

The possible Brexit paradox: more extensive and sincere criminal justice cooperation?

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Police Detectives on the Tor Network

Content of this presentation

- The need for systematic international responses to transformative (especially technological) challenges
- The concurrent impact of fiscal austerity
- The risks of exceptionalism: UK political volatility and need to bear in mind that Brexit is not an existential challenge to the EU, but they exist
- A chance for progress? – The UK Government's desire for a [security/CJ] treaty with the EU
- Despite Brexit's uncertainty: four conclusions

Systematic EU response to transformative global economic, social and technological challenges

In terms of structure, speed, cost and risk of error there are four levels of *inter-jurisdictional* criminal justice cooperation (all heavily reliant on ITC) with potential evidential significance:

1. Algorithmically-enabled (distinguishable from 'algorithmic decision making') high volume sharing of scientifically standardised data
2. Algorithmically-enabled high volume searching of less standardised data that has to be rationed (for processing and validation capacity reasons)
3. Judicial record sharing (may require some knowledge of comparative law)
4. Evidence gathering and criminal justice casework (time consuming – hence expensive - because of significant (possibly poorly understood) differences in procedural law or the law of evidence (cultural as well as doctrinal) and a great deal of non-standardised information.

Circumstances requiring further systematic responses to rapid global economic, social and technological change

- High volume Freedom of Movement has had no significant impact on trends in traditional UK crimes & nothing significant for the country of origin of detected offenders, but no serious dissent from the view that the EU system is vitally important for both UK criminal justice and security
- In contrast, digitalisation and the exponential increase in jurisdictionally uncertain offending has been ***doubly transformative***:
 - a) The rapidly increasing volume and consequential harm from cyber-enabled (e.g. attacks on IT-dependent infrastructure) or cyber-enhanced (e.g. cross-border phishing) crime
 - b) Increasing relevance in traditional crime, epistemological complexity of digital evidence and conflicting scientific/technological cultures
- Despite organisations and individuals responding to cyber threats by taking preventative/protective measures and under-reporting, a) and b) both are placing huge demands on criminal justice resources and b) - *coupled with traditional cjs underfunding* - have resulted in deeply troubling UK fundamental rights (due process) failures

Systematic EU response to transformative global economic, social and technological challenges

- The *securitisation* of criminal justice that began with terrorist crimes and resulted, for example, in interconnectivity between public data systems (e.g. EU criminal and refugee databases) and with private data (e.g. PNR) *is also accelerating with cyber threats to 'national security' (very broadly defined)*
- Legal changes occur more slowly (reactive) than crime/ITC developments, but the EU system (*inevitably imperfect and far from risk free*) for *inter-jurisdictional* cooperation has two advantages:
 - a) It is moving quickly from the old *inter-state* cooperation model (MLA) to judicially supervised MLR: speedier/less-expensive, lower level of political intervention/delay and increasingly (subject to national law) consistent with defence autonomy
 - b) Fundamental rights protection (via ECHR, CFREU and EU data protection law) and judicial problem resolution (via dialogue between CJEU and national courts) are hard-wired into the system

The concurrent impact of fiscal austerity on the UK criminal justice system (cjs)

1. Reducing capacity and capability (e.g. prisons, police, forensic science & legal aid) & interaction with other trends
2. Will intensify with Brexit (loss of tax revenue, but additional Brexit driven additional *non-cjs* expenditure)
3. Loss of efficiency if UK cjs no longer benefits from EU cooperation system (e.g. ability to identify/obtain back stories for the few serious offenders within the 'generally law-abiding and tax-paying crowd')
4. The Brexit vote resulted in a spike in 'hate' crime and the UK faces the prospect of further Brexit enhanced or created crime (e.g. crimes/harms in an increasingly 'lightly' regulated labour markets and serious 'McMafia' risks in Ireland)

The risks of exceptionalism: UK political volatility and need to bear in mind that Brexit is not an existential challenge to the EU, but they exist

My risk analysis (consistently argued in presentations since 2016):

1. UK political volatility (initially questioned whether the May Government would survive, but now and after premature Article 50 action, it seems to live on only because decision making is paralysed by internal divisions)
2. Eurozone instability
3. Visegrád 4/ authoritarian populism
4. Terrorism
5. External shocks

Five EU tensions between (identified in Laffan 2018):

1. the national and the European, the whole and the parts
2. ***the EU as a problem-solving arena and a polity***
3. states and markets, between public and private power
4. the EU and its wider international environment
5. 'ever closer union' and the various forms of 'variable geometry' that has increasingly become part of the dynamic of integration

A chance for progress? – The UK Government's desire for a [security/CJ] treaty

When asked by a House of Lords Committee in March to suggest the key features of such a treaty I advocated four key principles:

- **Reciprocal aim:** protection for (a) citizens, residents and visitors in the UK and in (b) all EU member states and, hopefully also, (c) other EEA states
- **Wide scope:** security and criminal justice cooperation in the broadest sense (e.g. including offending relating to food, and transport sharing information for employment vetting for safeguarding purposes and MLR - if necessary using criminal sanctions - of domestic violence prevention orders made by family courts)
- **A clear penal objective:** to prevent discriminatory punitiveness.
- **Technological resilience: requires** comprehensive and flexible structure (i.e. readily adaptable to changing social and economic circumstances, and above all new developments in science and technology)

Despite Brexit's uncertainty: four conclusions

1. The development of the JHA acquis - above all the successful exploitation of new science and technology - supports a view that history is on the side of the EU with its inter-jurisdictional cooperation *system* and (albeit imperfect) checks and balances
2. The UK needs an internal dialogue – including cjs professionals and academia - about how a future EU-UK relationship might be devised for mutually beneficial ‘protection from harm’ well beyond our traditional notions of security and criminal justice
3. In terms of UK right-wing political discourse (‘global Britain’ v EEA) reducing higher crime/security risks is likely to/should require – paradoxically - abandoning ‘cherry picking’ for the greater compliance with the most or all of the JHA acquis
4. This will require the EU to place its role as a problem-solving arena *par excellence* before that of a polity, and tap unprecedented reserves of patience for several years of difficult negotiation.

References (1)

Wilson, T.J.(2018), 'The implementation and practical application of the European Investigation Order in the United Kingdom: an academic perspective' (English text only) in Á Gutiérrez ZarzaLos (ed.) *Los avances del espacio de Libertad, Seguridad y Justicia de la UE en 2017: II Anuario ReDPE* ,Wolters Kluwer edit.

House of Commons Justice Committee, Oral evidence: Implications of Brexit for the justice system, 10 January 2017 Questions 82 – 167 <
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/implications-of-brexit-for-the-justice-system/oral/45203.html> >

House of Lords European Union Home Affairs Sub-Committee, [uncorrected] Oral evidence: the proposed UK-EU security treaty, Wednesday 21 March 2018 Questions 10 – 19. <
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-the-proposed-ukeu-security-treaty/oral/81352.pdf> >

References (2)

Wilson et al. (2016) T J Wilson, M W Stockdale, A Jackson, S Carr, G Davies, D Johnson and E Piasecki, *Evidence to the House of Commons Justice Committee Implications of Brexit for the justice system inquiry: evidence by members of the Northumbria Centre for Evidence and Criminal Justice Studies, School of Law, Northumbria University.* <

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Implications%20of%20Brexit%20for%20the%20justice%20system/written/43268.html> >

