

Global Simplification of Extradition: Views of Practitioners in New Zealand, Canada, the US and EU

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Introduction

In the development of transnational criminal law most scholarly attention has been paid to changes in the definition and scope of transnational crimes, to the neglect of changes in the definition and scope of transnational criminal procedures.¹ From the viewpoint of the defendant subject to many different criminal jurisdictions, procedural cooperation in regard to transnational crime is a significantly more immediate concern.² This article responds to that criticism by exploring that most complicated form of international cooperation against transnational crime – extradition – and more particularly, the discernible long-term trend towards the simplification of the conditions for extradition in the law of many states. The aim of this simplification process is to increase the level of cooperation against serious transnational crime, although how far states are prepared to or aiming to go is not clear.³ Simplification appears to be taking place in four main thematic areas:⁴

- a. The nature of the extradition procedure: the characterisation of the extradition process appears to be shifting from criminal to quasi-criminal or even administrative.
- b. Simplification of the substantive and procedural conditions for the use of the state's coercive powers and the quality of criminal justice in the requesting State: this appears to

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¹ F Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political' (2015) 6(1) *Transnational Legal Theory* 89, 91.

² See S Gless, 'Birds-Eye View and Worm's Eye View: Towards a Defendant-Based Approach in Transnational Criminal Law' (2015) 6(1) *Transnational Legal Theory* 117, 123.

³ See N Boister, 'Global Trends towards the Simplification of Extradition Procedures: From the Substantive to the Procedural without a Universal Framework of Reference' in T Maluwa, M Du Plessis and D Tladi (eds), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Leiden: Brill/Nijhoff, 2017) 511-546.

⁴ Many of the elements of these themes are explored in Boister, *supra* n 3, from 517.

be occurring through erosion of the conditions of double criminality, extraditability and specialty, and the 'exception to the exception' approach to bars such as the nationality, political offence and death penalty exceptions, as well as the dispensing with the need for evidence and the adaptation of rules of procedure.

- c. Acceptance of sovereign crime control rationales for simplification of extradition and erosion of non-legal conditions for extradition: simplification of extradition appears to be being pushed along by rationales like crime suppression and comity, while non-legal conditions like cultural affinity are not seen as essential to successful extradition.
- d. Expansion of the legal bases of extradition: the material scope of extradition appears to be expanding through reliance on a growing number of legal bases, including bi- and multilateral treaties, domestic legislation and reciprocity.

A parallel but inter-related process to simplification of extradition proceedings is the issue of interaction between extradition and the rights of the person subject to the extradition process. There is a general trend to a broader human rights emphasis in extradition⁵ that appears to be pulling up short of close scrutiny of a requesting State's criminal justice system and the potential impact this may have on the individual, and there is some dispute as to whether this scrutiny should be a judicial or executive task. The rise of human rights may serve as a complicating factor in the simplification process while at the same time serving to enable it by justifying it.

This process of simplification alters the triumvirate of interests in the extradition process. Simplification or reduction of the conditions for extradition increases the power of the requesting state in the extradition process at the expense of the requested State. It also alters the position of the individual subject to extradition, decreasing the substantive barriers to extradition thus making them more vulnerable to extradition, while potentially improving their human rights protections in regard to due process and humane treatment. The process of simplification of extradition is not, however, that well understood. In an effort to get a better grasp of the nature of this process, what is driving it, and where it is heading, this paper eschewed reliance on existing comparative research

⁵ CJR Dugard and Christine van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 *American Journal of International Law* 187-212.

in making such an assessment in favour of soliciting and synthesising the views on the simplification of extradition of those most closely involved in the day to day formulation of extradition policy and running of extradition procedures – expert extradition practitioners. It thus sought authoritative guidance from individuals whose opinions, because of their role and experience, carry more weight. The paper is structured as follows. Part one discusses the research method adopted in gathering and analyzing the experts’ opinions. Part Two reviews the data gathered from answering the seventeen questions put to the extradition experts arranged in some of the topics central to simplification articulated above: the character and effectiveness of extradition, the substantive and procedural requirements for extradition, human rights as a condition for extradition, justifications and non-legal conditions for extradition, *aut dedere aut judicare* as an alternative to jurisdiction, legal platforms for extradition, and finally the possibility of radical reform of extradition through pursuit of a global arrest warrant or failing that a no-dress rehearsal rule in extradition. Part Three discusses their responses drawing out common themes. Finally, some conclusions about the nature of the process of simplification of extradition are drawn.

I. Method

The raw data was provided by a limited number of semi structured qualitative/in-depth interviews⁶ of a limited selection of key legal practitioners and officials in target states/regions. These interviews followed a set of questions designed to identify the participants’ views of problems with extradition, simplification solutions and problems with the solutions.

a) Choice of interviewees

One of the main methodological questions was who qualifies as an expert on extradition. In regard to the generation of policy and practice of extradition, experts were considered to be those who had special technical and institutional knowledge of this policy and law because of their specific functions. The interviewees ($n = 22$) were selected individuals from intergovernmental organisations, government departments and in private practice in:

⁶ See A Bryman, *Social Research Methods*, 6th edn (Oxford: 2016, OUP), 465 et seq; B Curtis and C Curtis, *Social Research: A Practical Introduction* (London: Sage, 2011), 27 et seq; H Rubin and IS Rubin, *Qualitative Interviewing: The Art of Hearing Data*, third edition, (London: Sage, 2012), generally. Ethical approval was sought and granted from the University of Waikato. Each interviewee was asked to sign a consent form and given a Participant Information Sheet entailing an outline of the project and a list of questions.

- New Zealand and Australia in order to obtain information on what they perceive as being the most significant challenges to extradition and potential reform of the law ($n = 2$ out of 5 who agreed to be interviewed⁷);
- Canada and the US because of their very active extradition arrangements ($n = 9$ of the 10 who agreed to be interviewed⁸);
- the Netherlands, Belgium, Scotland, England, Germany, the EU, UN, and a European NGO because of the unique solutions developed in Europe ($n = 11$ of the 12 who agreed to be interviewed⁹); and
- the UN for insight on global solutions ($n = 1$)

One of the obvious limitations of the selection is that the participants were drawn from Western states. The advantage of doing so though is that Western states are the most active in extradition and in particular in the simplification of extradition. The sample of participants was recruited purposefully to get a mix of prosecutors and justice officials, defence counsel, judges, officials working for International Organizations, and representatives of NGOs concerned with extradition. The selection was made partly on the basis of personal knowledge and partly on the basis of recommendations by other experts in a participant driven process.¹⁰ It made possible the generation of a list of key persons closely involved in extradition in different countries and organisations both at a practical and policy-making level, the kind of experience directly relevant to the aims of this study. Of the 22 participants, three had less than ten years' experience, fourteen ten years or more and five some twenty years or more experience in extradition.

The participants were asked at the outset of the interview how they had become involved in extradition. Ten had either been or were still prosecutors who had moved into extradition and become specialists in extradition. They had then moved on to a role either leading specialist extradition teams, or in national justice ministries, or central authorities, or acting as liaison officers, or in a specialist role in the courts working on coordination of international cooperation.

⁷ Three dropped out: one was promoted to the bench and declined to participate, another was briefed in a high profile case involving the US, and another was unavailable. Sensitivity of extradition in NZ because of the Dotcom litigation frustrated all further efforts to recruit participants.

⁸ One was called to a case conference in Denver the day of the interview in Vancouver.

⁹ One was called to replace a colleague at a Conference.

¹⁰ DD Heckathorn, 'Respondent Driven Sampling: deriving valid population estimates from chain-referral samples of hidden populations' 49 *Social Problems* (2002) 11-34.

Five of the ten had pioneered the formation of specialist extradition teams or served as directors of these teams.

One participant had joined a justice ministry in an expert role after beginning as a researcher, another after working there as an intern.

There were various other pathways into this specialist area. An academic participant was drawn into a judicial role because of their specialist interest, a judge had moved to a career in various IGOS, a researcher with an academic background in extradition had joined an IGO, while a lawyer had joined an NGO which worked on extradition's impact on human rights.

The career path of the six defence extradition specialists was haphazard. One had simply inherited extradition practices, another had moved into extradition because of their human rights expertise, two had done so through their research on extradition, another through working on refugee cases, and finally one had been both prosecutor, worked in international cooperation where he had played a leading role, and then made the shift to the defence.

