UNITED NATIONS
Office on Drugs and Crime

Report

Informal Expert Working Group

on

Effective Extradition Casework Practice

Vienna,
2004

INDEX

EXECUTIVE SUMMARY

Over recent years, UNODC's Legal Advisory Programme has used informal expert working groups to identify, capture and make available to justice system professionals best international practice in a range of casework. To date these expert working groups have dealt with mutual legal assistance, asset forfeiture, drug abuse offender casework and now, also with extradition. These reports help national practitioners to implement the international drugs, organized crime, anti-terrorism and anti-corruption instruments.

This report deals with extradition casework. The EWG identified and extensively reviewed the most important common problems impeding prompt predictable extradition, particularly between countries of the world's different major legal traditions. It examined experience in dealing with those problems, compared them, then developed the comprehensive package of recommendations contained in this report.

The EWG divided its recommendations into two groups. Those dealing with extradition infrastructure such as legislation, treaties, institutional structures, etc. are found in Chapter 2. Those dealing with day-to-day casework practice, e.g. the planning, preparation and conduct of extradition proceedings, communication systems and practice, language problems and reducing delays are in Chapter 3.

The report index gives a headline overview of the detailed recommendations. If implemented, they should ensure efficient, effective, just and fair extradition to properly meet 21st century realities for persons sought to stand trial or serve sentence for serious crimes.

Model checklists that could provide a general guide for Requesting States in preparing extradition requests were also developed (Annexes B and C). However, due to wide differences between States in their domestic legislation and practice in extradition requests, no more detailed universal checklist could adequately reflect such variations. Accordingly, the EWG did not attempt to create them.

CHAPTER I - INTRODUCTION

The Expert Working Group (EWG)

Organization and Participation

1. UNODC's Legal Advisory Section organized an informal expert working group ("EWG") of extradition practitioners. The EWG met in Vienna, 12-16 July 2004.

2. Participating experts with wide personal experience in international extradition casework were gathered from all the major legal systems and regions. They participated in their own personal capacities. The full list of participating experts is at *Annex A*.

Task

3. The EWG's task was to:

(a) identify the key obstacles in casework practice to quick and predictable extradition between States for extraditable offences, particularly under the international drugs, organized crime, terrorism, and corruption–related instruments;

(b) extract the most important success factors and lessons learned to date in dealing with those obstacles; and

(c) develop best practice guidelines to help States as a whole to overcome those obstacles, and in particular, to ensure that extradition requests:

(i) are prepared, transmitted and executed efficiently and effectively;

(ii) typically contain the required information of the quality needed by requested States to promptly grant the requests; and

(iii) have best prospects of being granted, as quickly as possible.

Working method

4. The EWG first identified the obstacles to quick and predictable extradition, which are set out in Chapter 1. Drawing on its extensive collective casework experience, the group then extensively discussed success factors and lessons learned.

5. From this, the EWG developed best practice recommendations to address both structural and operational obstacles to just, quick and predictable extradition - since successful outcomes in day to day extradition casework practice critically depends on the existence and adequacy of any underlying extradition treaties, legislation, policies, practices, resources and resource use. These are set out Chapters 2 and 3 respectively.

6. The draft report of the group that convened in Vienna between 16-20 July 2004 was circulated for further comments and suggestions, including from other invited experts who had been unable to be physically present in Vienna at the time. The ensuing settlement process resulted in this final and unanimous report.

Overview – Extradition At A Glance

Extradition – What is it?

7. Extradition is the formal process by which one jurisdiction asks another for the enforced return of a person who is in the requested jurisdiction and who is accused or convicted of one or more criminal offences against the law of the requesting jurisdiction. The return is sought so that the person will face trial in the requesting jurisdiction or punishment for such an offence or offences.

What is the legal basis for it?

8. The legal basis for extradition may be bilateral or multilateral treaty or convention, *ad hoc* agreement, reciprocity or comity – the latter two usually supported by domestic legislation. Historically, extradition was based on pacts, courtesy or goodwill between heads of sovereign States. Newly-emerging international criminal tribunals exercising treaty-based criminal jurisdiction means that extradition is now also possible to these non-State bodies.

To what extent are States obliged to extradite?

9. Historically under international law, there was no general duty to extradite. However over the last 50 years an increasing number of States have assumed obligations to extradite through bilateral [1] and multilateral international agreements.[2]

10. How extradition takes place in a particular case remains governed by domestic law of the Requested State, and so each State is generally free to prescribe, for example:

- procedures for arrest, search and seizure and surrender;
- how an extradition request will be acted upon;
- what refusal grounds apply, and whether refusal is mandatory or discretionary;
- which decisions, if any, the executive takes and which, if any, the judiciary takes;
- what evidentiary requirements govern that decision-making, and to what extent if any, evidentiary rules exclude relevant material from consideration;
- whether persons sought remain in custody pending those decisions, and if not, what conditions are set to ensure the person does not flee;
- what review and appeal mechanisms apply to what decisions and at what stage(s) of the extradition process;
- what time elapses between receipt of an extradition request and the final decisions on whether or not to return the person.

11. At the international level, the sheer size and scope of the resulting domestic variations in substantive and procedural extradition law create the most serious ongoing obstacles to just, quick and predictable extradition. The main ones are set out below.

Obstacles To Quick And Predictable Extradition

12. From the above, the EWG identified the following obstacles impeding extradition casework:

- Weak/outdated extradition laws and treaties;
- Countries have widely differing preconditions for granting extradition;
- Length, complexity, cost and uncertainty of extradition process;
- Lack of awareness of national / international extradition law and practice, of the grounds for refusing an extradition request, of how extradition could be improved, or of what alternatives exist to extradition and how they work;
- Language – translated extradition requests and attached materials are costly, usually done under tight deadlines and prone to critical interpretation errors;
- Communication and coordination problems, both between domestic agencies and between States;
- Prejudice to the success of an extradition request arising from premature arrest;
- Burdensome evidentiary requirements of Requested States that are not familiar to or well understood by Requesting States, or seemingly more relevant to deciding the person's guilt or innocence (an issue reserved in extradition law to the courts of the Requesting State);
- Non-extradition of nationals (however defined), or those who obtain citizenship by deception, and limitations on their effective prosecution in the refusing State;

[1] See e.g., United Nations Crime and Justice Network (UNCJIN) database, including bilateral agreements on extradition, judicial/legal assistance, drugs control, and prisoner transfer http://www.uncjin.org/Laws/extradit/extindx.htm

[2] See for UN crime, drug, corruption and terrorism instruments http://www.unodc.org/unodc/en/drug_and_crime_conventions.html;http://www.unodc.org/unodc/en/terrorism_convention_overview.html

- Lack of trust among States about the integrity of each other's justice systems; [3]

- Hence, wide scope continues to be given to the political or politically motivated offence extradition refusal ground and the discrimination refusal ground, and too little attention given to putting in safeguards to build trust, or to alternatives, such as prosecuting the person in the Requested State or an acceptable third country in lieu of extradition, where the domestic law if the Requested State so allows;

- Delaying tactics, such as frivolous or irrelevant defence requests for further information;

- Abuse of privileges and immunities, such as inappropriate grant or maintenance of diplomatic immunity or asylum;

- Inflexible prosecution practices in Requested States following receipt of an extradition request - including mandatory local investigation and prosecution triggered by that receipt for the extraditable offences, and local prosecution of minor offences compared to the offences for which extradition is sought;

- Partial, repeated or uncoordinated appeals throughout the extradition process;

- Failure of extradition due to preventable problems arising in transit States;

- Excessive cost burdens for some Requesting and Requested States.