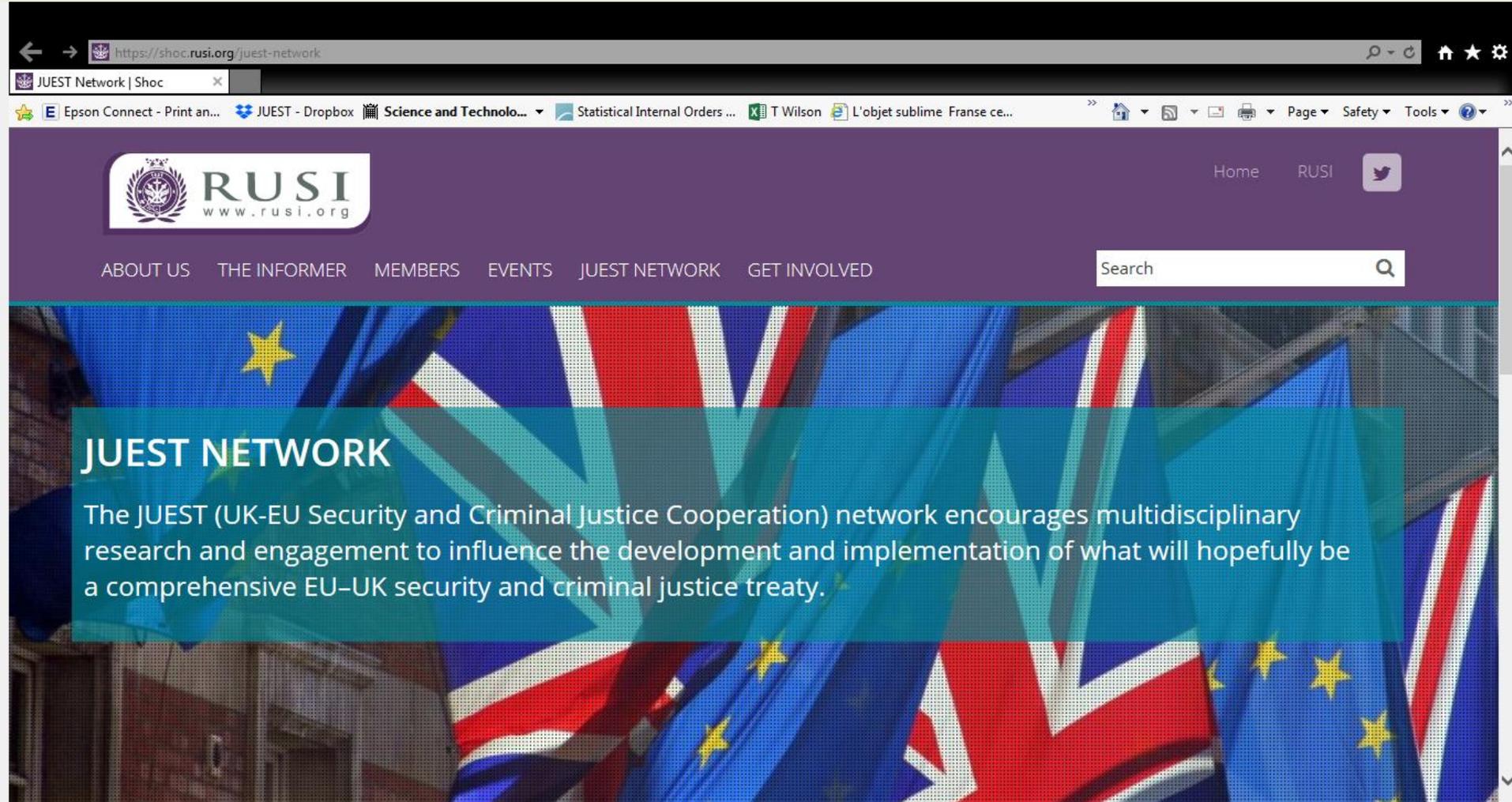
Wilson, T (2015), 'The Global Perspective' in M. Peplow (ed.), *Annual Report of the Government Chief Scientific Adviser 2015: Forensic Science and Beyond: Authenticity, Provenance and Assurance: Evidence and Case Studies*, Government Office for Science. <

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/506462/ga-15-37b-forensic-science-beyond-evidence.pdf >

Wilson, T. J., 'Criminal Justice and Global Public Goods: The Prüm Forensic Biometric Cooperation Model', *The Journal of Criminal Law*, 2016, 80(5) 303-326. <

<http://nrl.northumbria.ac.uk/27800/1/TJW%20JCL%20April%202016%20Seminar%20paper%20post%20proof%20version.pdf> >