It would have been highly desirable to increase the number of interviews and to standardize the number of interviewees per country, and per category but this was a limited project with limited funding, and accessing these experts no simple issue because of the relatively obscure and highly sensitive nature of the work they do. Each interview followed an initial approach made more than twelve months prior to the interview. The interviews were conducted from August to December 2016. All participants have been anonymised because of their role in policy making and practice, but labels are used in the analysis to describe their specific kind of expertise and country of origin.

b) Framing the interview

Interviews seeking expert opinion of this kind presented an opportunity to move beyond the insights of traditional research into extradition by providing more nuanced data than general analysis of policy, legislation, case law and extradition statistics. The interviewer was seeking the participants' special knowledge and insights and thus they were permitted to define in some degree what data was relevant,¹¹ but in general the content of interviews was framed by the interviewer. The interviews followed a set of specific questions related to this topic before allowing some final observations by the participants. The questions required descriptive elucidation (what

¹¹ LA Dexter, *Elite and Specialized Interviewing* (reissued Colchester: ECPR Press, 2006) (1st Edition, Evanston: Northwestern, 1969) 18.

are the major hurdles for extradition and why?) and of a normative kind (should evidence requirements be increased or decreased and why?). The aim was to elicit rich detailed answers from practitioners and policy makers, not to obtain a comprehensive set of answers. The project was thus shaped relatively narrowly by existing knowledge relating to extradition, to avoid irrelevant data and to get to conceptual density as rapidly as possible. This partial framework and its basis in existing disciplinary knowledge is reflected in the relatively narrow scope of questions asked of respondents.¹²

c) Conducting the interviews

The usual time limit for an interview was an hour and a half but this varied depending on the interviewee, with some an hour in length and one two and a half hours in length. All interviews were done face to face by the author. Notes were taken by the interviewer during the course of the interview, owing to the objections of some of the interviewees to recording. Analysis of the data was done by the interviewer. One of the peculiarities of expert interviewing is its transactional nature, where the participants play a much stronger role in redirecting initial questions and deciding what data is produced, and the interviewer must strive to keep control of the process and judge to what extent if any participants are tailoring their responses.¹³ Although the aim was to ask all interviewees the same questions, the approach adopted was flexible when necessary: the interview departed from the guide in terms of the order and wording of questions, and new questions were asked when prompted by replies and the direction given by the interviewee, so long as material was relevant to the simplification process.

d) Data analysis

A loose combination of grounded theory and thematic analysis, adapted to expert interviews, was adopted as the method for data analysis.¹⁴ The interviews had two goals: i) to try to systematise the experts' knowledge of the features of the simplification of extradition (what they thought was happening and why) and ii) if possible generate one or more general theories about the nature and direction of this process as a whole. A number of risks were identified to coherency of the data.

¹² See N Pidgeon and K Henwood, 'Grounded Analysis' in M Hardy and A Bryman (eds.), *Handbook of Data Analysis* (London: Sage, 2004) 625, 632-4.

¹³ First identified by Dexter, 115.

¹⁴ See generally Pidgeon and Henwood, 629; Bryman, 573.

Many of the participants were national experts whose knowledge was thus based on national law. They were not all as well-informed about every issue raised because they occupied different positions in the procedural machinery requiring different kinds of technical knowledge. Finally, some issues were simply more important to some than to others because of their position in the legal profession or because of specific features of their domestic legal context.

Expert Opinion on Simplification of Extradition

a) The character of extradition

Prompted by an apparent shift from characterising extradition as criminal to administrative in some national courts,¹⁵ the participants were asked at the outset of the interviews how they would characterise the extradition process: criminal, quasi-criminal, administrative, *sui generis*, and why. This question generated a variety of answers, rooted in the national law of the participants. While some defence counsel tended to emphasise the criminal nature of the procedure, the more general sense was that it was criminal in the first place and administrative in the second place. But even this orthodox bifurcated analysis was questioned by two German participants who emphasised that the criminal process was not purely criminal because it was assistance in a trial, while the administrative process was not purely administrative, as it involved foreign policy issues beyond public purview. The apparent growth in importance of the administrative element was somewhat countered according to an EU official by the European Arrest Warrant (EAW)¹⁶ where the administrative element had been dispensed with. Yet again there were discordant notes: a Dutch defence counsel thought the rise of the EAW in the EU (and the fall of standard extradition) meant that extradition (if we can call it that) was becoming progressively more administrative in the EU. He estimated that if the EU continues to integrate ‘in five to ten years there would be no criminal procedure. It would be automatic.’ The *via media* quasi-criminal or even more loose ‘*sui generis*’ were preferred by a surprising number of participants, who emphasised extradition’s unique nature,

¹⁵ In English Law, for example, see *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 at 156 where Viscount Simon considered it ‘criminal’ to *Pomiczowski v District Court of Legnica, Poland* [2012] UKSC 20, [32] where Lord Justice Mance implied is administrative.

¹⁶ Article 2(1), Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States of the European Union of 13 June 2002 OJ L 190/1, 18 July 2002; in force 1 January 2004.

a Belgian government expert likening it to ‘delivery of mail’. An English government barrister simply refused the debate, commenting: ‘It is not easy to characterise extradition and not helpful to do so’.

The participants were obviously acutely aware of the atypical nature of extradition, and what characterisation meant for resolving difficulties within the process. As the former Australian government lawyer pointed out, ‘characterisation is at the heart of the controversy about extradition.’ The participants’ answers tended to convey the conceptual elusiveness of extradition today, the absence of a shared taxonomy at a national level and a lack of clarity about what a proper taxonomy at an international level should look like now. However, they also conveyed a sense that a conceptual shift is taking place, that extradition is changing from what was once accepted to be a criminal process to into something else, although they did not agree precisely on what that was.

b) The effectiveness of extradition

The participants were surprisingly unified in their views when asked about the effectiveness of the extradition process, given the extreme length of notorious cases and the perception that extradition is often futile.¹⁷ In general they viewed the process as effective in the sense that it removes the individual sought from the requested state to the requesting state in the end. In the words of a Canadian justice official, ‘although lengthy, it seldom fails’.

The former Australian Government lawyer thought the process ‘ridiculously slow’ in the modern globalised world. This sluggishness was the result of a litany of familiar problems: absence of extradition treaties when required, old extradition treaties, list based treaties, absence of legislation/poorly drafted legislation, difficult general conditions such as double criminality, difficult bars to extradition such as the nationality exception, extradition’s use as a political tool (the coup in Turkey was given as an example), problems of translation, problems with identification of the individual sought, the impatience of requesting states, poor answers to requests for further information, poor communication, failure to adhere to ‘division of work’ between the requested and requesting states by the introduction of substantive issues of guilt at the extradition

¹⁷ In *Office of the King’s Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1, Lord Bingham noted (at [2]) ‘the procedures established by bilateral treaty have in the past been characterised by technicality and delay so great as to impede or even frustrate the efficacy of the process.’ Delay results from exhaustion of all potential remedies, and can have significant impacts on the length of pre-trial detention.

hearing, the failure of judicial officers and defence counsel to understand the full complexity of extradition, poor understanding of other systems' rules, disorganisation, parochialism, the endurance of the civil/common law divide, problems flowing from trials in absentia (dubbed by two participants the 'Belgian disease'), problems flowing from parallel claims to asylum, law enforcement avoidance of extradition, delay generally and in particular the dilatory effect of appeals and review processes. It was controversial whether respect for human rights was a hurdle. Some participants thought so, others not, pointing to the application of human rights instruments like the European Convention of Human Rights and Fundamental Freedoms¹⁸ as a base-line condition for to extradition.

Some participants thought effectiveness depended on the particular partner state. A German government lawyer considered extradition relatively effective within the Council of Europe, more difficult with non-European states, and noted that common law states presented problems. The US was 'ok, it at least communicated', Australia was 'not too bad', but the UK was 'like a black box. You sent requests and never knew whether they were being dealt with or not'. Common lawyers tended to single out the lack of understanding in civil law states of different standards of legal sufficiency in regard to evidence. Civil law states commonly submitted 'wholly conclusory' papers not referring to direct evidence to which witnesses have testified. They took requests for further information as a challenge to the judge who certified the request. They were often 'indignant' when asked to provide proof of someone's identity. One Canadian thought they were 'not getting better'. Another, more philosophically, noted the maintenance of the nationality exception in civil law countries and thought 'extradition is a different kind of process for them'.¹⁹ In abstract riposte to these criticisms, the two Belgian experts noted that the biggest problem for outgoing requests was 'lack of trust'. However, more reflectively, one of the Belgians questioned the continued validity of the nationality exception, labelling it a 19th Century concept, and because nationality changes continually in the modern context, needed an update.

The participants gave some examples of specific attempts to overcome these problems: Belgium's assumption of the authenticity of documents and acceptance of transmission of requests by mail, Canada's putting extradition hearings before Judges in the Superior Court because of the

¹⁸ CETS 5, 4 November 1950.

¹⁹ On the history of the exception see I Shearer, 'Non Extradition of Nationals': A Review and a Proposal' 2 *The Adelaide Law Review* (1966) 273.

absence of expertise in the lower courts, Germany's adoption of a more flexible approach, US prioritisation of the removal of the nationality exception in negotiation of bilateral treaties, US avoidance of the nationality exception by luring individuals to other states and then requesting arrest and extradition, Canada's posting of liaison officers to provide assistance to foreign partners and feed-back, the setting up of points of contact and central offices like Canada's International Assistance Group to ensure communication and develop relationships of trust and furnish informal advice, the establishment of transnational institutions like EUROJUST to help with practical issues of incomprehension among states, and the general popularity of extradition with consent.

At a more prospective level an EU official suggested that what was missing were jointly negotiated, uniform, norms. A German government lawyer noted that concern for human rights would be a lot easier to assuage if the same standards were applied by all states; others implied that human rights protections would be more effective if all defendants had the same resources to pay for legal assistance. A Belgian participant thought a range of regional treaties may be a solution, in order to provide a platform for extradition relations with new states. Highlighting the latter point, the effectiveness of the EAW was contrasted sharply with the ineffectiveness of standard extradition. But it was cautioned that the level of cooperation depended on the EU partner. Moreover, some states such as the Netherlands had introduced 'double criminality through the backdoor' by using the criminal law provisions attached to the warrant to check if the facts fit the law. The UK's reforms relating to *de minimis*, monetary thresholds and the trial ready requirement²⁰ were singled out for criticism because of the difficulties they presented to civil law states. A German Government lawyer noted that Germany no longer bothered to make extradition requests to the UK because it regards the UK as a 'failed state' for extradition. Germany was in turn criticised by an EU official for being too protective of its nationals thus frustrating the attempt to bypass the nationality exception in the EAW. And so we come full circle.

