try and change them in any significant way would probably take longer than that. It may not be 10 years, but certainly four or five, and there might be difficulty and delays in ratification as well.

The Chairman: Is there some merit in looking at those 35 we want *en bloc* and not changing them?

Professor Steve Peers: It will definitely simplify things to say, “Here’s the list of things we have been happy with”—and we reviewed them in 2014, of course, and the Government issues information here on how things are working in practice, and there have been a couple more since—“and we do not want to change them”. Obviously, there might be two or three things you want to change, but the fewer and the less difficult the things you want to change, the better, and there might be some things they want to change on their side, but that will be the crucial feature. If you want to negotiate something from scratch, that will take much longer, as the Japanese did on mutual assistance for evidence. If you want to say, “We take this existing list with no change”, that should not take more than two years. If you want to

start renegotiating it, we start, potentially, talking about something longer, depending on how difficult the changes are.

Tony Bunyan: The strand that is hitting me here, and it hits me even with these 34 or 35 measures, is that that is the status quo at the moment, but, if there are any future changes to those 35 laws, we will not be at the table to discuss what changes are made to those. Obviously, Norway and Switzerland are at the table in the Mixed Committee in relation to Schengen, so they are sitting in on the working parties and can influence what is going on. It is that lack of influence—which has not always been to the good, I might say, for the UK and is sometimes extended against civil liberties’ need, not just in taking part in something but deciding where we are going now and taking part in operations where people very much underestimate the number of operations organised by the Council in the law enforcement area. Every year, there is a whole package of measures going through, whether it is against immigration, cars, drugs or whatever; it is an enormous infrastructure. If you are not part of that decision-making, you have to go along with things in time, and it is all right now when it is recent, but in time you will not want to be part of some of these things.

Helen Malcolm: We have not investigated whether we are talking about bilaterals with each of the 27 states or a bilateral with the EU. I would be enormously in favour of the latter for reasons of simplicity, speed and being able to keep this track vaguely on line. There is, for instance, the extradition treaty with Norway and Iceland. It has, so far as I am aware, only two differences from the EAW, which are two discretionary reasons for non-return: the political offence exception and the surrender of your own nationals. Other than that, word for word, it is the same as the EAW and the form at the end of it is worded identically to the EAW form. On the one hand, that makes life simpler. On the other hand, of course, it does not answer any of the existential and philosophical problems people have with the EAW if you are giving them the same thing. Again, and I tend to speak very practically: there is an enormous advantage in having one single form. If you were sitting in a small police station in the back end of Bulgaria, you just send off one form when making an application for extradition across, shall we say, the continent—therefore to include the UK for the time being. Assuming we are outside the EU, there will always be a practical desire to put the British one into a drawer and deal with it tomorrow because it is a bit complicated and slightly different, if you have that option.

Q9 Lord Condon: Does a single bilateral leave us vulnerable to the strategy of negotiation—because these are so important to us that they may well use it as a negotiating tactic to get concessions in other unrelated areas? We are assuming good will all round, but one of my

fears is that, because of the importance of this area, something like a single bilateral will be tantalisingly shown to us and then brought in as part of concessions in other totally unconnected areas.

Helen Malcolm: I suspect the answer to that is political, and you are better equipped than me to answer it. That will be the case in any event, even if we are dealing with 27 different bilaterals, because all the countries will have different interests to promote as against us. On the other hand, we have a very good name at the moment in Brussels. You have, as the legislators, that card in your hand. We are known for arguing pragmatically, practically and sensibly on the whole—with some exceptions, I accept—and we have been in the forefront of negotiating things such as defence safeguards and victim protection over the last few years. I know, at least informally, that people are rather depressed at the idea of the British moving away from the negotiating table, so I can only hope you will have success in your negotiations and not too many concessions.

Lord Watts: Let us say the treaties are agreed and we accept them as they stand, and that is the easiest way to negotiate them. If there is a change to the treaties, and we will not be party to that negotiation, where does that leave the UK with everybody else after the treaties change?

Helen Malcolm: By definition, you are talking about a UK-EU treaty. An inter-EU treaty will not necessarily mean a change in our treaty, but of course you look at the prospect of divergence, ultimately, which will not be helpful for swift and practical enforcement.

There was one other question you asked earlier: to what extent can we fall back on existing Council of Europe treaties? We can, to an extent, certainly within the extradition field. However, there are problems in Europe with that. The directive that brought the European arrest warrant into force in 2002 explicitly says for EU member states that this replaces all existing EU procedures, so they would have to overcome that, particularly for those states that automatically transpose European law into their domestic law without the intervening Act of Parliament that we have here, so we would still be all right. Indeed, we still operate the Council of Europe treaty on extradition with countries such as Israel, Russia and other non-EU member states, but it is very much an open topic at the moment for us, academically and practically, as to whether other monist states—states that automatically bring a treaty law into their domestic law—are bound by the repeal provisions and, therefore, have no pre-existing or previously existing arrangements with us and would have to revive them.