[3] Although the offence is serious and deserves justice, doubts over the observance or protection of human rights in some Requesting States or the independence or integrity of their judges or prosecutors leads to reluctance or even refusal to extradite to those States - unless assuaged, for example, by appropriate guarantees, or a decision to prosecute in the Requested State.

CHAPTER 2 - BEST PRACTICE RECOMMENDATIONS FOR EXTRADITION

Enable lawful extradition without a treaty wherever appropriate

13. Although extradition has always been possible on the basis of reciprocity and comity, many States prefer to extradite only to countries with which they have treaty relations. Treaty-based extradition systems require a wide network of extradition arrangements for extradition needs to be effectively met. Any country not included may become an extradition haven.

14. This treaty preference helps to ensure that extradition is as just, predictable and certain as possible, particularly between States with high volumes of mutual casework. But treaties also limit extradition obligations to only treaty partners. Where extradition with other States can be based on reciprocity or comity, it is often supported by domestic legislation – and is entirely discretionary.

15. The treaty preference also reflects historic differences between legal systems. Most common law tradition States required a treaty basis; civil law tradition States less so. Over 130 (70%) of the world's 192 sovereign States are former colonial jurisdictions that became independent and responsible for their own foreign relations since 1960. Many exercised their sovereign rights to succeed to extradition treaties. Most were are badly out of date. Successor States have not always been able to replace them with modern treaties meeting foreseeable needs.

16. The EWG concluded that for many countries a predominately or exclusively treaty-based extradition system may be neither affordable nor realistic for current and foreseeable needs:

- unaffordable, because upgrading or putting in place extradition treaties is often a lower budget priority for new sovereign States than other competing needs like food, health, education, employment, the economy and defence;

- unrealistic, because the information age, technology and globalization empower criminals to identify and choose non-treaty countries of operations and refuge - then, if needed, cross borders faster than most pursuing criminal justice systems.

17. Accordingly, for States that do not already have in place an extensive treaty network, the EWG recommends that States enable their authorities to give effect to extradition requests in the absence of bilateral or multilateral treaty arrangements on a case-by-case basis. For example, States can provide in their domestic legislation the ability to enter into specific extradition agreements in particular cases with other States where no arrangements are already in place.[4] Another alternative to extraditing in the absence of a treaty is the legislative empowerment to extradite for example after consent by the Head of State. [5]

Make an inventory of extradition laws and treaties

18. It is essential to have effective cooperative arrangements in place to facilitate extradition. A proper legal basis for extradition is crucial. States should ensure that appropriate laws are in place. It is recommended that each State conduct an audit to establish an inventory of its extradition laws and treaties and to carefully review them to ensure that they enable effective extradition in the face of all foreseeable serious crime. Particular attention should be paid to agreements that have been published and forgotten, not officially published, or which may have been concluded under former colonial regimes, or where there is an issue of succession in the case of new separate sovereign States emerging from a prior single State.

Ensure those laws and treaties are flexible and up-to-date

19. Each State should assess whether its existing extradition instruments respond to current and foreseeable needs.

[4] The Royal Siamese Government may at its discretion surrender to foreign States with which no extradition treaties exist persons accused or convicted of crimes committed within the jurisdiction of such states provided that by the laws of Siam such crimes are punishable with imprisonment of not less than one year (Article 4, Extradition Act 1929, (Thailand)).

[5] Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign state, if the President has in writing consented to his or her being so surrendered (s. 3(2) Extradition Act 1962 (South Africa)).

Wherever appropriate renegotiate and extend the treaties

20. Treaties can be expensive to negotiate and renegotiate. The investment is justified between countries whose bilateral casework volume warrants it, or where current treaties have outdated provisions that unnecessarily heighten risks of delayed or failed extradition with treaty partners.

21. For example older "list" treaties contain specific lists of offences for which there can be extradition, as opposed to newer treaties providing for a generic punishability standard. To minimize negotiation time and cost, the internationally accepted UN Model Treaty [6] and Model Law [7] could be proposed either for new bilateral/regional treaty purposes or for upgrading old treaties.

22. When successful regional or inter-regional arrangements have been established, consideration should be given to extending those arrangements to States outside the region when appropriate, e.g. Council of Europe Convention on Extradition [8], Inter-American Convention on Extradition,[9] Minsk Convention.[10] All contain provisions enabling non-Member States to accede to the relevant Convention.

Reduce or eliminate authentication and certification requirements

23. To help facilitate the extradition process, States should attempt to keep formalistic requirements pertaining to the certification or authentication of documents in support of a request to a minimum, or if possible to eliminate such requirements completely.

Enable temporary surrender of persons sought to the Requesting State

24. Many countries defer extradition if the person sought is facing or serving a term of imprisonment in that State. The result is that any extradition has to await completion of that sentence. If the sentence is long, the resulting delay can prejudice or defeat the prosecution in the Requesting State and leave any victims without justice.

25. Temporary surrender enables the person to be present in the Requesting State for prosecution or for an appeal, then be returned to the Requested State to complete his or her original sentence. The capability of a State to temporarily surrender such a person to the Requesting jurisdiction has proved to be a very successful procedure. It has removed the critical problem of trial delay with all the consequences of that. States should consider providing for the capability to temporarily surrender a person sought in these circumstances.

Enable consent surrender of persons sought to the Requesting State

26. Consent surrender is a simplified process for the surrender of a person sought, who voluntarily consents to face trial or punishment in the Requesting State after provisional arrest and the presentation of a formal extradition request. The person foregoes the protection of the full extradition process, and he or she is surrendered without formal determination of his or her liability to be surrendered. The simplified process has significantly reduced the number and cost of extradition proceedings in a growing number of States.

27. Consent surrender avoids the need for the full extradition process. It can lead to the loss of protections normally available to the person sought through the extradition process. The surrendered person may later be unable to invoke certain rights, such as the rule of specialty or the ban on re-extradition. Therefore safeguards need to be in place to ensure that consent is indeed voluntary and that the person understands the significance and consequences of his or her decision. To ensure the process is not abused, most countries insist that a judicial officer ensure that the person sought has voluntarily consented and understands the consequences of that choice.

28. Accordingly, States should ensure that extradition laws and arrangements provide for consent surrender of persons willing to face trial or punishment in response to a request, with formal procedures for verifying and documenting consent (e.g. in cases of later attempt to deny or withdraw consent).

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[6] The UN Model Treaty on Extradition was adopted by the UN General Assembly in 1990 by Resolution 45/116, and amended in 1997 by Resolution 52/88: http://www.unodc.org/pdf/model_treaty_extradition.pdf

[7] The UN Model Law on Extradition – E/CN.15/2004/CRP.10.