'The technical mess' could be escaped, according to the former Australian Government lawyer, by an honest policy discussion to distil extradition's fundamental goals. He questioned whether the goal of extradition was: good relations between states; respect for the rule of law; or delivery of justice. The issue of how these goals were balanced against each other was also raised by participants. Defence counsel clearly felt that there was an overemphasis on the crime control interests of other states. A Dutch defence counsel noted that in standard extradition the Minister

²⁰ S12A of the Extradition Act 2003 (inserted by s156 of the Anti-Social Behaviour Crime and Policing Act 2014).

of Justice gave the final decision, and never said no because of the danger to foreign relations. A Canadian defence counsel commented: ‘When the US says jump, Canada asks how high?’ The NGO lawyer considered the characterisation of the problem of extradition an effort to balance security with the protection of fundamental human rights incorrect, because doing so resulted in ‘a zero sum game where human rights lose to protect society’. In her view, some kind of reconceptualization was necessary that abandoned this binary.

The participants’ responses suggest the endurance of immediate and perennial problems for international cooperation against crime including suspicion of the motives and methods of others, frustration with the intrusion of domestic criminal processes into extradition, and the civil common law divide. From the perspective of achieving faster, smoother, extradition, the main difficulty is perceived to be one of adaptation: the adaptation of foreign states to domestic procedure and the adaptation of domestic officials/lawyers to the ‘foreign’ procedure that is extradition. Hovering in the background is what the EU official referred to as ‘the basic problem of all international cooperation to understand each other’, a difficulty that has proved surprisingly persistent. Interestingly, despite this litany of problems the bulk of the participants accepted the necessity for progressive improvement of efficiency through better communication and by improving the articulation of different national legal systems in regard to extradition. Few appeared to believe that a more efficient system was something that the current state of international relations or domestic political acceptance of extradition could not actually endure. To some extent the rights of individuals appear to be perceived as standing against this progressive (if frustrated) development of the functional efficiency of extradition; something against which it has to be balanced. A few dissenting voices engaged in more abstract questioning of what the goals of extradition actually are, and pointed out conflicts between over-efficiency in extradition and justice to the individual.

c) The basic requirements for extradition

It is considered an orthodox requirement of extradition that, as Justice Brandeis put it in 1922 in *Collins v Loisel* ‘an offence is extraditable if the acts charged are criminal in both countries’.²¹ In the *MM v United States of America*²² the Canadian Supreme Court emphasized that the principle

²¹ 259 US 309 at 312.

²² 2015 SCC 62, par 16, 70.

of double criminality underlies all phases of the extradition process. The German Constitutional Court has emphasized its importance to legality.²³ Yet if a crime is listed in the treaty some states take the view that that listing is determinative of extraditability and double criminality is not required.²⁴ In more advanced arrangements like the Nordic Model, however, it has been dropped entirely.²⁵ Digging a little deeper, the next question focused on whether the participants thought double criminality (or dual criminality) should be a condition for extradition, and if so how strictly it should be applied, and whether it should include matching grounds of jurisdiction. The participants' answers suggested acceptance of the necessity of double criminality in abstract, but also acceptance of very loose interpretations of the principle in concrete situations.

All but one thought double criminality essential. Various reasons were given for its importance: its role in securing national sovereignty and the protective function of the state, its role in securing fair warning to potential extraditees, its role in securing public support for the extradition of nationals, its role in rejecting non-criminal political offences, its role in rejecting trivial requests, and its link to the requirement to provide substantiating evidence. A Dutch defence lawyer noted that double criminality's complete removal 'would be very strange', a Canadian defence lawyer that problems arose 'when we wandered away from it'.

It was thus no surprise that suggestions for change were limited mainly to which organ of state should assess it, and whether it could be assessed in a ministerial process to afford greater control. Only the former Australian government lawyer was sceptical about the necessity for double criminality in standard extradition, arguing that while there should be an inquiry into the nature of the process that the person faces in the requesting state, it did not necessarily require double criminality. A number of participants noted that the abandonment of double criminality in the EAW for a list of serious offences had been made on the assumption that member states trust each other or are 'like-minded'. A few pointed out that the removal of double criminality for the list of serious offences in the EAW was problematic because of the vagueness of the definition of crimes such as 'computer related crime' and had led to the practice of checking where there was doubt.

²³ *Bundesverfassungsgericht* (German Federal Constitutional Court), ruling 18 July 2005 (2236/04), 58 *Neue Juristische Wochenschrift* (2005) 2289–2303 at 2290.

²⁴ See *Factor v Laubenheimer* 290 US 276 (1933); (US) *Riley v Commonwealth of Australia* (1985 159 CLR 1 (HCA) (Australia); *United States v Cullinane* [2003] 2 NZLR 1 (CA) (New Zealand).

²⁵ See, for example, A Convention on a Nordic Arrest Warrant 2005 (15 Dec 2005), article 2.1.

For most participants the real issue was how the principle should be applied in order to avoid frustration of extradition. There was general comfort with the use of the conduct based approach for satisfying double criminality advocated in many international instruments.²⁶ The participants tended to the view that double criminality was not a problem in practice as most important crimes are crimes everywhere. Participants mentioned rare cases where it was a problem: matching the French offence of trading in influence, some foreign tax offences, US offences of smuggling dual-use goods, and abortion. Proceeding on the assumption that extradition ‘is not for no good reason’, a Belgian government expert noted Belgium’s application of the principle ‘extradite for facts, not for crimes’, reasoning that ‘as a result there was no reason to do an analysis of the laws for which the charge is brought.’ Various methods for dealing with difficult offences were suggested. Belgium, for example, bundled allegations in regard to a US request to Belgium case for a dual use offence involving gyroscopes as forgery²⁷ and engaged in creative use of old treaties to find crimes to cover the whole package. Canada would extradite for any charge on a list of charges brought by the US so long as it falls within the scope of a Canadian offence, or involves conduct that is criminal in Canada, surrendering for US offences such as wire fraud loosely covered by the conduct of fraud even though they are much more serious. Less sanguinely, a Dutch Judge felt that while small technicalities should be over-come, where there is a principled basis for objection, such as non—criminalisation of euthanasia, abortion, soft drugs, and so forth, double criminality should be insisted on.

Although the principle that extradition may be refused where the offence is committed outside the territory of either state and the law of the requested state does not provide for jurisdiction over such an extra-territorial offence in comparable circumstances is recognised *inter alia* in the UN Model Treaty on Extradition,²⁸ article 7(2) of the Council of Europe’s 1957 European Convention on Extradition,²⁹ and article 4(7) of the Framework decision on the

²⁶ See, for example, article 43(1) of the UN Convention against Corruption, New York, 31 October 2003, 2349 UNTS 41; in force 14 December 2005. For a ‘soft law’ instrument, see article 2 of the 1997 UN Model Treaty on Extradition, GA Res 45/116 and amended by GA Res 52/88.

²⁷ See ‘Pakistani National Extradited and Sentenced for Attempting to Export Sensitive Technology for Pakistani Military’, US Department of Justice, *Justice News*, 1 September 2016, available at <<https://www.justice.gov/opa/pr/pakistani-national-extradited-and-sentenced-attempting-export-sensitive-technology-pakistani>>, visited 16 February 2017.

²⁸ Article 4(e).

²⁹ 12 December 1957, ETS 24, in force 18 April 1960. See also the Additional Protocol to the European Convention, 15 October 1975, ETS 86, in force 20 August 1979; Second Additional Protocol to the European Convention, 17 March 1978, ETS 98, in force 5 June 1983.

European Arrest Warrant, many participants did not consider this requirement necessary. For the majority where the crime occurred was not a matter of concern to the requested state. The EU official (in a view shared by the UN official) objected conceptually that it wasn't really a problem of double criminality but of 'the double possibility to prosecute'. A few dissenters noted that advocacy of the jurisdictional double criminality was occasioned by negative responses among participants to the claims of some states to extensive extraterritorial jurisdiction. A Dutch judge thought jurisdictional double criminality relevant in situations such as where Germany asserts universal jurisdiction over drug offences and the Netherlands does not. Canadian defence counsel singled out as problematic cases those where the defendant and all of the conduct occurred in Canada, and the US claimed extraterritorial jurisdiction that is completely out of sync with Canadian jurisdiction (it is noteworthy that a US government lawyer noted that the US fights arguments for jurisdictional double criminality).

