HOUSE OF LORDS

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Justice and Institutions (Sub-Committee E)

Inquiry on

THE EU'S POLICY ON CRIMINAL PROCEDURE

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3.40 pm

Witnesses: Jodie Blackstock, Anna Odby and Ilias Anagnostopoulos

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Members present

Lord Bowness (Chairman)
Lord Anderson of Swansea
Lord Blackwell
Lord Boyd of Duncansby
Lord Dykes
Lord Elystan-Morgan
Lord Renton of Mount Harry
Lord Rowlands
Earl of Sandwich
Lord Temple-Morris

Examination of Witnesses

Jodie Blackstock, Director of Criminal and EU Justice Policy, JUSTICE, **Anna Odby**, Law Society, and **Ilias Anagnostopoulos**, CCBE (Council of Bars and Law Societies of Europe)

Q27 The Chairman: Good afternoon. Thank you all very much for coming to help us with our inquiry into the EU's policy on criminal procedure. For the record, let me advise you that Members' interests are recorded in the Register of Lords' Interests. Members of the Committee with relevant interests will declare these as we go along—I do so as a practising solicitor. The session, as you know, is on the record. It is being webcast live and will be available on the parliamentary website. A transcript will be taken, which you will have the opportunity to check and correct, but it will be on the parliamentary website before that is done in its uncorrected form. I would be grateful if, when you speak for the first time, you could begin by stating for the record your names and official titles or positions. When we come to the questions, obviously we will leave it to you as to your responses, but please do not feel that you all have to respond to every question, although if you want to add anything, please do so. Would any of you like to make an opening statement, or would you prefer to go straight to the questions?

Jodie Blackstock: I do not need to, thank you.

The Chairman: You would like to go straight to the questions.

Anna Odby: Yes, please.

The Chairman: In that case, I ask you first of all to introduce yourselves and the positions that you hold, perhaps starting with Ms Blackstock.

Jodie Blackstock: Thank you, Lord Chairman. I represent JUSTICE, which is the UK section of the International Commission of Jurists. We are a cross-party law reform organisation, working specifically on access to justice issues and human rights. My position there is Director of Criminal and EU Justice Policy and I am a barrister by trade.

Ilias Anagnostopoulos: I am Ilias Anagnostopoulos and I chair the Criminal Law Committee of the Council of Bars and Law Societies of Europe. We deal with all aspects of European criminal law. I am very honoured to be here to answer your questions.

Anna Odby: My name is Dr Anna Odby. I am here to represent the Law Society of England and Wales, which I do not think needs any further explanation or introduction. I sit on the EU Committee of the Law Society and I am a practising solicitor.

Q28 The Chairman: Thank you. Perhaps I may start. As you know, the EU rules on minimum standards in respect of criminal procedure are intended to facilitate mutual recognition of judgments and judicial systems. One thing that we are looking at in this inquiry is whether the system of mutual recognition has gone too far. Should there be less mutual recognition in order to limit the jeopardy to suspected or accused persons or should the courts have greater freedom to refuse mutual recognition on human rights grounds? It is a wide question and I am sure that you will all want to contribute to it.

Jodie Blackstock: There are a number of aspects to that question. The first observation that it is appropriate to make for those of us who have been working in this field for a long time is that, once it is accepted that there is benefit to EU activity in the area of criminal procedure in the law, it becomes quite difficult to unpack where one stops, as it were. If it is

accepted that there is a need to prevent criminals from crossing borders and therefore that an efficient arrest warrant procedure is appropriate, a whole raft of instruments accompany that. Therefore, we have got into the position of saying that perhaps we need to look at the supervision order on pre-trial proceedings in relation to bail and at what we do post-proceedings in relation to transfer of sentences. From JUSTICE's perspective, our most comprehensive answer to the whole question is that, while it may not have gone too far as such, it has not kept up with the requirement for procedural safeguards for suspects and to recognise the needs of victims and witnesses as they are affected. Generally, it is the people who are affected across a broad spectrum by these efficiencies in police and judicial co-operation that need now to be addressed. Fortunately, we are slowly beginning to see that.

Finally, on the last aspect—whether the courts should have greater freedom to refuse on human rights grounds—Sir Scott Baker's inquiry looked at this in some detail in relation to the European Arrest Warrant and extradition proceedings generally. To some extent, we agree with their conclusion, which was that the courts already have the powers, certainly in the UK and across member states, if they choose to use them, of refusing on human rights grounds. However, what they do not have in many cases is the requisite evidence to support those human rights arguments. One example—and this is something that Ilias can speak much more to—is conditions in Greek prisons. There have been a number of cases when it has been attempted in an extradition setting to argue that people should not be returned to Greece, but there has not been sufficient evidence that that particular person will go to that particular prison where they will suffer inhuman treatment, whereas in relation to asylum law it has been conclusively accepted that the position in Greek prisons means that it is unsuitable to send people back to Greece at present. Sorry—that was a long answer to perhaps a long question.