[8] http://conventions.coe.int/treaty/EN/cadreprincipal.htm

[9] http://www.oas.org/juridico/english/treaties/b-47(1).html

[10] The 1993 Minsk Convention will be replaced by the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, signed on 7 October 2002 in Kishinev, Republic of Moldova.

Enable surrender for ancillary offences

29. Some States allow extradition for "ancillary offences." These are other offences the Requesting State wants to prosecute or punish the person for, but which are not serious enough to qualify as extraditable offences. However, surrender for an ancillary offence is *only* possible *in combination* with surrender for an extraditable offence. Surrender for the ancillary offence follows, as it were, surrender for the extraditable offence.

30. A number of States take this principle even further by introducing in their bilateral agreements the possibility of ancillary extradition for offences under administrative law, provided certain conditions are satisfied.

31. Surrender for ancillary offences in these circumstances has the distinct advantage of highlighting, anticipating and enabling prosecution in the Requesting State of offences for which prosecution may otherwise be precluded by the "rule of specialty" [11]. It saves time and costs of later communications, and the risk of any later misunderstanding.

32. The EWG noted these benefits, and recommends that States enable ancillary surrender in their extradition laws and treaties, where a person is being surrendered for one or more extradition offences.

Reform and simplify double criminality requirements in domestic laws treaties

33. Double criminality is an extradition requirement under most extradition treaties, laws and reciprocity regimes. Unless it is satisfied when required, extradition will fail.

34. It is not necessarily satisfied if the crime for which extradition is sought is a crime in both requesting and requested jurisdictions. Both places may name, define, categorize or characterize it differently, or include different constituent elements as essential components of the crime. If so, extradition may again fail, unless the treaties or domestic law have removed these serious technical obstacles to effective extradition.

35. Modern extradition legislation and treaty practice adopts a simple punishability test of both the foreign offence and equivalent domestic offence, regardless of their constituent elements or how they are named, defined or characterized. The reforms retain the substance of dual criminality protection undiminished, namely the criminal conduct - but remove unnecessary technicalities, in particular those associated with traditional list-offence approaches to dual criminality.

36. All that is required to be shown to satisfy the test is that:

- the foreign offence is punishable by imprisonment or other deprivation of liberty for a minimum period of at least [x] years (usually 1, 2 or 3 years) or a more severe penalty;

- had the conduct constituting the foreign offence taken place locally, it would have constituted an offence under local law (however described) punishable by imprisonment or other deprivation of liberty for a maximum period of at least [x] years or a more severe penalty.

37. The EWG recommends that States adopt this reform into all treaties and domestic law.

38. The EWG also noted that State practice differs on the issue of the relevant time at which dual criminality must exist. In some cases it is the time the extradition offence was allegedly committed - in others, the time at which the extradition request is decided. For the avoidance of doubt, the EWG recommends that the competent national extradition authorities of States clarify this issue with each other.

Restrict offences qualifying as political offences to the essential minimum

39. There is a recent trend for States in their domestic laws and extradition arrangements to include provisions expressly rendering certain offences ineligible for the political offence exclusion. Examples of such offences are offences referred to in multilateral agreements to which States are parties and which may include those Conventions addressing terrorism, transnational organized crime, drug trafficking and corruption[12] and

[11] The rule of specialty is a principle of customary international law that prevents an extradited person being prosecuted in the Requesting State for any prior offence, except the offence(s) for which the person was extradited. In general, post-extradition prosecution for such other prior offence can occur only if either the Requested State agrees, or the Requested State first allows the person reasonable time to freely leave the prosecuting State and the person does not.

[12] http://www.unodc.org/unodc/en/drug_and_crime_conventions.html and http://www.unodc.org/unodc/en/terrorism_convention_overview.html

specified categories of offences such as: murder, manslaughter, inflicting serious bodily harm, sexual assault, kidnapping, abduction, hostage-taking, extortion, and using explosives endangering human life and resulting in property damage.

40. Accordingly, States that have not already addressed this issue should consider incorporating similar provisions into their laws and treaties, so that extradition for serious offences is not precluded as unjustified claims that an offence merits application of the political offence exception should not be used to preclude extradition.

Relax extradition of nationals prohibitions and exclusionary evidentiary rules

41. Historically, all States of the world's main legal traditions protected persons within their borders against exposure to foreign justice systems by different requirements. The objective was identical, the means different.

42. Common law tradition States have tended to exercise territorial jurisdiction over their nationals and would extradite them if requesting States supplied evidence in a form satisfying both its technical admissibility of evidence and its sufficiency of evidence rules. Safeguards developed for fact-finding by civilian juries were needlessly carried over into extradition hearings determined by legally trained magistrates or judges.

43. On the other hand, historically civil law tradition States did not generally extradite their nationals, would submit them to domestic prosecution in lieu of extradition, and for that purpose would assert wide extraterritorial jurisdiction over them, wherever the crime was committed.

44. The EWG noted recent reforms of relaxing prohibitions on the extradition of nationals by a growing number of civil law tradition States by changing their domestic law and even their constitutions,[13] and of relaxing evidentiary requirements by common law tradition States, often under treaty obligation to do so.[14]

45. The EWG also noted the growing number of treaties and conventions encouraging their Parties to create competence in their authorities to submit cases for domestic prosecution when extradition is refused not only on nationality grounds, but also increasingly on other refusal grounds.[15]

46. The EWG endorses each of these initiatives to relax undue restrictions and mandatory and evidentiary requirements and encourages States to follow suit to ensure the greatest flexibility of response and enable justice to be done in the most appropriate jurisdiction in all the circumstances.

[13] eg, Austria: The International Criminal Court Law (Über die Zusammenarbeit mit den internationalen Gerichten, BGB1 Nr. 263/1996, Über die Zusammenarbeit mit dem Internationalen Strafgerichtshof , BGBI. III Nr. 135.2002), and European Arrest Warrant Law (Über die Zusammenarbeit mit den Mitgliedstaaten der Europäischen Union, BGBI. Nr 36/2004), read with s.12 of the Judicial Assistance Law, 1979 (Über die Auskieferung und die Rechtshilfe in Strafsachen).

Colombia: Constitution (Constitucion Politica de Colombia), art 35 (1997); El Salvador also amended its Constitution in July 2000 to permit extradition of its nationals.

Germany: Constitution (Grundgesetz) art 16 (2) (2000);

Greece: Code of Criminal Procedure, art 438; Portugal: Constitution (Constituição Da República Portuguesa), art. 33(3). Italy: Since 1948, the Italian Constitution has permitted the extradition of Italian nationals if expressly provided for in extradition treaties or agreements.

Switzerland: International Mutual Legal Assistance in Criminal Matters Law (Loi federale entraide internationale en matière penale), art 7.

[14] e.g., Republic of South Africa: s. 10(2) Extradition Act, 1962 (substituted by s. 8 of Act No. 77 of 1996), which eliminated the *prima facie* case evidentiary requirement, as follows: "For the purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned."

Canada and New Zealand both provide for the admissibility of a "record of the case" from the requesting State comprising a summary of the evidence acquired to support the request for the surrender of the person, and other relevant documents and copies – Canada: ss. 33-37 Extradition Act 1999; New Zealand: s. 25 Extradition Act, 1999.