The requirement of sufficient, reliable, evidence to substantiate an extradition request is highly controversial because while common law states generally do require such evidence³⁰ civil law states do not, because they consider extradition a matter of international assistance not criminal law. The further and equally controversial element to this is the standard that this evidence must reach, with many common law states still insisting on the requesting state making a prima facie case in order to justify extraditability.³¹ Predictably when asked whether there should be a sufficiency of evidence threshold for extradition all of the participants from common law states thought evidence should be required, one noting its constitutional importance, another its role in application of double criminality. Their choice of the standard to be applied depended on their nationality: US participants preferring probable cause, New Zealanders and Canadian's the prima facie test, the English 'a case to answer'. Equally predictably, participants from civil law states rejected the requirement for evidence, emphasising on principle that the decision that someone is suspect is one for the requesting authority but pointing to the practical difficulty of requiring a prosecuting authority in the middle of an investigation to put its whole case together. The EU official summed up the view of many when he said that in order to avoid a de facto trial in the extradition court questions of evidence should be dealt with by the courts where the individual is

³⁰ Evidence of guilt was first required in the British Imperial Apprehension of Offenders Act 1843 – see IA Shearer, *The International Law of Extradition* (Manchester: Manchester UP, 1973) 153.

³¹ See Sir Scott Baker, *A Review of the United Kingdom's Extradition Arrangements* (2011) 39.

tried; he commented that ‘insisting on evidence is a convenient way of saying no.’ A Belgian participant, after conceding that part of the problem was being asking to do something unfamiliar and noting that what common law states need is in the police file in most cases anyway, quipped that requests for evidence ‘hurt our feelings’. And while participants from common law states tended to approve of requiring different evidential thresholds from different states with higher standards for more questionable states and lower for close partners, civil law participants were critical of scheduling states into different categories of trust which they thought foreign and outdated.

Overall the responses suggested an incremental but seemingly inevitable drift towards a no-evidence approach. The senior Scottish prosecutor noted that no evidence was required under the EAW, and that the broad conduct approach Scotland takes to double criminality in standard extradition meant that evidence is not relevant. The English government barrister pointed out that the UK applied a no evidence approach to a long list of partner states in Part II of its Extradition Act. The NGO lawyer thought there was no principled objection to a no-evidence approach, commenting that a shared approach to human rights was more necessary than evidence. When the participants were asked whether an authorized ‘Record of the Case’ (ROC) requiring an authenticated summary of the evidence as used first in Canada³² can be relied on as an adequate basis for meeting such an evidential threshold, opinions were, however, mixed. All of the Canadian government lawyers were supportive, on the basis as one put it that it was a ‘nice compromise’ to avoid insisting on first person witnesses and affidavit evidence. So did government lawyers from other non-ROC jurisdictions, admiring its retention of sufficiency while addressing the interests of requesting states. Defence lawyers were not as enthusiastic. One thought it imperfect but better than a no evidence rule, because in that case ‘we would never know’. Another highlighted the danger that only the most incriminating evidence was cherry-picked in the ROC and that the case is decontextualized because discovery is not required. Making the same point, another commented that the ROC was prompted by criminal justice overreach and the breakdown of due process. Echoing the point that the issue was not the sufficiency of evidence but its reliability, and that testing reliability in the ROC is difficult, a Canadian joked: ‘If you are in law [as defence counsel in Canada] to win, you don’t take up extradition’. A Dutch defence counsel viewed summaries of evidence such as those in an ROC as basically just the indictment and useless. He noted, for

³² See s 33 of the Canadian Extradition Act 1999, c.18.

example, that the defendant might say ‘I don’t know a particular witness but that there is no way for them to challenge it’. He concluded: ‘If you are going to send evidence send it all, make it possible for the judge to do something with it. If you can’t, don’t send any.’

Exploring the issue of which state should bear the burden of adapting itself to the other’s procedure a little further, when asked the participants were generally in favour of the notion that the requesting state should be required to adhere to the technicalities of the criminal procedures of the requested state. They differed as to the degree of adherence that should be required. Most were against adherence to technical criminal procedure of the requested state as a time-wasting irrelevancy because it was not trying the individual. A Belgian expert jested that the ‘Requesting State is not a criminal’, his colleague that the requested state should ‘take the law of the requesting state as you find it’. Many made the point that cooperation required recognition that they were dealing with a foreign system, flexibility and the willingness to downgrade formalities and seek a common standard as much as possible were values expressed by many. But some were against flexibility to accommodate requesting states. A New Zealand defence counsel, for example, commented that requesting States influence domestic practice so as to marginalise the standard rule in order to make it comfortable for them to operate the way they are used to at home. He thought that the requesting state should be required to adhere to the technicalities of the requested state’s criminal procedure to a reasonable degree. The NGO lawyer argued, however that different criminal procedures were immaterial to the predicaments of individuals provided human rights are upheld, and that human rights were helpful in dealing with different types of systems and traditions.

The gist of the responses suggest the growth in the margin of appreciation granted to requesting states in extradition. Double criminality in a substantive sense is considered uncontroversial because of the total abandonment of formal normative matching in standard extradition. Jurisdictional double criminality raises technical difficulties about whether the ‘criminality’ that is ‘doubled’ includes jurisdiction (implying jurisdiction is part of the substance of a crime) or whether jurisdiction is strictly procedural, and reveals a split between government and defence lawyers, rooted in acceptance or rejection of extensive jurisdictional prescriptions by some states, but its practical support is limited. Responses to the anchoring of double criminality in sufficiency of evidence rehearse the timeworn quarrel between civil and common law traditions over the necessity for provision of evidence to an acceptable standard, but reveal an awareness of a changing context in which the no evidence rule is slowly gaining in popularity while half-way

houses like the ROC also point the way towards it. The general acceptance of the necessity to relax domestic criminal procedures also confirms growing recognition of the validity of foreign sovereign interest in extradition and the necessity to accommodate it through broadening the margin of appreciation. This involves a general recognition of the difficulties of articulating two different systems of criminal justice, particularly where they are very different, and the need to move to greater flexibility, although the question of how flexible the requested state should be is not settled. There were, however, intimations that complete accommodation is possible provided there is adherence to base-line human rights values.

d) Human rights and extradition

Clearly for the defence counsel the protection of defendant's the subject of the extradition request's human rights was a priority. The Dutch Defence counsel, for example, argued that defendants would be more accepting of extradition if they thought they would be treated properly and fairly in the requesting state. But, significantly, the importance of taking account of human rights was acknowledged by all participants. They indicated a surprising amount of comfort with the post *Soering*³³ development of human rights bars to extradition which has manifested itself in multilateral treaties³⁴ and what a German government official described as the transformation of extradition from a two dimensional state to state process to a three dimensional affair with the individual as a third party. The basis of this importance lay variously in constitutional protections, international and regional human rights law instruments like the European Convention of Human Rights, and domestic approaches to extradition such as Germany's adoption of an attitude of *Volkerechtsfreundlichkeit*. Some participants suggested that there had been a slow shift in the attitude of their colleagues to human rights. The former Australian Government lawyer noted that officials had often expressed surprised when he had advocated that Australia had a duty of inquiry

³³ *Soering v UK* (1989) 11 EHRR 439. Significant reliance has been made subsequently on the European Convention on Human Rights, CETS 5, 4 November 1950, in questioning the legality of detention for extradition purposes (article 5(1)(f), fair trial in extradition proceedings (article 6) and the right to an effective remedy in extradition proceedings (article 13).

³⁴ See, for example, the article 16(13) of the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, 2225 UNTS 209, and article 44(14) of the United Nations Convention against Corruption, New York, 31 October 2003, 2349 UNTS 41; in force 14 December 2005, which provide that any person regarding whom extradition proceedings are carried out shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the requested State party.

as to human rights in extradition. The real shift according to most had been in the attitude of the courts. Citing recent cases in the European Court of Human Rights, the European Court and in domestic courts, EU participants noted a clear judicial tendency that where there is evidence of potential risk to the subject of the extradition request no judge should authorise surrender without satisfying themselves there is no risk to a person. Much was made of the human rights basis for the EAW³⁵ and its importance to mutual trust and recognition.

The difficulties of different levels of human rights protection in the broader context of global extradition clearly troubled some participants, many like the UN official supporting application of the same non-derogable human rights as a person subject to the ordinary criminal law both in the requesting and the requested state. Participants were also troubled, however, by the prospect of extradition as a vehicle for human rights relativism. The former Australian government lawyer advocated a healthy respect for pluralism noting that different states can achieve good outcomes in different ways, while the English government barrister pointed out that ensuring special treatment for persons extradited discriminates against others in many requesting state criminal justice systems (if a specific cell size is insisted on, for example, she noted the other prisoners will literally have to squeeze up). In contrast, a German Government official, who was explicitly comfortable with human rights relativism, noted that in negotiating bilateral extradition treaties he would specifically include all of the standard exclusions including some that countries disliked such as the death penalty exception.

Variation on the rights engaged and the degree to which they should be scrutinised became apparent in comments on proper scope of human rights protection, particularly in regard to the nature and conditions of punishment. While there was general consensus on the death penalty and torture or inhuman and degrading treatment³⁶ as deal breakers, European participants in particular felt more comfortable with greater levels of scrutiny of other features of punishment regimes in requesting states. As the Dutch defence counsel noted ‘it’s not just a case of waving goodbye as in the past.’ But they also noted a willingness to fit their norms into foreign practices. A German Government official noted, for example, that in regard to the potential sentence of life imprisonment, while Germany requires an opportunity for parole after 15 years, it is quite flexible on how other states approach this problem, accepting that this test is met so long as there is some

³⁵ See Preamble, Recital 12 and 13 of the Framework Decision of the EAW.