Q29 The Chairman: Perhaps we should ask Mr Anagnostopoulos to follow that.

Ilias Anagnostopoulos: Mutual recognition is a bit of a strange creature. It was meant to facilitate European integration without obliging member states to change their domestic legal systems. Actually, it was under the UK presidency in 1998 that this idea was promoted; it was adopted in Tampere in 1999. While it is true that this principle of mutual recognition has contributed to European integration, it has become clear that it cannot function without minimum standards that are applicable and operating in all European countries. Since its origin is from the single market, these too are products that are able to circulate freely in the common market. They follow EU standards regarding procedure and, if they do not, they are not acceptable. The free circulation of criminal decisions cannot function properly if we are not sure that the common minimum standards are followed, which is not the case in some countries. It has been apparent that we need some further work in that area. This was recognised with the 2009 Roadmap for strengthening procedural rights, which says that, whereas progress has been made regarding law enforcement instruments, such as the European Arrest Warrant, the freezing orders and the confiscation orders, nothing has been done in respect of strengthening the protection of procedural rights. This was the starting point for the proposed directives of the European Commission. We have already had the one on interpretation and we will soon have the second one on information. The third one is on the right to access to a lawyer, which is being debated at this time.

On the second question, I would also be very much in favour of the courts having the power—and they have the legal basis to do this—to check in each case whether there are human rights concerns that would not allow the execution of a foreign judgment. This is not an attack on the legal system of the requesting country. It is a very good cross-check for all European countries. It is a good thing that through the eyes of a court of another country a specific case is checked on human rights standards. For example, on the European Arrest Warrant, in the preamble and text it is stated that this instrument respects human rights. It

is not meant to lower human rights protection and standards. This is a legal basis for courts across Europe to do this check and not to execute decisions or orders where they are concerned that human rights would be infringed.

Q30 The Chairman: Dr Odby, do you want to add anything?

Anna Odby: I have three small points to make in addition to what we have just heard. The first point is that it is quite difficult in the absence of objective criteria to answer the question as it has been put: "Has it gone too far?" What does that mean? Do we have too many mutual recognition instruments? We have seen, for example, quite a number of framework decisions in the 10-year period following Amsterdam.[1] There is a question as to what the correct pace should be of lawmaking in this area. It is perhaps something that should be borne in mind when looking for the answer. The one point that I would add is that there is some uncertainty, at least in my mind, about exactly what shared competence means here. For example, if the EU were to make mutual recognition instruments in a particular field, does that then preclude national competence to act in the same area? That was point one.

Point two is whether "too far" means too different and too intrusive. Does mutual recognition cause too much disruption in national legal systems and to national legal cultures? Even minimum procedural rules, if they are to be an alternative to mutual recognition instruments, would have intrusive effects—arguably even more.

The third possible interpretation of going too far is being too far weighted in favour of security measures at the expense of individual rights. We have the Roadmap proposals, which should hopefully address at least in part those concerns, but I would add that the suggestion that judicial discretion is somehow compromised by mutual recognition instruments or by minimum procedural standards is perhaps overstating the situation. We

[1] The Treaty of Amsterdam.

have seen in the European Arrest Warrant scenario how even in this country the judges have considerable scope for safeguarding individual rights in the context of the extradition procedure.

Q31 Lord Temple-Morris: I will turn the question around by challenging the assertion that mutual recognition has gone too far. I would say that it has hardly started and that there is an enormous amount of quasi-federal pressure waiting to come out, with a load of orders, directives and everything else that are largely unimplemented. It is all there. The first question is how on earth you get more cohesion in this without more central power—I believe the common phrase is "vertical power"—from Brussels. Nobody will agree to it, least of all my own Government. The other thing that I would like you to comment on is that there are two sides to this. There is the human rights side, with all the worthy things about wanting people to be treated well in prison cells in various European countries and to be treated equivalently to prisoners in other European countries. That is one side of it. But you also have, galloping ahead, a great need for cross-border legislation and power in, for example, money laundering, which is the speciality of one of you. That issue is in a different league from that of somebody in a prison cell; it is totally different. I put it to you that at the moment we are failing in both of them. How do you react to that?