New Zealand permits certain documentary hearsay evidence: "in any proceedings under this Act where direct oral evidence of a fact or opinion would be admissible, a statement made in any deposition, official certificate, or judicial document taken, given, or made outside New Zealand and tending to establish that fact or opinion is, if duly authenticated, admissible as evidence of that fact or opinion." (s. 76 Extradition Act, 1999).

[15] eg., UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, art. 4(2)(b); International Convention for the Suppression of Terrorist Bombings, 1997, art. 8; International Convention for the Suppression of the Financing of Terrorism, 1999, art 7(4); UN Convention Against Transnational Organized Crime, 2000, art. 15(4); UN Convention Against Corruption, 2003, art. 42(4);. Examples of States that have legislated for such optional extraterritorial jurisdiction, at least over nationals include: Australia: Extradition Act 1988, s. 45(1); Republic of South Africa: Prevention and Combatting of Corrupt Activities Act, 2004, s.35; Protection of Constitutional Democracy Against Terrorist and Related Activities, 2004, s. 15.

47. The EWG reviewed a related development whereby some States that did not extradite their nationals now may do so for the purposes of trial only - provided the person is returned to serve any sentence imposed. The EWG saw such conditional extradition of nationals as a far from perfect solution. While better than nothing to avoid the consequences of outright refusal, it undermines extradition as the international legal mechanism for trial and punishment in the country whose criminal law was violated.

Consider adoption of a broad "extradite or submit to prosecution" duty

48. As Requested States have accepted treaty obligations to extradite, they have accepted obligations to either extradite or submit the case to prosecution (*aut dedere aut judicare*). The obligation is not to prosecute, but to submit the case for assessment and determination whether in the light of all the facts and circumstances a prosecution should be brought. An "extradite or submit to prosecution" duty does not exist in the domestic law of some States.

49. All international drugs, organized crime, corruption and anti-terrorism instruments contain this obligation if extradition is refused on the grounds of nationality. [16]

50. To ensure the obligation to submit to prosecution in lieu of extradition is effective in both theory and practice, the instruments require State Parties to establish universal jurisdiction over their nationals in such cases. They may also permit such States to establish jurisdiction over the relevant serious offences when alleged offenders are found in their territory and they do not extradite them for other reasons.

51. The EWG encourages Requested States to establish a capacity to submit to domestic prosecution appropriate cases where it has refused extradition in the broadest sense, and not just on the ground of nationality – or in the case of non-nationals, for other reasons - to help ensure that prosecution in lieu of extradition is effective. Whenever a State adopts this wider capability, the option is best exercised when the Requesting State asks the Requested State to submit the case for prosecution following rejection of its extradition request and the Requesting State is willing to assist, for example, through the provision of necessary evidence.

52. For prosecutions in lieu of extradition to have best prospects of success, the EWG also encourages mutual legal assistance whenever appropriate from States that unsuccessfully request extradition to States that refuse it.

Enable re-determination of citizenship, amnesty, etc. improperly obtained to block extradition

53. Conferring naturalization, amnesty, diplomatic or other immunities or privileges are important sovereign protective acts of States. They must be free to exercise them for the peace order and good government of that State, when exercised with full knowledge of all pertinent facts.

54. In the case of grant of citizenship, every sovereign State may set its own rules for acquisition of its nationality. However, when two or more States confer nationality on the same person, the right to require international recognition of that grant of citizenship is no longer exclusively within the legal competence of the granting State. International law prevents any State insisting on such recognition, unless that nationality is the person's real and effective nationality. [17]

55. Sometimes States grant privileges or immunities to a person unaware of his/her past criminal record or behaviour. Extradition casework continues to be replete with examples where a person sought, obtained and maintained the grant to avoid extradition.

56. The EWG recommends that States ensure they have the authority necessary to review and re-determine grants of citizenship and privileges or immunities that block extradition if secured through the falsification or concealment of information. The EWG also recommends that where unmeritorious

[16] e.g. UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances – Art. 6(9)(a); UN Convention against Transnational Organized Crime – Art. 16(10); UN Convention against Corruption – Art. 44(11); as well as all anti-terrorism conventions and protocols that create criminal offences (except for the 1963 Convention on the Offences and Certain Other Acts Committed on Board Aircraft and the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection).

[17] Nationality must correspond with the factual situation taken as a whole. The evidence may or may not demonstrate that a person retains only nominal links with one or more countries of nationality and severed all others in favour of the country claiming recognition of its protective jurisdiction over that person. Careful evaluation of the evidence is needed to establish whether stronger factual ties exist between the person and the State whose nationality is involved, than the others(s) – e.g., habitual residence, family ties, centre of the person's interests, participation in public life, attachment shown for the country and the extent inculcated in the person's children, etc: *Nottenbohm Case (Second Phase)*, Judgement of the International Court of Justice, 6 April, 1955.

applications are lodged merely to delay extradition, the filing of a request for asylum or refugee status should not automatically bar extradition proceedings.

Asylum grant should affect extradition only to country from which protection sought

57. The grant of asylum to a person reflects a country's concern about persecution he or she may face in the country from which asylum is sought.

58. The EWG recommends that in deciding whether or not to extradite such a person, the grant of asylum should be a relevant consideration only where the Requesting State is the country from which asylum was granted.

59. There may be cases where the Requesting State later may grant extradition of the person to the country from which asylum was granted by the Requested State. In such a case, the EWG recommends that the Requested State consider whether safeguards should be put in place against re-extradition to that country.

Consider enabling simplified surrender by backing or recognizing foreign arrest warrants

Commonwealth Scheme (mainly common-law tradition countries)

60. Backing of Warrants schemes are a simplified form of surrender between States. An arrest warrant issued in one country is certified by a judicial officer of the other country, then given full faith and credit in the latter country as if issued as a local warrant there. Application for judicial certification of the foreign warrant is often – but not always – made directly by the police, and there are limited grounds for refusal.

61. Variants of the scheme are successfully applied between such jurisdictions as Singapore, Malaysia and Brunei; Australia and New Zealand; and the United Kingdom and certain Channel Islands.

The European Arrest Warrant

62. On 1 January 2004 the European Arrest Warrant (EAW) [18] entered into force between 8 of the 15 EU Member States. By 31 December, a total of 24 Member States of the newly enlarged EU of 25 Member States apply the EAW scheme. [19]

63. The scheme replaces traditional extradition procedures between EU member States with a simplified fast-track common arrest warrant system - to simplify and accelerate surrender procedures between them, as if they were a single jurisdiction.

64. The scheme uses a common arrest warrant and applies to 32 listed offences (including crimes under the jurisdiction of the International Criminal Court) [20]. In general, if the list offence is punishable in the issuing State by a custodial sentence or a detention order of at least three years, the EAW receiving State must surrender the person sought for a listed offence, without verification of dual criminality. The cross-border casework processing is also revolutionized. Instead of being handled by political or policy authorities, they are now processed directly by judges and prosecutors.

65. The EAW requires each national judicial authority to recognize, *ipso facto* and with a minimum of formalities, requests for the arrest or surrender of a person made by the judicial authority of another Member State for the purpose of:

- conducting criminal prosecutions;
- executing custodial sentences; or
- executing detention orders.