Professor Steve Peers: That could easily be dealt with by a clause in the transitional arrangements in the Article 50 treaty, and a monist state would be automatically transposing

that to address the issue of the point at which you start to convert pending European arrest warrants to Council of Europe extradition requests. That whole process of moving over, if it happens, ought to be a clear and simple transition; otherwise, everyone who is detained on the basis of a pending European arrest warrant will ask not to be detained in hundreds of cases around the continent, and here too, and some people will potentially be let out whom we do not want to be. That is one issue.

There is another legal issue here about whether we have a bilateral negotiation or not. It is an open question how much the EU might have exclusive external competence over some of these issues, so that we have to negotiate with the EU rather than the member states. On data protection, it probably does because it is a harmonised law and on some of the other issues, arguably, it does. The Commission certainly thinks that it does, and that is argued on the Council of Europe protocols to the terrorism convention. If necessary, it is possible that that might end up being litigated at the EU level and, of course, we cannot affect what the EU court says—and, especially, if we no longer have a judge on it, we have no effect at all. That bilateral option is potentially a factor that the Commission will certainly be against for its usual political reasons, which it legally, ultimately, might bring to the European Court, which might say, “That is right, you can’t do side-deals on some of these issues”. It is not either all or nothing, but on some of these issues it is possible we cannot do it bilaterally and it has to be the European Union. Certainly, on the databases of the European Union itself, there is no doubt that is the case.

The Chairman: We have covered the European arrest warrant.

Q10 Lord O’Neill of Clackmannan: On the question of the CJEU jurisdiction, to what extent do you anticipate that this jurisdiction could become a sticking point, given that we have been talking today about a dynamism in the process and we are not just dealing with the status quo but anticipating additional problems arising? Do you think that the dynamic is in itself a problem and, if it is, can you identify any particular areas? I am thinking Ms Malcolm could help us there.

Helen Malcolm: Again, that is almost a political question. As you are well aware, there are those who are convinced that the CJEU regulates their day from the moment they get up and brush their teeth in the morning, and there are others of us who do not see it in quite those terms. For them, I imagine it is genuinely a sticking point. Legally, there would have to be a way of policing and enforcing, I suppose, an EU-UK treaty on whatever subject. We have, after all, adopted CJEU jurisdiction willingly—more or less willingly—and legally since 2014 for a number of measures, including the 35 we have spoken of and the ones we have opted

into subsequently, so it was not a sticking point, philosophically or legally, in relation to those. There are practical issues with the CJEU, in particular the fact that most of the judges there have no criminal experience at all. It is only the French advocate general who has ever been into a criminal court or prosecuted a case, although our own advocate general is very experienced and did a lot of public law, some of it having distinct relevance to the criminal law, if I can put it that way, but she would not dream of describing herself as a jury advocate, nor would any of the rest of us use *lèse majesté* in that sense, so there is a problem of experience at the court. It is one of the things that the Bar Council would very much like to see redressed, in a way, but as Professor Peers has said, if we are out of the EU, we no longer have any ability to influence who is sitting on that court.

Professor Steve Peers: There are several elements to this. The first element is the EU almost never asks non-EU countries to sign up to the EU court's jurisdiction, so that in itself should not be a problem, and I am sure we would say no if we were asked, although I do not think that will arise, but two things will arise. First of all, the EU court has jurisdiction to interpret the treaties which the EU signs with non-EU states, so the EU would be able to give interpretations of their deal with the UK. It has already given rulings on the EU Schengen association with Norway and Iceland, it has been asked to rule on the EU-US extradition treaty, and there are many cases in other areas of EU law where it has ruled on treaties with non-EU countries. Those rulings have an impact on us. They would be about the recognition of British arrest warrants sent to Ireland or wherever to get British nationals back or whoever it might be, but they would not be directly binding on us. That relates to the second point, which is the divergence point.

Tony Bunyan has already talked about one type of divergence which could exist in future, and I know we have a question later about divergence, which is the legislated divergence when the EU law gets amended, but this is a second type of divergence, of course. It is quite possible that our courts, no longer being covered or bound directly by the EU courts in the way they are under the European Communities Act, will give different rulings on the same legislation, in effect, if that is what we have agreed to apply. Even if there are slight variations in the EU version and the EU-UK version, I expect there will be provisions in common and the EU court will be ruling on the EU-UK treaty, but there will still be divergence in respect of how to interpret the particular treaty between the EU level and the UK level. You have to deal with that other type of divergence as well. To give you a practical example, although I am sure it will be resolved before Brexit, the same question that arose in our Supreme Court about Julian Assange being released because the Swedish police issued a European arrest warrant has gone

to the court of justice from a Dutch court and they have fast-tracked it, so we should have a ruling in October, unless it gets settled or withdrawn. That is the kind of thing where it would be slightly awkward, obviously. Imagine the EU court saying after Brexit, “Well, the Swedish police cannot issue European arrest warrants”. What will Julian Assange say if he is still in that embassy another five years down the road? It would be odd if the same ruling does not apply to the UK if we are still applying European arrest warrants without any relevant differences from the legislation, as Norway and Iceland are.

The Chairman: We have run out of time. Thank you very much indeed. It has been very helpful. As I said earlier on, it would be very helpful if you can give us more practical examples of the differences it would make at an operational level and the arrangements that would work more effectively in the future. If, on reflection, there are other things you want to send us in writing, please feel free to do so. Thank you very much indeed for your time this morning.