Jodie Blackstock: I suppose that it has been a slow process in some respects; it has been slow getting started in comparison to other areas of the Union. However, we should look at the number of instruments that have been created in this field since competency began 10 years ago. I think that the count from the Government at a meeting I went to not long ago was about 70, if you include all of them. The ones I listed in our evidence were those that we consider most directly relevant to judicial co-operation in criminal procedure. When they start to come into force we will see their impact. As I said in answer to the first question, where do you stop? Once you start to engage in this area, you recognise that, as

you said, there are many aspects of procedure that will need cohesion between judicial systems. It has been done on a case-by-case basis; that seems to be the most sensible approach. You cannot do everything at once. That was attempted in relation to procedural safeguards in 2003 when we had a single framework decision setting out all the rights that are now contained in the Roadmap. It was not seen as an appropriate way of legislating. We have now got one aspect of each right being taken on a slow basis. It is a slow process; the implementation period is incredibly slow. The access to a lawyer provision has 36 months for implementation in the current proposal, which is a remarkable period when those of us who work in this field have seen the need for provisions on legal access since the European Arrest Warrant came into force. I do not suppose that there is an easy answer to any of it; I have probably just raised more questions.

The Chairman: We will not get tempted down the road of that last point because we have done a small inquiry on that.

Ilias Anagnostopoulos: My response to the question of whether mutual recognition has gone too far is to ask whether it has gone too far because no counterbalancing measures have been adopted. That is, a number of law enforcement or prosecutorial instruments have been introduced that facilitate mutual recognition, but we do not have counterbalancing instruments such as the ones on the protection of procedural rights. This is what I understand by mutual recognition going too far—too far because there are no appropriate counterbalances.

In relation to the other question, the human rights concerns do not refer only to prison conditions. There is a whole range of such concerns. They go with other human rights concerns in the issuing state over whether the procedures are appropriate. For example, it is well known that there are countries where the authorities are very 'arrest warrant happy'. For example, Poland issues four times as many arrest warrants as Germany, although its

population is half the size. That means that Poles are eight or nine times 'arrest warrant happier' than Germans. There are well known cases here, too, in which someone has stolen a pig or whatever. So there are serious proportionality issues which can and have to be addressed by the courts in respect of human rights.

Anna Odby: Perhaps I can inject a degree of comfort into the exercise. I think that the EU institutions would be well advised to develop clear criteria at the outset. We have the Roadmap and the action plan, for example on the Stockholm programme, which provide some indication of what they are thinking and in which direction they propose to go. I would compare the situation with what is currently happening: namely, a discrete exercise undertaken at the moment primarily by the Council, on which the Commission recently released a communication, to develop criteria for when substantive criminal law measures are drafted. The criteria are intended to indicate when EU lawmaking becomes necessary. In this area we would like the criteria to indicate when, for example, minimum procedural rules will become necessary to support the more efficient operation of mutual recognition instruments. Of course, necessity as a concept is inherently subjective and the process is complicated by the fact that there are difficulties enough in collecting data and comparing them between 27 member states because of the differences in criminal procedures and substantive law.

Q32 Lord Anderson of Swansea: Dr Odby talked about objective criteria for common minimum standards. How does one establish such criteria? For example, Denmark and Sweden may have very strong views about the conditions in our prisons, but by whom should the objective criteria be established? Should they all be common? Who decides? What is the appropriate mechanism for giving evidence of those failings on which a decision may be made in respect of the extradition or whatever?

Jodie Blackstock: Detention is a good example, because the Commission has just completed a Green Paper consultation on how to adopt minimum standards in detention conditions. It has been focusing on the length of that pre-trial detention as well as the conditions in which people are kept. Its starting point is that there are a number of instruments that have been drafted and agreed at international level within the UN and the Council of Europe: the European Committee for the Prevention of Torture and the UN's Committee against Torture both operate in this area. The European prison rules also set out in great detail the ideal conditions in which to keep people. All that is a very good starting point, but none of it comes with the capacity that you have within EU lawmaking, which is a far more focused and practical approach to legislating because of the mechanisms that are set up and the way that legislation is prepared at an EU level, as well as the enforcement mechanisms that come with it. If nothing else were done in relation to detention other than adopting the standards that already exist in less binding measures within an EU package, that would be a sensible approach to take.

There are other measures that are very helpful in terms of training, which we are still very far behind on. One of the main complaints about mutual recognition is that we do not know what we are recognising. There are many programmes in place now. Certainly, the Commission has been trying to adopt this for some time and has sought judicial training across borders in its current programme of funding, and we should see more of that. Indeed, on Monday I was at a meeting organised by the Home Office with Polish judges looking at how to deal with the proportionality problem in arrest warrant cases. They met with judges from Westminster Magistrates' Court to discuss alternative measures to using a warrant, for example. It is a mammoth task when there are 27 different systems. We have to try to understand between us how other systems work in an attempt to trust how those other systems work.