66. With effect 1 January 2004, the Council Framework Decision on the European Arrest Warrant has also replaced existing extradition treaties and agreements between EU member States.[21] However those States can still enter into bilateral or multilateral

[18] Introduced by the Council of the European Union on 13 June 2002 (2002/584/JHA). A full description can be found at http://europa.eu.int/scadplus/leg/en/lvb/l33167.htm

[19] Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

[20] See Article 2.2. Under Article 2.4, a judicial authority may also request extradition for offences not on the list, which carry 12 months' imprisonment in both jurisdictions. In such cases, the EAW receiving State may, at its discretion, subject surrender to a dual criminality requirement that the acts for which the warrant was issued also constitute an offence in the receiving State, whatever the constituent elements or however it is described.

[21] Insofar as they relate to extradition: 1957 European Extradition Convention and its protocols; 1978 European Convention on the Suppression of Terrorism; Agreement of 26 May 1989 between the then 12 EU Member States on simplifying the transmission of extradition requests; the relevant provisions of the Schengen Agreement of 19 June 1990; 1995 Simplified Extradition Convention; and the 1996 Extradition Convention.

agreements to further simplify or facilitate the surrender procedures.

67. The EWG encourages States to consider the potential benefits of simplified surrender procedures with other States or groups of States, adapted appropriately to their respective needs and requirements.

Deploy and make appropriate and constructive use of staff located abroad

Criminal justice liaison personnel abroad – benefits and costs

68. Because of the marked differences between legal systems, there may be requirements in Requested States unfamiliar to the Requesting State, e.g., to obtain extradition, or judicial orders sought under mutual legal assistance requests. Delays, wastage and frustration occur when incoming requests do not comply with the Requested State's laws or procedures, or if so, still result in offenders not being promptly extradited and prosecuted, or mutual assistance requests not being executed in the most timely and useful way.

69. Liaison officials help transform the way requests are both made and executed. Having someone available on the spot who knows exactly what is required to process the request immediately has proved invaluable. Liaison personnel placed in Requested States help ensure that materials are provided to the Requested State the first time and that waste and delays are minimized. They have proved effective, particularly in processing urgent and complex cases.

70. Resource issues may initially seem to preclude placing liaison officials abroad, particularly for developing countries. Costs are not alone determinative, and rigorous cost-benefit analysis should precede any properly considered decision. For example, a key requested State, whether developed or developing:

- may considerably improve its foreign casework success rate and impact by deploying one liaison prosecutor or magistrate in those Requested States and one less police liaison officers than the 3 already there; and
- seeking to recover abroad millions of dollars worth of public funds stolen by key former government officials could properly justify the deployment of liaison personnel to ensure successful extradition, mutual legal assistance, and asset confiscation/forfeiture/return or sharing outcomes.

71. For those and other reasons, some States have chosen to locate one liaison person in a State central to a region or continent with which his or her country has enough volume or value of cooperation casework to justify the placement. Sometimes, the specifically trained and experienced person is placed to carry out the liaison function from directly within the foreign Central Authority or prosecution service.

72. The EWG accordingly recommends that States give serious consideration to establishing a contact mechanism to expedite and facilitate the preparation and making of extradition requests. As recourse to flight is often to countries in the same region, a contact mechanism or liaison personnel should be established on a regional basis, when cost-effective.

73. Different skills and experience are needed depending on the deploying countries, foreseeable needs and any bilateral or regional relationships involved. Liaison personnel should normally have experience in the extradition field and preferably have a prosecution background.

74. Existing programmes and bodies, which can serve as models of such initiatives, are Eurojust[22], the European Judicial Network,[23] The Iberoamerican Network of Judicial Assistance in Civil and Criminal Matters (IberRED) [24] the French Liaison Magistrate Programme,[25] the US Attache programme [26] and the Canadian Counsellor of International Criminal Operations to the Canadian Mission to the EU in Brussels. [27]

[22] http://www.eurojust.eu.int

[23] http://europa.eu.int/comm/justice_home/ejn/index_en.htm

[24] IberRED was formed at its first constituent meeting in Cartagena de Indias, Colombia, 27 to 29 October 2004.

[25] http://www.justice.gouv.fr/presse/conf221203.htm and http://www.justice.gouv.fr/Saei/Actualite/mag_liaison.htm .

[26] eg, http://www.usdoj.gov/criminal/oia.html , and http://www.fbi.gov/contact/legat/legat.htm .

[27] Counsellor, International Criminal Operations Canadian Mission to the European Union Avenue de Tervuren 2 1040 Brussels, Belgium. The Counsellor assists European States in making extradition and mutual legal assistance requests to Canada and when Canada makes requests to those States.

Consular staff

75. Where direct inter-country links are not already in place between criminal justice authorities, States should give consideration to using personnel such as consular officials, already in place in the States' embassies, missions and consulates to assist in the processing of the request and the establishment and maintenance of communication networks where appropriate.

Simplify judicial review and appeals processes

76. Two important competing priorities underlie the judicial review and appeals process in extradition casework. They impact differently on the speed and predictability of extradition. On the one hand a person sought must be able to ensure that extradition takes place only in strict accordance with the law. On the other hand the extradition process must be just but also efficient.

77. The EWG concluded that there must always be adequate appellate and review recourse for persons sought, given the range of legal and personal issues that may arise throughout the extradition process. Appropriate judicial economy is needed too.

78. The EWG reviewed cases involving forum shopping, multiple partial appeals, progressive sequenced, or trampolining appeals at more than several points during the extradition process in federal and non-federal jurisdictions. [28] Without questioning the need for judicial review or appeal on the appeal points raised, the EWG concluded that extradition appeal and review processes are overdue for rationalization in many countries, and noted that the process has begun in some.[29]

79. In order to achieve judicial economy and accelerate the extradition process, the EWG accordingly recommends that, without prejudicing the fundamental right to review or appeal by the person sought, or effectiveness of judicial review:

- States in which appeal and review can be brought in the above ways should seek to simplify the procedure by limiting the number of appeals which may be sought within the extradition process and the number of courts (e.g. federal or state) in which such appeals may be brought; and

- wherever possible and consistent with its basic constitutional principles, States should adopt a single appeal mechanism for extradition casework to review all appropriate factual and legal issues, while eliminating repeated and partial reviews.

[28] eg, The group of appeals associated with Indonesia's request to Australia for the extradition of the late Dr Hendra Rahardja. He was sentenced *in absentia* by an Indonesian court for instigating as the senior executive officer of a bank in Djakarta a number of transactions which, in effect, procured in excess of $US400 million for companies in which he had a direct or indirect interest: *Rahardja* ([1999] FCA 1423, [2000]FCA 639, [2000] NSWSC 790, [2000] FCA 1297, [2002] NSWSC 680, [2002] NSWSC 1249, [2002] NSWSC 1253. After the extradition proceedings began, Dr Rahardja mounted a series of state and federal court challenges, but died in Australia before the challenges were finally resolved. Subsequently, Australia gave mutual legal assistance and confiscated and returned to Indonesia some of the proceeds associated with the case.