³⁶ Article 3 of the European Convention of Human Rights.

chance of getting out even by grace as in certain states in the US. Cell conditions were more difficult. The German official added that whereas the European Court of Human Rights only requires a guarantee of 4m² for ‘free movement’ in the cell space for the duration of the sentence, Germany insists on a minimum cell size of 8m². The two Belgian experts, in contrast, thought that the standard set by the European Court in recent cases ‘could require the absurd’; concerned about the diplomatic impact and cost of follow-up obligations they asked rhetorically in regard to a fifteen year sentence how long was it feasible to keep checking? North American participants were generally far more sceptical of detailed inquiries into punishment and prisons in requesting states. A Canadian Government lawyer commented that just because prisons are not comfortable and sentences not the same in the requesting state, should not be a problem for extradition. Due process was not generally considered as significant a barrier because the extradition process was not a full criminal trial,³⁷ while fairness issues downstream at trial could be met by evidence of the requesting state’s good prior record, in which case guarantees of a fair trial would suffice, unless there were specific allegations of the like of hearings before special courts, lengthy pre-trial detention, failure to inform the accused properly of the charges, improper conviction, the unavailability of defence counsel or appeal, and convictions in absentia.

While there was some acceptance particularly among European participants that the requested state is responsible for all foreseeable human rights violations, which puts it under the burden of getting better and more information about conditions in requesting states, the kind of evidence required to reveal such a real risk of violation was, again, more controversial. There was support for the view that it required evidence of concrete/real/factual/serious risks to justify rejection of the request. The Dutch judge expanded, giving examples of evidence that the individual is on a ‘kill list’, is a political enemy of the state, has scars, but noting the difficulty of showing torture by sleep deprivation. If the risk was general, some participants were content to seek assurances and extradite, while others thought it depended on the nature of the general risk, the English barrister noting that a general problem relating to prison conditions would be enough to prevent extradition. Government participants thought reliable sources of evidence included the State’s own foreign office reports or the Council of Europe’s Committee for the Prevention of

³⁷ Article 6 of the European Convention of Human Rights.

Torture's reports,³⁸ but were very wary of relying on NGO reports because the accuracy of their information was in their view open to question.

Participants cited various techniques for requested states to avoid confronting possible human rights violations including the rule of non-inquiry, assurances, high thresholds of evidence, and local remedies. Recalling the political offence exception, somewhat ruefully, the Dutch Judge thought that 'it was premature to have got rid of it' because in difficult situations like the current one with Turkey, it provided a better option than refusing on human rights grounds because that required elaboration of a reason while the political offence exception did not. US participants were particularly strong on the strict non-inquiry approach taken by the US, justifying it in the executive's exclusive constitutional power over relations with other states, and the vetting of the treaty by the Senate during that treaty confirmation process, one commenting, 'the State Department's decision is final', another confirming 'we don't look behind the treaty'. The Canadian government lawyers also made the point that quality control was done during extradition treaty negotiation, but that it only created a presumption of fairness. The English government barrister expanded that requesting states' objections that they have already been vetted during treaty negotiation could be overridden in the case of a concrete human rights issue, and they could be pressured to answer specific questions about the prospective human rights treatment of an individual. Some were more sceptical of the utility of vetting. A German Government official noted that when challenges to India's human rights had been answered by the German courts with the standard response that the requesting Government had already been vetted, 'they were all laughing'. The validity of vetting issue was also raised in regard to the EAW. Commenting on the deliberate removal of an express human rights ground for refusal of surrender in the EAW the EU official noted that it was to avoid a level of scrutiny being applied in every respect incompatible with mutual recognition: 'trust presumed respect for human rights.' The NGO lawyer's response was that the EAW had been introduced into a human rights vacuum after 9/11 and in result was completely unbalanced in favour of security, an imbalance only partly corrected by subsequent EU directives on criminal due process aimed at upgrading domestic protection of human rights in the criminal justice systems of member states.³⁹

³⁸ Available at the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment, <<http://www.cpt.coe.int/en/>> last visited 16 February 2017 .

³⁹ See *infra* n 56.

There was also a difference of opinion on whether a requesting state's assurances in regard to treatment and safety can suffice to make extradition permissible in circumstances where there is an appreciable human rights risk to the individual human rights, an issue that has been the focus of high profile cases⁴⁰ and political concern.⁴¹ Some participants were comfortable with assurances, considering them in the words of one US participant 'normal business', while others thought there were no real alternative to assurances because it was unrealistic to expect requesting states with poor criminal justice systems to improve them overnight. Government lawyers noted that while requested states tended to get annoyed, when asked for assurances they gave them because they knew extradition relations between the states were at stake, although potential diplomatic repercussions may have been the reason why a number of defence counsel thought government authorities reluctant to ask for assurances. Those much more 'cautious' about the value of assurances, tended to differentiate between their value in situations such as the death penalty exception, and other types of situation such as prison conditions where they were often considered inadequate. The importance of the identity, nature, character and capacity of the assuring state of the requesting state was signalled by a number of participants. Turkey and Russia were, for example, cited as problematic examples. Another problem was the emergence of evidence of violations after assurances had been given. The way to approach the problem according to the cautious was trust by verification, severe scrutiny of their 'reality' by identifying clear risks. This could be undertaken, for example, according to the Scottish prosecutor by seeking assurances from someone in the position to enforce them effectively, and not from someone whose practice the requested state officials could not monitor such as a prison governor. Monitoring was another favoured tactic, but was difficult because of the unwillingness of requesting states to comply after the extradition and the absence of a legal right to consular access to foreign nationals. Monitoring due process raised questions of what access to a lawyer meant, what was an effective defence, and so forth. Some participants were outright sceptics about assurances. A Canadian defence counsel worried they were a 'fig leaf'. Focussing particularly on the requested state's

⁴⁰ For example, *Othman (Abu Qatada) v The United Kingdom*, 2012 ECHR 56, where the European Court held the real risk of submission of evidence adduced by torture at the appellants retrial in Jordan despite assurances meant a violation of article 6 of the European Convention on Human Rights.

⁴¹ The House of Lords Select Committee on Extradition, for example, believes the arrangements in place in Britain for monitoring assurances are flawed – see *2nd Report, Extradition: UK Law and Practice*, 10 March 2016, HL Paper 126, para 88 -94.

current incapacity to properly assess the downstream situation, the NGO lawyer argued for a ‘pause mechanism’ to make assessment possible. She noted that contrary to the usually accepted view that it was for the defence lawyers in the requesting state to check, lawyers in the requested state had taken to checking up themselves using local NGOs to get evidence of what happens to the person once they were extradited and convicted. The Dutch defence counsel confirmed this tendency when he recorded that he kept on checking after his clients had been surrendered and asked them to contact him in case of alleged violation, but noted that he rarely heard from them.

These responses reveal more unease about assurances than anticipated, and not only among defence counsel. This appeared to flow from the increased depth of inquiry into down-stream matters in particular in Europe as the scope of the human rights bar to extradition expands beyond the death penalty exception. Scrutiny of the content of assurances and indeed of all human rights issues raises the issue of whether that scrutiny should be undertaken by the executive because extradition involves sensitive inter-state relations,⁴² or by the judiciary because it involves the legal rights of individuals. There was something of a split between those participants willing to accept judicialisation of the process and those wedded to the importance of the executive’s expertise. US participants were content with assessment by both the court and State Department, with the latter assuming the lead role. The Canadian Government lawyers were similarly content with executive prominence in this regard. Various reasons were given: bureaucratic expertise, the executive’s principled approach, its expertise, its ability to work to timelines, its understanding of the relationship with comity, the judicial reviewability of the decision (which had the added benefit to the defence that general rules of evidence in common law states were not applicable thus permitting in a lot of otherwise inadmissible evidence). In a point echoed by colleagues, a Canadian Government official opposed the courts making the initial assessment because it pre-empted ‘the political people from dealing with an issue they were best-positioned to deal with, and dragged the court into an area of international relations where it was not an expert’. Another complained that the process becomes too slow when the judiciary takes over as in the UK, while a colleague questioned the ability of a court to reach out to another country especially countries with which extradition had been difficult. A Canadian defence counsel cautioned, however, that Canada’s interest was not the individual’s interest and thought judicial review in such cases overly

⁴² In the South African case of *Misozi Chanthunya v S* (4/2013) [2013] ZANWHC 45 (30 May 2013) the court held assurances, for example, were a matter entirely for the Minister.

deferential to the Minister. Echoing the latter point, a US defence counsel thought the role of the judiciary was being eroded by the executive.

The majority of participants, somewhat remarkably, supported judicialisation of this assessment, mainly because human rights compliance was judicial in nature, non-discretionary and independent from political and economic pressure. They also pointed out that the judiciary had the skill to assess evidence and apply evidential thresholds when assessing human rights risks. The former Australian government lawyer expanded that the best outcomes for human rights were achieved when the defence put high quality information before the court and the judicial officer (who in contrast to the accepted wisdom was usually quite good at getting information) pushed the executive (who otherwise would deal with the question superficially though lack of incentive). He also thought the criticism of judicial encroachment on questions of intergovernmental rights unfounded because in practice the courts gave quite a wide discretion to the executive. Interestingly, a German government official noted that reliance on the Court of Appeal in Germany to ask for assurances defused tension in international relations around assurances because it was not the executive making the request. Some supporters of judicialisation were content with the double assessment by the judge and by the executive because it made possible the examination of novel issues that had either been newly discovered or had arisen because extradition had been delayed, while others like the EU official were opposed to double assessment, characterising executive assessment as a residue of sovereign control over extradition.