Q33 Lord Anderson of Swansea: Let me build on that, if I may. Obviously torture is an easy one, but then one moves along the spectrum to cruel and unusual punishments and all the definitions. You have talked about the ideal conditions. There are no ideal conditions—there may be in Scandinavia, I do not know. The Commission proposes; national governments dispose. How close are we to getting criteria that are accepted across 27 countries?

The Chairman: Please can we have a fairly quick answer from one or all of you to that.

Ilias Anagnostopoulos: You are right in saying that Article 3 of the Convention[2] in case law for the Strasbourg court is a starting point, but it does not solve all the issues. Of course, it would be unrealistic to think that all 27 European countries would have the same standards as the Scandinavians do. On the other hand, what we are talking about are minimum standards. What we are trying to prevent are unacceptable conditions. From that point on, for every country there is a possibility to improve and have higher standards, but what we are looking for is to have standards that do not fall below the minimum of what human rights dictate.

Q34 Lord Rowlands: My question follows straight on from the question asked by Lord Anderson and your observations. How difficult is it to sit down and write out what these minimum standards are in each area? For example, if all three of your organisations sat down and wrote out what you considered to be minimum standards and you compared notes, how much of a consensus do you think you would get?

Anna Odby: Perhaps I can answer that by saying that minimum procedural standards would be relatively straightforward, one would hope, by reference to existing international standards in the field of human rights. What is far more complicated is agreeing when mutual recognition instruments become necessary.

[2] European Convention on Human Rights.

Lord Rowlands: So you could write the standards down but the difficulty would be with the next process. Would your three organisations find common ground on all these issues?

Ilias Anagnostopoulos: We would, but what the states will do is another case.

Jodie Blackstock: That is the thing, yes. The work has been done as far as the Roadmap is concerned, because back in 2002 when the European Arrest Warrant was being decided we went through that very process. There was a Green Paper from the Commission that asked what procedural standards should be adopted. From the answers to the consultation, the original framework decision was proposed, and those rights are now contained in the Roadmap as agreed to be the priority rights. Over and above that, there are still outstanding issues, such as enshrining the need to have a presumption of innocence and the right to silence, although there has not really been any discourse about that, which has been evidenced in the debates that have happened so far. The Commission has incorporated into its action plan that in 2014 we will start again on a new process of what should be covered next. So maybe we will sit down and say, "We have achieved this much. What do we think we can hope to achieve after that?" However, I agree with the other speakers that it is not really the idea of what the headline right is; it is how you make that right effective. Those headline rights come straight out of Article 6 of the European Convention[3]. The whole point of this activity at EU level is to make it practical from the outset.

Q35 Lord Elystan-Morgan: Under the treaty, the EU only has competence to harmonise criminal procedure to the extent necessary to facilitate mutual recognition in criminal matters that have a cross-border dimension, as you know. Should other means to facilitate mutual recognition, such as more intensive judicial co-operation or more judicial training, be tried first? Should we seek to publicise the gold-plated standard that many of us regard the Police and Criminal Evidence Act 1984 to be?

[3] European Convention on Human Rights.

Ilias Anagnostopoulos: I would answer this question by saying that we have to do both; it is not "try first" but "try in parallel and intensively". Indeed, there is much to do in relation to education and training and all that. We are far behind what would be necessary, so much work has to be done in this area. This is a very appropriate field of action for the European Union because implementation is something that can have rules, evaluation, reports and discussions, which would result in improving the situation compared to what we have today.

The Chairman: I think that perhaps that is agreed by everybody. Is it?

Jodie Blackstock: It is. Just in relation to the Police and Criminal Evidence Act aspect, when the UK is negotiating at a European level it is that instrument that we turn to. Indeed, when we were negotiating with Scotland, that was the instrument that we turned to for what standards ought to be. It is so much further ahead of many other member states.

Lord Elystan-Morgan: So the initiatives need not be assumed to come from above, from an overarching body down. They sometimes come up from the grassroots.

Jodie Blackstock: Indeed, and that is the approach that the UK has taken to these things. Where there is divergence, we appear not to want to opt in, which is unfortunate.

Q36 Lord Temple-Morris: I just wanted to ask about that section of the question dealing basically with serious cross-border crime. There are a whole number of instruments that come out, most of them unimplemented, dealing with all these matters. Perhaps I could direct this question at Anna Odby. You are a specialist in money laundering. It might help us to know how that practice works in practice—bearing in mind that the European institutions mainly are advisory to national courts or prosecution authorities—if you have to chase your money around Europe.