[29] eg, Extradition Act UK, 2003, ss 103-116 provide a simplified single avenue of appeal on law or fact for all cases.

CHAPTER 3 – BEST PRACTICE RECOMMENDATIONS FOR EXTRADITION CASEWORK

Use modern technology to speed up and improve extradition casework results

80. The EWG noted that traditional slow methods of communicating and transmitting written, sealed documents through diplomatic pouches [30] or mail delivery systems often result in failure to meet extradition deadlines, and consequential discharge of a person sought for procedural reasons alone. It also noted that serious crimes are increasingly perpetrated across State boundaries impacting on victims in the different jurisdictions along the way.

81. The EWG concluded that the ability of all States to communicate rapidly and effectively in extradition casework is essential.

82. Accordingly the EWG recommends that:

- States use modern communication means like phone, fax or Internet to communicate, transmit and respond to extradition requests to the greatest extent possible;
- computer-based systems should be available and used to help process and manage the making and execution of requests;
- Requesting and Requested States should determine among themselves how to ensure the authenticity and security of their communications, and whether telecommunications should be followed up by written communications through the formal channels; and
- the bilateral and multilateral development assistance community give high priority in their programmes to helping properly equip the competent extradition casework authorities of developing countries for rapid, effective and secure communications with their casework counterparts in developed countries.

[30] The EWG noted that until new extradition arrangements are in place, old arrangements may still require documents to be transmitted in a certain way, e.g. through the diplomatic channel.

Make greater use of Interpol[31] to locate persons sought or request provisional arrest

83. Interpol is mandated to 'ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights'. [32]

84. In appropriate cases, States may seek the assistance of Interpol to ensure that the location of the person sought is identified as soon as possible.

85. The EWG encourages States to make more use of Interpol as appropriate.

86. To avoid risks of persons being arrested in a country from which extradition would *not* be sought, Requesting States should give clear instructions to Interpol, e.g. locate only, then notify - or locate and arrest, then notify.

87. To prevent inappropriate arrests of persons no longer wanted, the EWG encourages all Interpol National Central Bureaux to develop with their national extradition authorities an appropriate domestic system to ensure that whenever domestic warrants have been cancelled, red notices are promptly withdrawn.

Only resort to provisional arrest where need for arrest is truly urgent

88. The location of a person sought naturally generates pressure for immediate arrest, particularly in high profile complex cases. When a request is made for provisional arrest, due account should be taken of the fact that the arrest precipitates deadlines for the production of documentation, which may not realistically be met, and consequently will result in the discharge of the person sought.

89. Accordingly, States should ensure that provisional arrest requests are resorted to only in truly urgent situations. Examples of such urgent situations include flight risk, or public interest considerations such as the commission of other offences. On the other hand, a provisional arrest request may be unwarranted where flight risk appears low – e.g., the person sought has established roots in the community, or is already in custody in

[31] International Criminal Police Organization.

[32] Article 2, Interpol Constitution.

the Requested State. When the person is settled in the Requested State, a full extradition request should be submitted rather than a request for provisional arrest.

Make 3 key determinations once the person sought has been located

90. In striving for effective and predictable extradition, it is essential that the State seeking the enforced return of a person (the Requesting State) proceed from the axiom that extradition is country-specific.

91. Once the person has been located in another State, it must be determined:

- that the person located is indeed the person sought;
- whether that State can extradite the person - in particular, upon what legal basis an extradition request can be made and granted; and
- what the Requested State's law specifically requires as to form and content of requests.

Requesting and Requested Authorities to Communicate from Outset of Process

To clarify the basic requirements for extradition

92. Once the location of the person sought is known, the EWG encourages the competent extradition authorities of States to communicate promptly and informally in advance of any presentation of the request for provisional arrest and/or extradition, particularly as to:

- the nature of the extradition;
- any documentation required in the formal extradition request and any related authentication or certification requirements;
- time limits for receipt of extradition request and documentary evidence – and surrender;
- whether dual criminality is determined in terms of the time the offence was committed, or the time the extradition was requested;
- any other requirements of the Requested State.

93. Early communication helps make a Requesting State aware of any Requested State evidence admissibility requirements which, if not met, may result in the discharge of the person sought. It is not just that evidentiary requirements differ between common law and civil law jurisdictions. Domestic requirements can also differ within those jurisdictions. Consequently, if the particular evidentiary requirements of the Requested State are not known or understood in advance and inadequate materials are submitted, extradition will not proceed expeditiously and the offender not returned to the Requesting State to be prosecuted in a timely manner. Delays most commonly occur when documentary evidence has to be supplemented. In such a case, it should be done by sending the supplementary materials, rather than returning the original materials for adjustment. This not only saves time, but reduces the transmission costs. It also avoids the embarrassment of papers being lost in transit. Submitting adequate materials initially eliminates the wasteful back and forth exercise.

94. The EWG recommends that States, which have not already done so, develop and distribute to extradition partners checklists setting out and explaining these requirements. Pending that, the EWG produced the checklists at Annex B and C, and recommends their widespread adoption and use.

To update on any extradition reforms or extradition personnel changes

95. Communication at an early stage also helps speed up the extradition process by providing an opportunity for a Requested State to advise a Requesting State of any legislative changes - such as the elimination of the *prima facie* case requirement or of authentication or certification requirements, or changes in extradition personnel.

To expose to the Requested State a draft extradition request for feedback

96. Sending out draft requests to one's counterpart in the Requested State before finalizing and transmitting the official request is also highly recommended, particularly when the Requesting State is unfamiliar with the requirements in the Requested State, or the case is complex. This can help avoid later potential problems with, for example, dual

criminality, documentary requirements, and translation - as well as minimize delays.

To anticipate and deal with particular issues before they arise

97. Arrest, search and seizure: Different countries have different powers of arrest, search and seizure and different preconditions and limitations for exercising them. Some States can arrest on the basis of an Interpol notice; search the arrested person, their clothing, any property in the vicinity, and any place or thing (e.g., home, workplace) where there may be evidence to prove any offence for which the person is sought by the Requesting State; seize that evidence, and anything the person is suspected of acquiring through criminal behaviour. Others cannot, but have different possibilities. So, wherever possible before arrest, the Requesting and Requested State should clarify these preconditions and limitations together to pre-empt potential problems.

98. Custody or bail/conditional release following arrest: The Requesting State should ensure that where the person sought is entitled to a determination of bail or custodial detention in the Requested State, all information relevant to that determination is transmitted to the Requested State at the earliest possible time (e.g. a person's immigration status, criminal record and other background information, considerable assets abroad, multiple passports, flight history, aliases). Although not necessarily required by treaty, this information may assist in opposing applications for bail at conditional release hearings and in obtaining appropriate judicial orders.

99. Potential grounds of refusal: The Requested State should also communicate with the Requesting State at the outset of the process to identify any issues that could be raised as potential grounds for refusal. The Requesting State should then provide any information or documentation to address such issues, e.g. death penalty, political offence, discrimination, fair trial. Where there has been no such communication, the Requested State should advise the Requesting State as soon as possible so that these issues are addressed promptly.