The split on judicialisation or administration of the human rights assessment in extradition among the participants may have been about the relevant expertise and impact on delay, but it also tended very roughly to reflect the split between those participants more comfortable with a deeper analysis of prospective human rights risk to the individual and those more concerned with balancing these interests against sovereign interests in extradition. Among the former there was a balance in favour of if not exclusively judicial approach, then an increased judicialisation of the assessment of human rights risk.

While there was some perceptible regional variation (the influence in Europe of the European Convention on Human Rights was palpable) overall the participants' answers reflected acceptance of greater protection of human rights in extradition. They did not, however, reflect consensus on either the ideal depth of that commitment in regard to the operation of particular rights in particular situations nor on the appropriate mechanisms for the protection of human rights

during the extradition process. Some recognition of the need for prospective human rights risk assessment for the individual was balanced against practical issues such as capacity of the requested state and accommodating the requesting state and its interests. The rupture between the general commitment to formal recognition of human rights and concrete potentially extradition blocking divergence on what that means is illustrated by the argument from a US Government lawyer who felt an effort should be made to try to find other ways of reaching recognition that standards were very similar. He emphasised that the US followed due process, but ‘too many countries did not see things in the same way’. Formal recognition of the importance of human rights anchors the hypothesis that individually enforceable human rights have replaced many of the substantive elements of extradition which once served as proxies for human rights such as the political offence exception. The incoherence of the participant’s views on the how the actual protection of human rights should be approached suggests, however, that at a substantive level their adequacy as a replacement is questionable, and thus so too is the hypothesis.

e) Crime Suppression, Cultural Affinity and Comity

There was significant acceptance from officials of the importance of the suppression of transnational crime, a common rationale for simplification of extradition.⁴³ A Canadian government lawyer articulated a common theme among officials when she said that to fight impunity extradition had to become ‘more efficient’. There was also support for the notion that it was also important for the protection of victims’ rights. The US government lawyer argued that extradition was a means to bring people to justice rather than to suppress crime, and the more extradition treaties there were the fewer places to hide. The former Australian Government lawyer speculated, though, whether extradition’s point is really the maintenance of order, which had provided the rationale for extradition in the Nineteenth Century and led to the margin of appreciation built into extradition. Several steps for further efficiency were suggested, many of which are recorded at h) below. A small chorus of critics thought in contrast that crime suppression was already given too much weight and served as an apology for simpler extradition, noting *inter alia* that it was used to justify overriding individual’s rights and to pursue a ‘rather archaic

⁴³ See, for example, *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, 61 [167] where Baroness Hale, after noting the cross border nature of modern criminal activity emphasised that ‘inter-state co-operation is increasingly necessary in order to combat crime and to bring criminals to justice’.

retributive justice model' through extradition. Attention was drawn to the specific use of suppression of serious crime such as terrorism to justify the EAW,⁴⁴ while the EAW was now used for shoplifting. Thus while neither officials nor defence counsel side lost sight of either the importance of crime suppression or of individual rights, they fell either side of the fence on the validity of the suppression rationale as a justification for further simplification of extradition.

Most participants discounted the conditional significance of cultural familiarity, emphasising that extradition depended rather on meeting prescribed legal conditions. There was criticism of the paternalism implicit in requiring cultural affinity, and a Canadian defence counsel noted that despite the close cultural affinity between Canada and the US, extradition between them raises some of the deepest issues, while another pointed out that extradition was now common with non-traditional partners where there was cultural dis-affinity. There was, however, also some mention of the importance of trust in the justice of the other's system, shared legal cultures, or failing that familiarity with other states from different systems produced by regular extradition business. Some participants thought extradition more difficult without cultural affinity, particularly in extradition at a global level where close cultural affinity replaced the checks and balances available through shared human rights commitments. The former Australian Government lawyer observed that a non-traditional partner like China could argue that through becoming party to the UN's crime suppression conventions it had met the necessary conditions for extradition, and that introducing concerns for human rights was just introducing cultural affinity as a condition.⁴⁵ Moreover, the EU official added that it is easier to find the requisite legal basis for extradition if states have close cultural affinity such as in the trust based Nordic Model. More sceptically a US defence counsel pointed out that the Nordic Model depended on a complex of factors which means 'they can do things no one else can do'.

Given the importance placed on a more rigid legal structuring and conditioning of the extradition relationship, scepticism about cultural affinity was not surprising. More unforeseen

⁴⁴ For an example see, European Parliamentary Research Service, *Revising the European Arrest Warrant*, (European Commission Added Value Assessment EAVA 6/2013), 24 available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET\(2013\)510979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979_EN.pdf). It cites the example of case of Osman Hussein where the EAW made for a rapid transfer of one of those involved in the July 2005 attacks.

⁴⁵ An argument that has come sharply into focus in the Australian political debate as to whether to ratify the bilateral extradition treaty with China – see N van der Klippe, 'Australian Government Suspends Extradition Treaty with China', 27 March 2017, *The Globe and Mail*, <<http://www.theglobeandmail.com/news/world/australian-government-faces-political-revolt-over-extradition-treaty-with-china/article34433353/>> last visited 16 February 2017.

were views (or indeed knowledge) of the importance of comity, used heavily in some common law states to justify extradition.⁴⁶ One Canadian summed up the view of participants from Canada when he said comity ‘is the animating principle of extradition law. No comity, no system.’ A colleague explained that it was ‘important to accept that your way of doing things is not the only way of doing things’, another that ‘you cannot impose your standards on others’, while a US defence counsel thought it grew out of being part of an enforcement network, criminal justice personnel working on the same thing, sharing a goal, and then beginning to share the means to that goal. The former Australian government lawyer considered comity important in ‘explaining’ extradition and justifying extradition decisions, noting that extradition looks like a criminal process and then into it is introduced comity, ‘nakedly political considerations’. The US government lawyer thought comity was not a bad idea but preferred reliance on established principles; a US defence expert remarked that ‘the treaty provides the comity’. More explicit critics considered it a rhetorically weighty but empty concept because of the absence of evidence about the results of upsetting comity, one Canadian defence counsel commenting that ‘the notion that we have an overarching responsibility to other countries is overblown’. Perhaps most astonishingly all of European participants including the English lawyers noted that their systems did not recognise the principle. The English government barrister reflected the opinion of a number of participants about the difficulty of comity as a Trojan horse for allowing executive interests to intrude into the extradition process when she noted that comity was potentially dangerous as it deflects attention away from human rights issues. The responses show a fairly clear split between British Commonwealth jurisprudence (excluding England) where comity plays a peculiarly important although ill-defined role weighing in favour of political good relations with requesting states and thus in favour of extradition, and all other states where it doesn’t, a split that cannot be explained by the division between civil and common law traditions.

It is not that difficult to draw out a general theme from this mix of responses. Acceptance particularly but not only among officials of the importance of suppression of crime as a base rationale indicates support for a general normative position from which to approach doing

⁴⁶ See for example, *Hilton v Guyot*, 159 US 133, where the US Supreme Court noted that ‘[c]omity is neither a matter of absolute obligation nor a mere courtesy and good will. It is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws. The comity thus extended to other nations is not impeachment of sovereignty. It is the voluntary act of the nation by which it is offered and is inadmissible when contrary to its policy or prejudicial to its interests.’

extradition business. The rejection of cultural affinity as a necessary conditions tends to indicate an increasing willingness to do extradition business even with non-traditional state partners. The rhetorical importance of comity to some states suggests a movement towards recognition of foreign sovereign interest in extradition as a trumping factor. Put together this points to recognition of strong motivation for simpler and more efficient extradition relations with an increasing number of states, in a way that recognises their sovereign interest in extradition of crimes affecting them.

f) *Aut dedere aut judicare* as an alternative to extradition

If extradition fails, then what? Not, the participants thought, the taking of jurisdiction by the requested state. The participants confirmed their recognition of the strong national interest in universal extradition rather than universal jurisdiction, when they largely rejected the *aut dedere aut judicare* principle as impractical. The issue raised with them was not whether jurisdiction should bar extradition, but focussing on the most common form of the extradite or prosecute principle, if extradition was refused on the basis of nationality exception, and the refusing state did have jurisdiction, should it be compelled to prosecute, a principle recognised in a number of suppression conventions.⁴⁷ Only the NGO lawyer was wholeheartedly in support of the requested state doing so because of the serious impact of extradition on the accused's human rights. While others showed more tentative support, some arguing that it was practical where most of the evidence was in the requested state, and others that it was a good solution if you were unsure about the quality of criminal justice in the requesting state, the vast majority of the participants thought otherwise. The EU official joked that 'it was a very nice principle, only known mostly to university professors'. Various reasons were given for its rejection: the absence of a sound legal basis in national law, the negative impact on prosecutorial discretion, the immense difficulty when refusal of extradition was on any other basis than nationality such as when the requesting state gathered evidence by torture, the fact that the harm, victims, evidence, police, were all in some other state,⁴⁸ respect for the sovereignty of the requesting state and the basis for its prosecution (it has 'the most equity in the case' according to the US government lawyer), cost, and its use by civil law states to

⁴⁷ See, for example, Article 16(10) of the UN Convention against Transnational Organised Crime, 15 November 2000, 2225 UNTS 209.