Anna Odby: The money-laundering directives are slightly separate from mutual recognition instruments in the sense that they were originally developed as a single market measure. The idea was that you would avoid the sensitivities of EU involvement and criminal justice by

dressing it up, if you like, as a single market measure. It has worked well—perhaps too well. There have been various criticisms, as I am sure you are aware, of the 'gold-plating' of the directive here in this country. It has, however, caused an awful lot of problems, particularly in cross-border practice, in part due to the differences in how breaches of the obligations imposed by the directive have been treated. In this country they are punishable by criminal sanctions. That is not the case in many other countries in Europe. Perhaps the experience of the money-laundering directives in that sense lends support to the idea that the EU should introduce harmonised sanctions for the purpose of money-laundering enforcement. That example is in many ways different from what we are discussing today because here we are concerned not with substantive criminal law but with criminal procedure and mutual recognition instruments. I would add that, even if this instrument was primarily concerned with other issues, one interesting side effect has been the impact it has had on legal professional privilege across all EU member states. If you are familiar with the detail of the obligations imposed by the second money-laundering directive, it includes an obligation on lawyers to make a suspicious activity report if they suspect that their clients are involved in money laundering. For this purpose, you almost have an EU definition of legal professional privilege or the professional secret. Having established that definition in one instrument, it is difficult not to carry that interpretation across others. That becomes difficult in light of recent developments at the EU—for example, the debate as to whether in-house lawyers should appear in front of the European Court to represent the client whom they are employed by. In my mind it highlights the incredibly pressing need for there to be joined-up thinking, for definitions—no matter what area of EU law we are talking about—to correspond to each other and for there not to be any inconsistencies of approach.

Q37 Lord Boyd of Duncansby: I declare an interest as a Scottish solicitor-advocate. To what extent does EU legislation, including the proposed legislation on criminal procedure,

add practical value over and above existing instruments such as the European Convention on Human Rights and the Charter of Rights?

Ilias Anagnostopoulos: I think it certainly does. As we know, the Strasbourg court deals only with individual cases. It deals with them after all national remedies have been exhausted. That means that the decisions are not of a general nature, even though they can set some standards which are of general application. They come too late, whereas in EU legislation we can have general rules which are not simply case law. More than that, all the monitoring mechanisms of the European Union are in action after that. I mention the example of the European Arrest Warrant, where the reports filed so far on the implementation of this instrument are very valuable in respect of how it has been implemented and what deficiencies have been located. This is much more general and comes much more quickly than a decision from Strasbourg. So there is added value for sure.

Jodie Blackstock: I think it is worth making a comparison between the way that the court structure works in both Strasbourg and Luxembourg and legislating from the outset. Of course, if a case eventually gets to Strasbourg, it is a reaction to a situation that has already occurred. There is no way of preventing the action from occurring unless you can get an injunction under Rule 39, but that only applies in very certain, prescribed circumstances. There are on the last count 153,000 cases pending in the court and the average waiting time is over five years, which is an extraordinary time to wait to have an alleged breach of a right dealt with. Even then, the court is only able to declare that there has been a breach. It is for the member state to resolve the violation in some way. It is also a mechanism that tries to accord between 47 different countries which have a much wider breadth of different systems. So within the 27 countries and the legislative process it is much easier to add practical value which will prevent breaches of rights occurring from the outset in a way that we can at least attempt to agree between us and apply uniformly across the member states.

Q38 Lord Boyd of Duncansby: You mentioned the difference between the European Court of Justice and the European Court of Human Rights. Can I ask quickly if you have any concerns about the impact on the workload of the Court of Justice as a result of this?

Jodie Blackstock: I think that there will be concerns. I have set some of those out in my written evidence response. We would adopt the concerns that this Committee had in its own inquiry. We will have to wait and see. Of course, the court is nowhere near as overloaded as the Strasbourg court and it may be that, in this field, we start to see cases going to Luxembourg rather than Strasbourg, where the EU legislation exists in relation to it. That court may suddenly find itself equally overwhelmed. We would not necessarily have concerns about the judicial competence because it is clear from the case law of the court in Luxembourg that they have been dealing with criminal substantive law for many years. They have also looked at criminal procedural law. Even where there was not legislation in place, arguably, through treaty competency, they adopted the need for penalties in relation to the first-pillar legislative acts. Equally in relation to fundamental rights, they have established their own EU fundamental rights case law since the 1970s. So the judicial competence is there. Whether the capacity is, too, is another question.