100. In absentia proceedings: Delays are further reduced when Requesting States indicate at the outset whether any relevant conviction is the result of *in absentia* proceedings. Many States are required by law to treat *in absentia* convictions in the same manner as if the person sought has been accused and not yet tried and convicted. Early communication enables the correct material to be submitted and procedures employed before the issue becomes a problem.

101. Rule of Specialty: States should ensure when making requests that they identify all offences for which extradition is sought. This avoids later difficulties and delays from having to ask the Requested State for consent to prosecute further extraditable offences for which extradition was not initially sought. It also enables early strategic focus on all relevant offences, including potential ancillary offences.[33] In case of doubt, both the Requesting and the Requested States should ask and obtain additional information from each other.

Minimize translation problems

102. When the request is transmitted to the Requested State, the Requesting State should always ensure that the formal request in the language of the Requesting State is always accompanied by a translation.

103. States should attempt to keep the requests for extradition short, clear and brief to avoid difficulties in the translation of the request into the language of the Requested State.

104. In any translation, States should translate the whole request. Partial translations could result in conflicting interpretations or misunderstandings.

105. Where different official languages are spoken in different regions of the Requested State, the Requesting State should consult on the issue with the Requested State and translate the request into the most appropriate one for the Requested State's purposes. Where multilateral or regional treaties or arrangements indicate the languages in which the request needs to be translated, States should use the official language of the Requested State - or if more than one, the most appropriate one.

106. Requesting States are encouraged to translate in advance into the foreign languages those parts of national legislation

[33] See paras 29-32 above.

that are most often used, referred to or reproduced in requests.

Improve the Transmission Speed of Extradition request

107. Historically, the diplomatic channel was used to transmit extradition requests. It was reliable - what was sent in fact arrived. And dependable - the Requesting State could be assured the request was authentic, and originated from another sovereign State. Unfortunately the diplomatic channel also can be very slow. A criminal can travel half way around the world in less than a day, yet extradition requests can take weeks to arrive through the diplomatic channel.

108. Accordingly, the EWG recommends that, unless required by any extradition arrangement in force, as a matter of practice and to avoid delays in the process of consular dispatch (diplomatic channel):

- transmit provisional arrest requests via Interpol, rather than through the diplomatic channel; and
- send the extradition request directly.

109. If required to be sent through the diplomatic channel, a copy of the request should also be sent directly to the executing authority in the Requested State to allow for review and the preparation of any paperwork in advance of receipt of the actual request. Delivery of the formal request to the executive authority in the Requested State, rather than the judicial authority, should be considered sufficient to meet treaty or domestic law deadlines for submission of a request following provisional arrest. [34]

Requesting States to strictly comply with treaty procedural requirements

110. In most jurisdictions, Courts and Ministers are bound to interpret strictly treaty requirements such as procedural time limits, [35] certification, authentication or surrender requirements.

111. Failure by States to adhere to them could result in the judicial or executive discharge of the person sought for procedural reasons, irrespective of the substantive merits of the extradition case – e.g., a Requesting State fails to ensure the Requested State receives the formal extradition within [x] days of the provisional arrest of the person sought, or to ensure escort of the person from the Requested State within [y] days of the final decision to surrender.

112. Accordingly, the EWG recommends that Requesting States check at the earliest stages of the process what procedural requirements must be met, then plan and manage the process to ensure they are – particularly those that will result in wasteful extradition failure if not met.

Continue to Communicate throughout the Extradition Process

113. Maintaining contact with one's counterpart in the Requested State keeps communication channels open, even if only to ascertain whether the Request is in order, and to confirm one's availability to assist should further information or evidence be required.

114. Although communication is time consuming for both Parties, it is important for the Requested State to update the Requesting State on the status of the request as often as necessary during the course of the extradition proceedings, particularly when something out of the ordinary occurs. When there are delays in the process, and the Requesting State is not given an explanation, frustrations can result and pending prosecutions in the Requesting State may be jeopardized.

115. Timely communication of key information eliminates frustrations in the Requesting State when not kept aware of the

[34] see e.g., the Agreement on Extradition Between the European Union and the United States of America, which provides that where the person whose extradition is sought is held under provisional arrest by the Requested State, the Requesting State may satisfy its obligation to transmit its extradition request and supporting documents through the diplomatic channel by submitting the request and documents to the Embassy of the Requested State located in the Requesting State (Article 7(1)).

[35] e.g. For the submission of the formal extradition request when a provisional arrest request was initially made, the submission of documentary evidence, or surrender arrangements. The EWG also noted that that time requirements are often missed through poor domestic coordination when documents need to be processed through various Ministries and Departments in both States. If direct transmission between criminal justice authorities due to treaty or internal requirements cannot be achieved, then both States should monitor the progress of the transmission of the materials to ensure that deadlines are not missed. When time limits are set by treaty, it should be noted that different States compute time limits differently. States should therefore establish the actual dates when the request or documentary evidence is due.

In the case of the European Arrest Warrant and when a State in exceptional circumstances cannot observe the time limits set out in the Framework decision, the failure to comply has to be reported to Eurojust (Article 17 of the EAW Framework Decision).

status of the proceedings. This status information is often required to be reported by the Requesting State to their Court in a pending prosecution. It may also be necessary information relating to the prosecution of co-accused, which may be delayed pending the return of the person sought. Explanations given by the Requested State regarding unexpected delays, or information provided as to when the proceedings are likely to be finalized, may assist in preserving the pending prosecution.

Permit Presence of Officials/Foreign Representatives during Extradition Proceedings

116. The EWG encourages early liaison between the Requested State's legal office and the officials of the Requesting State or its diplomatic mission who would desire to be present at proceedings. Arrangements should be made, where appropriate, to allow the presence of police, legal or extradition liaison personnel or of lawyers of the Requesting State, and who would be on hand to assist with the proceedings should that become necessary. Requesting States should carefully plan these arrangements, particularly where those present later may be called as defence witnesses at trial in the Requesting State.

Expedite, Limit and Facilitate Extradition Hearings

117. The extradition hearing is an expedited process designed to proceed on documentation, keep expenses to a minimum and ensure prompt compliance with international obligations.

118. The EWG noted that extradition hearings are not trials of guilt or innocence of persons sought. Those are determinations for courts of Requesting States. Accordingly and wherever possible, issues not relevant to the extradition hearing should be precluded and the calling of witnesses avoided. The issues, which the Requested State may be required to deal with at extradition hearings are: identity, the existence and applicability of an extradition arrangement, double criminality, extradition objections, the authenticity of the extradition request, and the sufficiency of its supporting evidence.

119. If a Requesting State is unable to provide the evidence necessary to satisfy the requirements of the Requested State and such evidence is available in the Requested State, then that State may introduce that evidence at the extradition hearing under domestic rules of law of evidence (for example evidence to establish identity and/or evidence which would assist in satisfying the evidentiary requirements).

Promptly Notify the Requesting State when Surrender Order Made

120. Once surrender is granted, the Requesting State should be notified immediately, so that transfer arrangements can be made and the person sought surrendered as soon as possible. Transfer arrangements should be planned well in advance by the Requesting State to properly anticipate and avoid serious problems when escorts are not available to remove the person sought within the stipulated time limit.