⁴⁸ After the British government blocked the extradition of alleged hacker Gary McKinnon to the US in October 2012 on health grounds, it is noteworthy that in December the DPP announced it would not prosecute him because of difficulties of bringing a case with evidence in the US - see M. Kennedy, 'Gary Mackinnon will not face Charges in the UK', *The Guardian*, 14 December 2012.

protect nationals by refusing extradition but then not effectively prosecuting which caused problems with states from other traditions. One Canadian Government lawyer asked: ‘Why pursue a half-hearted prosecution where another country might have a better prosecution?’ A German prosecutor gave the example of the trial of the Somali pirates in Germany where the prosecution had encountered of problems with witnesses, languages, and assessing the age of accused, and Germany had not been able to deport the accused after they had been convicted because of the human rights situation in Somalia.⁴⁹ Most participants focussed on the practical problem of seeking cooperation from a state whose extradition request had just been rejected, particularly if they ‘were desperate’ as one put it. Participants painted a bleak prospect for success: although not official policy as a matter of practical reality in ninety nine percent of cases Canada’s prosecution services will not cooperate with the State that takes jurisdiction if it refuses extradition; ninety percent of such cases in Germany are dropped from lack of evidence; despite the newly enacted forum bar in English law it had in fact never prevented an extradition because of lack of enthusiasm for prosecution; the principle’s application in certain cases in Belgium were ‘show trials designed to let the requesting state know that Belgium was doing something’. The only winner, the participants thought, was the suspect. Various alternative solutions were suggested including taking a closer look at different forms of cooperation such as mutual assistance and transfer of proceedings in a ‘complementary manner’. The UN official noted that certain European states such as Germany, Austria and Switzerland made this linking more possible because they rolled legal provision for all forms of cooperation into a single statute.⁵⁰ The general rejection of the extradite or prosecute principle though suggests the participants’ perception that there is uncompromising state support for making extradition work rather than trying to replace it with some other mechanism, which in turn gives some idea of the weight of expectation being brought to bear on making the substantive and procedural mechanisms of extradition easier to use and less likely to fail.

g) Legal bases for extradition:

⁴⁹ See B Lakotta, ‘Germany’s Somali Pirate Trial is Pointless’, *Der Spiegel*, 12 September 2012.

⁵⁰ Germany: *Gesetz über die internationale Rechtshilfe in Strafsachen* (IRG); Austria: *Auslieferungs- und Rechtshilfegesetz* (ARHG), Switzerland: *Bundesgesetz über internationale Rechtshilfe in Strafsachen* (Rechtshilfegesetz, IRSG).

Moving away from the nuts and bolts of extradition to the more general question of the best in the sense of most efficient legal basis for extradition, the participants showed a preference for multilateral over bilateral relations, even among some participants from states that rely almost entirely on bilateral treaties, suggesting general recognition of the importance of broader extradition relations and the downgrading of the importance of individual variation in state practice. Some (including most of the common lawyers) came out strongly for bilateral relations, mainly because they could be more precise and tailored to the particularities (including their laws) of the two partners and enabled the building of a more trusting relationship. There was recognition, however, that bilateral treaties were expensive to negotiate and update. In addition, the German official noted that it was necessary to find the right partners, commenting that the Germany India treaty⁵¹ was politically symbolic but hardly used.

Most participants preferred multilateral frameworks like the 1957 European Extradition Convention, including defence counsel from common law states. Various reasons were given including the fact they reflected a common understanding, their common standards gave room to manoeuvre, they were easy to vary, and their repetitive use enabled the ironing out of problems. The EAW was considered by many to be a huge advance in efficiency, although its potential for over-efficiency was noted by a number of defence counsel. A number of participants highlighted the importance of a reasonable commonality of attitude to criminal justice and adherence to human rights treaties among members, if this kind of multilateral extradition regime was to work properly. A US defence expert expanded that the US would, for example, find it difficult to join an OAS multilateral treaty given the ebbs and flows of governments in Latin America. For the same reason participants, apart from the UN Official who highlighted their added value, were sceptical of multilateral extradition on the basis of the UN's large multilateral crime suppression conventions, which was viewed largely as a fall-back.⁵² The EU official commented that these conventions were too vague, containing a 'lot of blah blah provisions such as "if it is appropriate"'. Moreover, the point was made that reliance on them depended on whether there was in fact real consensus on the subject matter of the particular convention in the sense of criminalisation of the particular conduct

⁵¹ Treaty between the Republic of India and the Federal Republic of Germany, 28 May 2004, available at the Indian Ministry of External Affairs, <http://www.mea.gov.in/Images/CPV/leta/Germany.pdf>.

⁵² Thus answering the question raised about their under-use in N Boister, 'The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A Toolbox Rarely Used?' 16 *International Criminal Law Review* (2016) 39.

and extradition for that crime. In addition, some participants were antagonistic to the idea of extradition relations with a large number of parties such as through the UNTOC because of poor human rights protection in many of these states. The former Australian Government lawyer did not think the shared judicial culture and trust which underpinned multilateral extradition regimes such as the Commonwealth Scheme⁵³ could be projected onto the UN treaties because that culture and trust could not be created through the UN's multilateral process. Perhaps for this reason a US government lawyer noted that while the US had always pushed for use of suppression conventions as the basis for extradition, it always paired up suppression conventions with a bilateral treaty.⁵⁴ A number of participants were also antagonistic to ad hoc arrangements on the basis of domestic legislation because of the danger of creating expectations in all potential requesting states (and in particular Asian states) and then frustrating them. Opinions on the need for a universal extradition treaty were divided, with some participant's supportive of the idea provided states could meet specific standards of justice, but others noting the absence of political enthusiasm for such a global instrument. One of the Belgian experts favoured a constellation of regional treaties as an alternative, while the US government lawyer noted that for the US Department of Justice extradition was just one tool in the legal removal of an individual, and deportation another.

Responses to this question indicate the fairly broad recognition of the greater desirability of multilateral arrangements, despite the tailoring benefits of a bilateral arrangement. Again, the practical scope of multilateral commitment was generally considered limited by values such as adherence to human rights.

h) Potential Reforms: A Global Arrest Warrant? A No Dress Rehearsal Rule in Global Extradition?

This explained why reaction to the proposal that the European Arrest Warrant provided a workable model for global extradition was overwhelmingly negative. Whereas there was scepticism whether the EAW was built on sufficient trust, the obvious lack of trust at a global level meant a global

⁵³ The Scheme Relating to Fugitive Offenders within the Commonwealth, Cmnd 3008, May 1966; amended on several occasions (and renamed).

⁵⁴ He gave the example of how African state succession to the Extradition Treaty between the United States of America and Great Britain, 22 December 1931, meant that it could be used for extradition with a lot of African countries which were also party to a suppression convention.

arrest warrant was implausible. Specific reasons included: the absence of common or harmonised criminal legislation or common legal traditions; the absence of a guarantee of reciprocity; the absence of the rule of law and respect for human rights; the death penalty; due process concerns; and the absence of political union in international relations generally. The participants pointed out that institutional foundations of trust and mutual understanding in Europe such as the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ)⁵⁵ work on criminal justice indicators, the EU's Erasmus programme for judges⁵⁶ for providing direct judicial contact, and most importantly the EU's roadmap of six criminal justice directives,⁵⁷ were lacking at the global level. Moreover, a German government official remarked that the ECJ decision in *Aranyosi*⁵⁸ has shown there are limits to trust even in the EU; he could not imagine the same relationship with India and China and he was not alone in this kind of view. A few participants ventured that very limited arrangements were possible with close partners such as the backing of warrants system in Commonwealth countries⁵⁹ or in other regions than Europe, but with the caveat that a regional court was necessary to provide the underlying institutional background. A very few participants thought that a global version of the arrest warrant was possible and an ideal worth aiming for. The Dutch defence counsel, for instance, based on his view that the EAW was basically a stripped down version of standard extradition, thought a global arrest warrant could work globally in theory

⁵⁵ See generally <http://www.coe.int/t/dghl/cooperation/cepej/presentation/CEPEJ_depliant_en.pdf> last visited 17 February 2017.

⁵⁶ See generally <http://ec.europa.eu/justice/criminal/european-judicial-training/index_en.htm> last visited 17 February 2017.

⁵⁷ The procedural rights "Roadmap" that was adopted in November 2009 (OJ 2009 C 295/01), and then incorporated into the Stockholm Programme in December 2009 (OJ 2010 C 115/01). Six directives have been adopted by the EU: Directive 2010/64/EU of the European Parliament and of the Council of 22 May 2012 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280/1); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142/1); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294/1); Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65/1); - Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ 2016 L 132/1); Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ 2016 L 297/1).

⁵⁸ *Aranyosi and Căldăraru* Joined Cases C-404/15 and C-659/15 PPU, 5 April 2016, which held that mutual trust is not absolute and German authorities when surrendering to Hungary and Romania had to take into account prison overcrowding in those countries.