Q39 Lord Renton of Mount Harry: My question touches on material that I think Anna Odby was getting to just a few minutes ago. Would you like to comment on evidence we have heard previously that the original proposal by the Commission on access to a lawyer would have had a significant adverse impact on UK investigations and prosecutions? Following on from that, to what extent does EU legislation, including proposed legislation on criminal procedure, go further than existing international and UK laws? Does it cause perhaps too much disruption to our national criminal law procedures?

Anna Odby: I would agree that, certainly as drafted, the directive on access to a lawyer would go beyond the current position in the UK, but I would say, at least in my personal

view, that that is the point of it. There are obviously going to be cost concerns, and there are broader concerns about whether the safeguards that have evolved organically in what is in this case an adversarial system can be adequately provided for in an instrument that also has to be applicable in an inquisitorial setting. In terms of the overall question, where as far as I am concerned the proposals so far have not caused insurmountable difficulties—

Lord Renton of Mount Harry: Not insurmountable, but difficult.

Anna Odby: There are difficulties, yes, but with appropriate consultations and a willingness to engage, they can certainly be the subject of creative solutions. I do not think that you should necessarily give up just because something is alien to your system. I am aware that the Committee has heard evidence about the ways in which prosecutions and investigations would be hampered in the case of the draft directive on access to a lawyer, but that betrays, as the CCBE has pointed out, a fundamental misunderstanding of the role of a defence solicitor or a defence advocate. They are not there to obstruct the process. In fact, if a more sensitive view was taken, the argument would be that increasing access to them so that their involvement can be more effective would have the opposite effect. In the long run, it would help to speed up investigations and prosecutions by weeding out those instances when prosecutions and investigations should not have been undertaken in the first place.

Ilias Anagnostopoulos: The court in Strasbourg has put much emphasis on a series of decisions that affect legal assistance from the very beginning of a criminal procedure. This is the essential safeguard that the proceedings will be fair. Indeed, this is a key point in the CCBE's answer. Lawyers are not an impediment to the effective investigation of offences. They are there to guarantee that the proceedings are fair, that evidence is collected in the proper way, and that it can be admissible at the trial hearing later. Excluding them from the early stages means that miscarriages of justice may occur and that valuable evidence would not be admissible after what is set out on this basis. So if we take this point seriously, each

national system has to check its own provisions to see if they are compatible with this standard.

Of course, there will be a need for changes. In France, there was the famous or infamous *garde à vue*, which meant that detained persons were not allowed to see a lawyer until 48 hours after they were arrested. It has been a revolution in France that they now have to change it, but it will be done. In my view, it had to be done. It is a higher standard to grant access to a lawyer. So I do not think that national systems should be unwilling to adapt their rulings in some ways. If I may involve the Council's decision on the Roadmap, it is stated that, where necessary, applicable standards are to be raised, so adding some safeguards and raising existing standards is not something that is not desired by member states. It is something which is clearly stated in this decision.

Q40 Lord Elystan-Morgan: Could I say that the attitude taken by many of us who respectfully disagree with that view is not based in any way on the supposition that a lawyer is there to be a sort of wall of glass making life difficult for interrogators? What we had in mind was an example that, although I have trotted it out before, I think it is a good one. The police are called to an incident where a person has been killed. A suspect, X, is standing within 10 yards of the site. A policeman asks him, "Do you know anything about this?" and X replies, "Yes, I killed him". If it be the case that you insist that X the suspect would have to be represented by a lawyer before that crucial evidence is admissible, we would say that that is not practicable. Those of us who have practised English law, and I suspect Scottish law as well, would have regarded that as part of *res gestae*—something which happens so close to the event itself that it is virtually incorporated in it. That is the sort of example I have in mind. The next one is this. Under our codes under PACE,[4] a judge can say that, even if there has been a breach of the codes, he does not believe that such a breach is fatal to the fairness

[4] Police and Criminal Evidence Act 1984.

of the trial. We think that that flexibility is properly placed in the judge. Those are the basic attitudes that command our own response to this question.

The Chairman: I shall ask you to comment briefly on this because this inquiry is on a slightly wider point than just the proposed directive covering access to lawyers.

Jodie Blackstock: Perhaps I may come in here because I read the evidence that you heard in relation to this. We would disagree quite strongly about the way in which the proposal was put to you. In fact, on the last point you made about Section 78 of PACE, the exclusionary rule is in the proposal. It was in there from the outset and it is even stronger now in the current draft. This proposal was drafted by a criminal solicitor with many years' experience of the English system. She came at it from as much of a common law perspective as any of us would wish, bearing in mind the constraints of getting a piece of legislation approved within the Commission's system. It was also a draft piece of legislation which was prepared for negotiation. Before the UK decided not to opt in to it, I understand that there had been two meetings of the working party in Brussels at which exactly the same concerns as ours were raised in relation to those aspects on which you heard evidence. Those aspects of concern have now fallen away in the current draft.