Academic/professional engagement with the [security/CJ] treaty's development



https://shoc.rusi.org/juest-network

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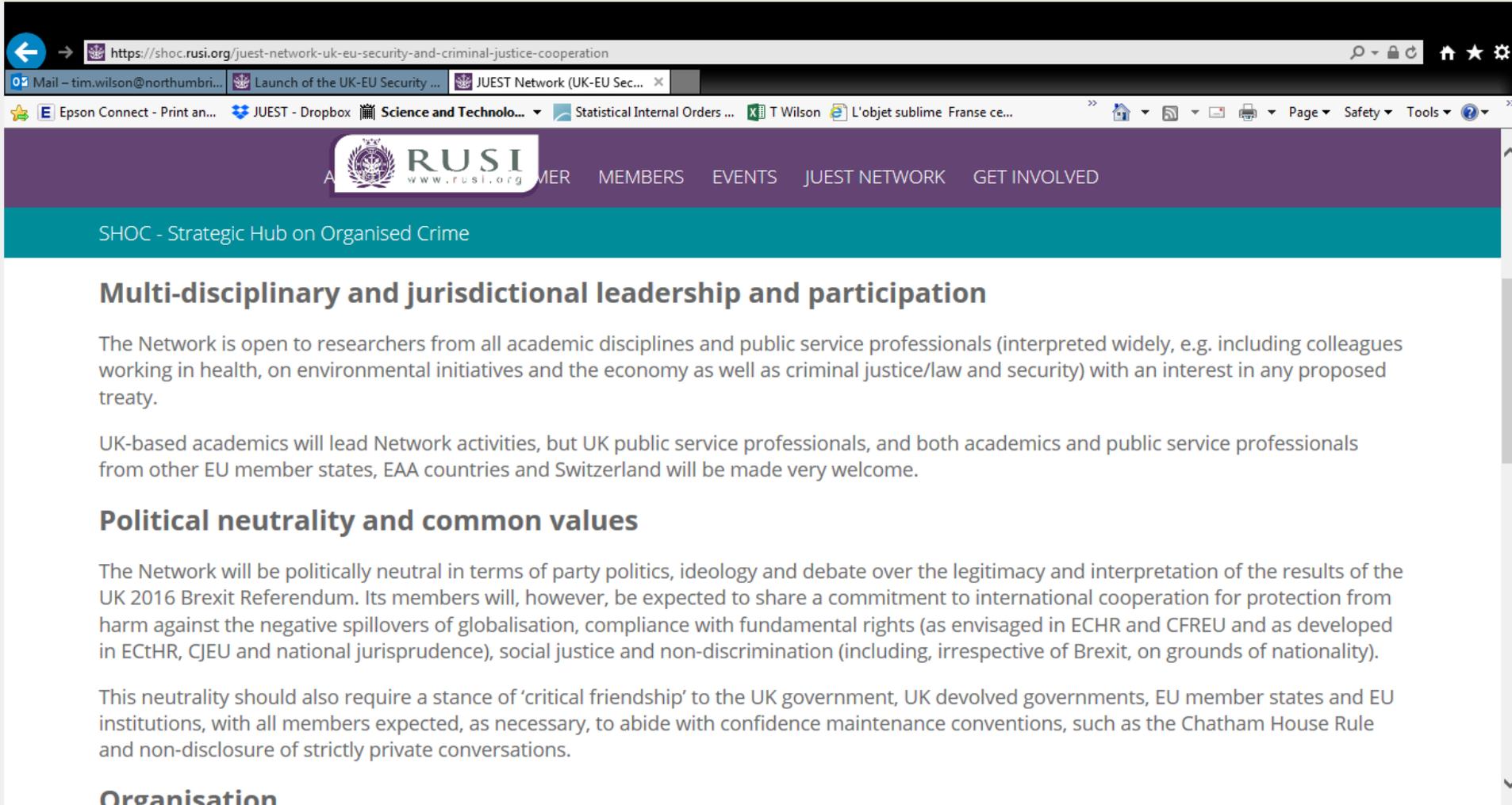
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JUEST NETWORK

The JUEST (UK-EU Security and Criminal Justice Cooperation) network encourages multidisciplinary research and engagement to influence the development and implementation of what will hopefully be a comprehensive EU-UK security and criminal justice treaty.

Academic/professional engagement with the [security/CJ] treaty's development



The screenshot shows a web browser displaying the RUSI website. The address bar shows the URL: <https://shoc.rusi.org/juest-network-uk-eu-security-and-criminal-justice-cooperation>. The browser tabs include 'Mail - tim.wilson@northumbri...', 'Launch of the UK-EU Security ...', and 'JUEST Network (UK-EU Sec...'. The website header features the RUSI logo and navigation links: 'HOME', 'MEMBERS', 'EVENTS', 'JUEST NETWORK', and 'GET INVOLVED'. Below the header, a teal banner reads 'SHOC - Strategic Hub on Organised Crime'. The main content area has a white background with a teal header for the section: 'Multi-disciplinary and jurisdictional leadership and participation'. The text below this section discusses the network's openness to researchers and public service professionals, the role of UK-based academics, and the network's political neutrality and common values. The section 'Organisation' is partially visible at the bottom.

Multi-disciplinary and jurisdictional leadership and participation

The Network is open to researchers from all academic disciplines and public service professionals (interpreted widely, e.g. including colleagues working in health, on environmental initiatives and the economy as well as criminal justice/law and security) with an interest in any proposed treaty.

UK-based academics will lead Network activities, but UK public service professionals, and both academics and public service professionals from other EU member states, EAA countries and Switzerland will be made very welcome.

Political neutrality and common values

The Network will be politically neutral in terms of party politics, ideology and debate over the legitimacy and interpretation of the results of the UK 2016 Brexit Referendum. Its members will, however, be expected to share a commitment to international cooperation for protection from harm against the negative spillovers of globalisation, compliance with fundamental rights (as envisaged in ECHR and CFREU and as developed in ECtHR, CJEU and national jurisprudence), social justice and non-discrimination (including, irrespective of Brexit, on grounds of nationality).

This neutrality should also require a stance of 'critical friendship' to the UK government, UK devolved governments, EU member states and EU institutions, with all members expected, as necessary, to abide with confidence maintenance conventions, such as the Chatham House Rule and non-disclosure of strictly private conversations.

Organisation

Academic/professional engagement with the
[security/CJ] treaty's development

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*Then please visit the JUEST
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[https://shoc.rusi.org/juest-
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