⁵⁹ See EP Aughterson *Extradition: Australian Law and Procedure* (Sydney, Law Book Company 1995), 236 on surrender between New Zealand and Australia.

but with a lot more trust and respect for human rights. This rather *outré* view provides an interesting perspective on the general hostility to the idea of a global arrest warrant perceptible from most of the participants. The reasons against such a global arrest warrant would from his point of view simply become costs if it were adopted, in much the same way as the flaws in the EAW have not prevented it from becoming a very popular mechanism in the EU, even in the UK.⁶⁰

The participants' views of a global reform to avoid any form of preview of the trial process during the extradition process by introducing a 'no-dress rehearsal rule' was also generally negative.⁶¹ Various reasons were given relating to the importance of substantive conditions like double criminality and respect for human rights, and the unacceptability of an open-door to extradition because many countries still sought extradition to pursue political enemies. Some participants were apprehensive of further change. A Canadian defence counsel was anxious the ROC might be abandoned in favour of a no evidence rule. The New Zealand defence counsel was concerned about the case for further reform being generalised from hard cases. Support for change towards a no-dress rehearsal standard came mainly from civil law participants, arguing that common law states frustrate crime suppression by too strict an adherence to formality in extradition. For those who thought development of a no dress rehearsal rule possible, what was required was time, an environment of greater trust, greater harmonisation, regular contacts, greater transnational integration and limitation of the scope of cooperation to certain common crimes. In this way, according to a German official, 'step by step, islands of trust could be established, but no continents of trust.' A US defence counsel commented that '[t]he rise of nationalism was not good for the simplifying of extradition'. Thus overall, while it was difficult at first blush for many participants to imagine such a no-dress rehearsal rule operating at a global level, there was to some extent implicit acceptance that it could come about through a process of incremental non-programmatic change in global extradition as the frequency and quality of international contacts grew.

Moreover, when asked if they had anything extra to add in regard to the reform of extradition not covered by the substance of the questions, the participants' supplied a desiderata which in some

⁶⁰ The British Home Secretary has warned that the UK must stay in the EAW – *Express*, 7 March 2017, available at <http://www.express.co.uk/news/politics/775804/Amber-Rudd-Brexit-warns-UK-must-remain-EU-arrest-warrant-scheme>.

⁶¹ The fact that this notion was novel was indicated by the fact that many participants sought clarification of its meaning either prior to or during the interviews.

degree plots a course for further incremental change. Some suggested changes to the first steps of the process including the provision of legal remedies for individuals to challenge the issue of Interpol Red Notices,⁶² more scrutiny of the need for extradition in old cases, and better policing of extradition generally through the formation of specialist squads dedicated to pursuing fugitives. There was also a lot of support for the establishment of suitably independent and capable central authorities to play a coordinating and quality control role before cases went before the courts, and for facilitation of transnational relations between cooperating authorities through institutional mechanisms like the European Judicial Network. Other practical proposals included proper resourcing generally, improving translation through allocation of resources, simplifying the contacts between governments through video conferencing, and establishing channels for extradition judges to communicate with trial judges so that they could clarify their views on whether the individual was clearly trying to obstruct the process or simply exercising their rights. More radically, administrative assessment of double criminality was mooted and a German Government official thought that extradition was not used enough against human rights objections. Other suggested reforms to court process included the assignment of specialist extradition judges, the establishment of specialised extradition courts, assurance that legal aid is available in the requesting state and that it meets the requested state's standards, mandatory time limits, statutory requirements putting all parties on notice that the process must be speedy and cost effective, only one right of appeal and the holding over of interlocutory matters until that appeal, and not delaying the taking of the decision to surrender until the outcome of appeals. Finally, a number of commentators supported the adoption of treaties promoting simplified extradition based on informed consent, with one defence counsel arguing it was more practical in the current environment where extradition was already highly simplified to waive the right to extradition in exchange for a better deal in the requesting state than defend the extradition, and another that consent should be given in return for guarantees of bail and release of assets sufficient to meet reasonable defence costs at trial.⁶³

⁶² Discussed in M Savino, 'Global Administrative Law meets "Soft" Powers: The Uncomfortable Case of Interpol Red Notices' 43 *NYU Journal of International Law and Politics* (2011) 263.

⁶³ There has been significant action in regard to simplified extradition procedure in the sense of extradition with the consent of the person sought, which usually entails an informed consent process subject to judicial guarantees and renunciation of the entitlement to rule of specialty. See, for example, articles 4 and 5 of the Third Additional Protocol to the European Convention on Extradition, Strasbourg 10 November 2010, CETS 209.

Part III. Discussion

These recommendations flow out of the experience of the participants, and represent attempts to overcome specific technical problems within the existing system rather than suggest a radical new direction. The system appears to have developed incrementally and sporadically in this way, at least at a global level, in the post-War period. Looking to the future, the former Australian government lawyer noted that the substantive elements of extradition are already dissolving because of greater integration among states and greater affinity. The survey of expert opinion tends to affirm his opinion. In regard to the classification of extradition itself, there was an absence of shared taxonomy at a national level and as a result ambiguity about what a proper taxonomy at an international level should look like, but also a sense of movement away from the notion that extradition is essentially a criminal process. While there was broad support for the inexorability of most extraditions, despite the obvious gains in efficiency of the last 70 years it was still considered inefficient with participants' accounts of responsibility fracturing on familiar civil/common law lines. Various specific hurdles to extradition were identified with a prominent position given to misunderstanding of the true nature of extradition by both domestic officials/lawyers and foreign partners and the desirability of clearing this up. With regard to the substantive conditions, general comfort with facilitative developments like the conduct approach to double criminality contrasted with discomfort with barriers to progress like matching extra-territorial jurisdiction. While most participants recognised the difficulties of strict adherence to the technical requirements of domestic criminal procedure and favoured flexibility, they disagreed on the degree of flexibility. Again general acceptance of the growing human rights dimension to extradition was balanced against dispute about its proper parameters, the validity of assurances, and whether the locus for human rights assessment should remain administrative or be judicialised. The participants' negative view of the extradite or prosecute principle confirmed a general theme of pursuit of better extradition rather than pursuing nationality jurisdiction. Yet at the same time as there was acceptance by most of the suppression of crime rationale for simplification, cultural affinity was largely discounted as a necessary condition for global extradition suggesting a growing awareness of the legitimacy of other non-traditional partner states' interests, compounded by acceptance by some of comity as a justification for extradition even though it extends beyond trust into pure political interest. More

efficient regional multilateral arrangements were preferred over bilateral arrangements, although the scope of the commitment was limited by doubts about trust and shared values. The negative response to the idea of a global arrest warrant and to the no dress rehearsal rule was expected although what was not expected was the tacit acknowledgement that greater and more simple systems of extradition were if not probable at least possible depending on the quality and incidence of international cooperation. In sum, while the opinions expressed in this survey do not demonstrate much that is startling or unexpected about the process of simplification of extradition and give the appearance of stasis in global extradition, upon closer examination they indicate acceptance by the participants of the necessity for and probability of requested states to adapt themselves and their practice to suit the requesting state. This is not a smoothly linear process of development: there is a sense of forward movement, then back as familiar problems reappear, then forward, but the general direction appears to be towards greater and greater cooperation. To put it another way, if we consider extradition to involve a triumvirate of interests of the requested state, requesting state, and the individual concerned, the participants' answers recognise that barriers raised by the requesting state to protect its interests are being lowered in a piecemeal way, as the requested and requesting state align their practice more closely. At the same time, the participants also recognise that individual's rights are becoming increasingly important. But the depth of the commitment to these rights is variable and heavily influenced by considerations of practicality. Moreover, while the commitment to the protection of these rights serves as a partial justification for the simplification process, it is not clear what is being simplified out of existence didn't do a better job of protecting the human rights of the individual subject to extradition. Finally, defence counsel and others concerned about the impact of this incremental process of simplification of extradition conveyed a palpable sense of resignation that more was on the way, and appeared to be adopting coping strategies to try to ensure a fair deal for their clients at trial. A more difficult barrier is mistrust of the requesting state. While mistrust has not impacted as significantly at a formal level (witness the development of the extradition provisions in the UN crime suppression conventions) in the views of the participants it does have a very strong impact on the potential scope of practical commitment, serving as an inarticulate but critical condition for extradition. The discourse as a whole is one of progressive engagement tempered by the necessity for trust, the essence of modern extradition in the view of those who work in the system. There is a danger,

however, that this progressive engagement will build the necessary trust even when the substantive conditions in domestic criminal justice systems have not changed sufficiently to permit extradition.

Conclusion

Extradition can be characterised as a rather formal legal relationship constrained by an inherited set of legal conditions, the result of 19th Century political distrust. The research undertaken in this project set out to elicit expert opinion on the nature of the simplification of extradition. Its findings tend to confirm that the break down point in every extradition relationship depends not only on stated but unstated conditions. These conditions include explicit legal commitments but also the familiarity of legal traditions, sharing of value systems, the political context, and progressive engagement of the professionals engaged in extradition, all of which ultimately produce/do not produce trust in the other system. An actual extradition may fail during the process because of the absence of one or more of these conditions, but it seems it is more likely never to get off the ground in the first place. As for where this simplification process is heading, the research tends to confirm that there is no set programme to transform standard extradition at a global level into an apolitical process where values based bars are explicit and surrender judicially determined. Nevertheless, international and efforts and state practice do appear to be shifting the break down point of extradition in piecemeal and incremental fashion towards greater accommodation of foreign states in a broader margin of appreciation, and the research suggests a fairly broad willingness to make the effort, even though the precise goal is not clear. Will extradition one day be reduced to the simple question, 'window or aisle seat'? The answer is not clear. But if it is, states will arrive at that point without having planned the journey and with little general awareness of what has been traded away to reach that destination.