The other issue on which you heard much evidence from the police and the Lord Advocate was how we grapple with evidence-gathering situations. What they did not explain to you was that, in the way it was drafted, it had a qualification in it, which was that there already had to be a requirement in the national law for the person to be present at that stage, so any search of a house does not apply. Secondly, where the acquisition of evidence would be affected by having a lawyer present, the member state would not have to apply the provision. So, unpacking it, it seemed to us that the only place where there would be an actual concern from the UK perspective was in the taking of fingerprints and DNA at a police station.

The Chairman: Forgive me, but we are going down a secondary inquiry on access to lawyers. We do not have time. The draft will come back to us and I have no doubt that we will be able to comment on the changes. Thank you for warning us in advance of what we are likely to be getting.

Q41 Lord Blackwell: This is probably a fairly quick point, which has been referred to earlier. EU legislation on mutual recognition, criminal instruments and the development of instruments, such as the arrest warrants, has advanced faster than legislation in respect of the right of individuals in criminal proceedings. I just want to check whether that is a common view. If so, why is it that way?

Ilias Anagnostopoulos: It is recognised in the decision on the Roadmap that this side of co-operation has gone forward and that the other one, procedural rights, has not. I would say that there is more a lack of political will to advance this second leg of legislation, although I respect the reasons related to divergence of national assistance and so on. It is clear that the political will was not there, which is why the initial initiative by the Commission on procedural rights failed even after it had been limited to what was thought to be a minimum by the German presidency. After the decision on the Roadmap, it seems that the will is there again to go on with the protection of procedural rights. I would say that it is clearly a matter of political priority and what is more important.

Lord Blackwell: Has thought been given to what those things would be if they were to be taken forward? Are there concepts on the table?

Ilias Anagnostopoulos: Procedural rights are an ongoing project because we still have access to lawyers and we have the attention of the Green Paper on vulnerable persons and others. There is still a lot to be done as regards presumption of innocence and pre-trial detention.

Q42 Lord Rowlands: Are there areas of criminal procedure unnecessarily being covered by European legislation or proposed legislation? Conversely, are there areas which are not covered but which should be?

Jodie Blackstock: Certainly, as regards areas that have not been covered but which should be, that is easy. It is the programme that we are on now and have been discussing all afternoon. We all would have liked to see the procedural safeguards programme in place from the outset, as well as the victims package of instruments. It relates to both of them and not just the suspects. It becomes harder to impact where you would not have an instrument on prosecution. As I said from the outset, once you start on one instrument, the whole of criminal procedure comes into play. It is difficult then to ask whether we ought to ensure efficiencies across the board. Indeed, some of those instruments where one might say, "Well, if we stop there", and we do not need to implement, are useful from a defence perspective—such as the supervision order relating to bail. We hope that when that is implemented at a national level, it will resolve some of the lengthy periods of pre-trial detention for people in another member state who are, therefore, a flight risk.

There may be some questions about the raft of instruments that we have had on allowing previous convictions into trials in other member states. But the converse argument is that, if you have a serious offender where bad character can be admitted in a criminal trial in one country, why ought you not to know that they have been convicted of a similar crime in another member state?

With all of these instruments comes the safeguard, which is not necessarily about the right of access to a lawyer. It is what the person can do—their right to be heard—to object to the use of the co-operation instrument. That is the problem. As we found with the European Arrest Warrant, once it is issued you cannot object in the executing state in which it is issued that you are in the wrong country. Because you are in the wrong country, you also

cannot object about how you would be treated at trial in the executing state. There is still much work to be done over and above these minimum safeguard instruments and how these instruments affect the suspect, the victim or the witness on the ground.

Ilias Anagnostopoulos: I would add the conflict of jurisdictions. We have a framework decision, but it would be better for it to be 'Lisbonised', so that we have a directive which would advance this issue. It is important in a common judicial area that we have one jurisdiction for each case and do not have parallel proceedings going on in many member states. The double jeopardy rule—the *ne bis in idem* rule—just prevents a second conviction after the first but it does not solve the problem of multiple jurisdictions dealing with one and the same case.

Q43 Lord Rowlands: We have received written evidence from a professor of European law which questions one proposal, which is the right of victims. In his submission, he argues that there is no real cross-border dimension and that often cases involving victims are local and national. He even suggests that national Parliaments should query the subsidiarity issue on the proposal on the right of victims. How would you react to that?

Jodie Blackstock: I would argue that, when we are trying to build a new area that rests on trust and judicial co-operation across borders, it is imperative that all people affected by that system know that when they travel abroad they will be dealt with in the same way as when they are at home. It becomes incredibly difficult trying to unpack a definition of cross-border activities. You get to the stage where you may be discriminating and saying, "In this case you are a cross-border person, so we need to give you better safeguards than we would for our own nationals", which is why the cross-border aspect has been set aside in relation to these instruments. There was much debate on that in Brussels.

Lord Rowlands: So you are saying that, as regards the right of victims, there is no evidence that there is a cross-border dimension.

Jodie Blackstock: There are many cross-border dimensions in respect of people who go abroad on holiday and are victims of crime if they have their bags stolen *et cetera*. It happens on an extremely regular basis. The whole purpose of this new 'Lisbonised'—to continue that phrase—legislation is to ensure that what was put in place previously on the status of victims and compensation for victims of cross-border crime was implemented in a practical way.

It comes to a point where it is very difficult to have two sets of procedures—for example, "Because this person comes from the UK and they are in Romania, we need to make sure that they are provided with different standards from Romanians." It would be completely impractical, which is why it has been done under the harmonisation instrument. The whole point is to facilitate co-operation across borders but, in practice, it is much easier to do that from the national level.

This instrument is trying to achieve respect for the victim of crime. It goes only as far as to say that we ought to have in place measures that recognise the different capacities of victims, which are dependent on their physical and mental abilities and their age. It also looks at compensation. Victim support services are a very important aspect of this instrument and having a support network in place for people who have had crimes committed against them whether they are at home or, most important from our perspective—

Lord Rowlands: So you do not think that there is a subsidiarity issue.

Jodie Blackstock: No.

Q44 The Chairman: Can I ask the other two witnesses whether they think that there is a subsidiarity issue? I can see Lord Rowlands's point that the only cross-border element, perhaps, is that people have come across the border; the actual crime is in the particular country.

Anna Odby: Perhaps I may add to that. There is no definition of cross-border, in fact. If you look at the proposal so far for minimum procedural standards, these minimum procedural

standards apply across the board to criminal proceedings, not just criminal proceedings that have a cross-border dimension.

Lord Rowlands: That qualification of the condition placed in the treaty is not really meaningful.

Anna Odby: I would not interpret the treaty reference as a qualification in that respect and it does not appear as if the EU institutions have interpreted the treaty in that way either. What I would add is that there is an express treaty basis for at least minimum procedural standards to protect victims' rights. It is one of the three areas under Article 82 subparagraph 2 of the Treaty on the Functioning of the European Union, together with admissibility of evidence and individual rights.

The Chairman: I do not want to cut anybody short. Mr Anagnostopoulos, did you want to add to this? The Minister is replying, so I suspect that, in about a quarter of an hour, there will be a vote, and it would be quite useful if we dealt with the last question. Mr Anagnostopoulos, do you want to add to this question about victims and subsidiarity?

Ilias Anagnostopoulos: Not really. I agree with what has been said. There is a cross-border element there, so it makes sense to take action in this area.

Q45 Lord Temple-Morris: Could I just limit the question to the contribution of the UK, which potentially is very considerable? It could be much more considerable than it is; nevertheless it is a fairly sound contribution that it has made. At the moment we opt in on a case-by-case basis. We have a national attitude rather than a European attitude in general; I am generalising. I am just wondering what your view is on whether we could do a little bit better in terms of changing things or whether, in fact, we object too much. It is a mischievous question.

Ilias Anagnostopoulos: Well, the opt-in, opt-out clause was a compromise that was made in order for the Lisbon Treaty to be signed and come into force. This, of course, does not

concern only the United Kingdom, even though, of the countries that have this opt-in, opt-out facility, the UK is the most influential one. If the opt-out alternative is being used very frequently, it is obvious that this would not promote the European idea and European integration. Even though there are grounds, of course, on which the UK has requested to have this opportunity, on the other hand it is clear that the more opt-outs we would have, the less European integration we would have, at least over the Channel. So I think that it would be really important for European integration that the UK finds a way to opt in so that the opt-outs remain the exception, not the rule.

The Chairman: Has anybody anything to add? Do we agree? Thank you so much. I am sorry to bring matters to a conclusion rather quickly. Nevertheless, we are very grateful to all three of you for having come this afternoon and answered these questions on what, even for those of us who say we are lawyers, are not necessarily familiar topics. Thank you very much indeed.