Carefully Plan, Organize and Implement Transit Arrangements

121. Where the return of a person involves transit [36] through one or more third States, appropriate transit arrangements for the movement through those States should be carefully planned by the Requesting State. Responsibility should be clearly fixed as to what authority will secure the necessary transit authorizations. Care should be taken to avoid unnecessary risk factors, which may impede the prompt and proper return once all decisions on surrender have become final in the Requested State. For example, a person sought should not be transported through a country, which does not extradite its nationals and permanent residents, when citizenship could be claimed (e.g. through ancestry or other family relationship), or by a route presenting avoidable opportunities for delay.

Establish Objective Criteria to Determine Which Competing Extradition Request Should Prevail

122. When a person is sought by more than one State for the same or different offences, all may submit extradition requests to the Requested State. If the person is liable to be extradited to more than one of them, the Requested State must decide which request takes priority.

123. Treaties or national legislation often provide the criteria by which one request is given priority over the other. The criteria

[36] Moving a person through a State that is neither the Requested nor the Requesting State.

should be both clear and sufficient, to ensure transparency and consistency in the decision-making process.

124. The EWG reviewed criteria from their own experience of concurrent jurisdiction requests, together with those set out in the UN Model Treaty on Extradition Manual[37] and those developed by Eurojust [38] on which jurisdiction should prosecute in cross border cases where there is a possibility of a prosecution being launched in two or more different jurisdictions[39].

125. The documented UN and Eurojust criteria are complementary and sometimes different. The EWG concluded that additional criteria were needed, and recommends that States adopt and use the following criteria derived from those sources for dealing with concurrent requests:

- if the requests are made pursuant to treaties; [40]
- the jurisdiction where the majority of the criminality occurred, or where the majority of the loss or damage was sustained;
- the respective request dates, and the chronological order in which they were received;
- the capacity and possibility of subsequent extradition between the requesting States;
- in crossborder crimes, capacity of a jurisdiction to prosecute all offences for all others;
- the times, places and relative seriousness of the commission of each of the offences;
- the location, attendance of protection of witnesses;
- the nationality of the person sought;
- the possibility for the victims to participate in or follow the proceedings;
- for each jurisdiction, the extent to which there could be a just and fair prosecution;
- the relative availability and admissibility of evidence in each jurisdiction;
- the length of time for proceedings to be conducted and concluded;
- where social rehabilitation of the person sought would best occur;
- the extent and manner in which other international cooperation tools can be used (see paras 127–135 below); and
- other respective interests of the Requesting States.

This list is not exhaustive. Other factors could also be taken into account with appropriate caution.[41]

126. Finally the EWG urges careful assessment where concurrent requests problems can be reduced by subsequent re-extradition from the priority extradition State. This is an excellent option, though the benefits may not flow until after prosecution or punishment in the priority State. And it may not work at all if competing States seek the person for the same offence. Re-extradition may be prevented by the "double jeopardy" (*non bis in idem*) principle.[42]

Use other judicial cooperation tools where extradition may not be possible

127. Extradition is the oldest of all instruments of international legal co-operation between criminal justice systems. Rules of customary international law have evolved from extradition practice over the millennia, many of which guide recent forms of international criminal justice system cooperation, such as mutual legal assistance, and transfer of criminal proceedings.

[37] http://www.unodc.org/unodc/en/crime_cicp_standards_manuals.html

[38] Eurojust Annual Report 2003 – Annex, page 60 – 66. http://www.eurojust.eu.int/2003.htm.

[39] Eurojust, if asked, can give advice when multiple requests are made in respect of the same person in which warrant should take priority (Article 16 of the EAW Framework Decision).

[40] If requested under treaty, extradition is obligatory in certain circumstances - if under legislation only, usually discretionary.

[41] For example: (1) legal requirements to be met by prosecutors in the respective jurisdictions; (2) relative sentencing powers in each; (3) proceeds of crime considerations; (4) comparative costs of prosecution; and (5) impact on each jurisdiction's resources.

[42] No person shall be placed in jeopardy more than once for the same offence. The problems arise because the *non bis in idem* rule can mean different things to jurisdictions, unless clearly defined in their treaties. For some, it may be narrowly limited to punishment following conviction in the Requested State for exactly the same offence. For others, it may enable wide protection of a person acquitted in any jurisdiction of any crime - however described, whatever its constituent elements, and wherever occurring - arising from the totality of facts relevant to the extradition offence.

128. In many respects, international cooperation tools are interdependent and include:

129. The EWG draws special attention to these important interdependencies, and recommends that States approach their extradition casework with them at the forefront of their decision-making.

130. The practical impact of this for extradition caseworkers is to not make extradition requests, respond to them, or react to final decisions particularly decisions refusing extradition as if extradition is the only effective way of achieving justice in cross-border serious crime casework. Each of the tools have complementary roles and uses in ensuring that justice is done in respect of both international and local crimes. Decisions as to where justice can be best done in a particular case need to be taken objectively in the light of all the facts and circumstances.

131. Some examples (illustrative, not exhaustive) of effective use of the whole toolbox are set out in the recommendations below.

Use mutual assistance to strengthen extradition requests or prosecutions in lieu of extradition

132. States are reminded that mutual legal assistance affords a very useful means of obtaining evidence to bolster a case where it is possible that a request for extradition will be made.

133. It is advisable that the mutual legal assistance request be kept separate from the extradition request.

134. In situations where extradition would not be possible or may have been refused (e.g. on the grounds of nationality) and the Requested State is asked to proceed against the person sought in accordance with the principle of *aut dedere aut judicare* (where domestic law so permits), the Requesting State should put at the disposal of the Requested State all available evidence. If necessary, any additional evidence may be secured by a mutual legal assistance request.

Consider enforcement of foreign sentences where extradition refused

135. When a request for the extradition of a sentenced person is refused and the Requested State is his or her State of nationality, an option is available to the requesting State to ask the Requested State to enforce the foreign sentence. The EWG encourages States to consider providing that option in their domestic extradition laws.

Strengthen UNODC's work of facilitating effective extradition

136. The EWG recognized UNODC's established and mandated role in assisting requesting Member States to implement the international conventions relating to drug control, transnational organized crime, corruption and terrorism - particularly by legislative drafting assistance, development and supply of model legislation and other working tools, training key practitioners, and providing problem-solving mentor assistance with major domestic or international criminal casework. The EWG emphasized the high value of continued promotion, ratification/accession and implementation of these instruments, including their extradition provisions.

137. The EWG stressed the importance of drawing on the expertise of practitioners dealing with extradition issues and casework on a daily basis, and linking them to States in need of training - and by networking these efforts out under the scheme of wider partnerships, whereby the UN could function as the centre of this network.

138. The EWG proposed that UNODC consider developing a UNODC project to establish appropriate communication links and to facilitate periodic networking and casework problem solving reunions between the key casework practitioners of extradition States.

139. The EWG noted the quality and usefulness of UNODC's treaty implementation working tools – such as the UN Model Treaties, related manuals, model legislation, software for writing mutual legal assistance requests and other working tools. International awareness of the existence and value of some of them among prosecutors, judges, legislators, policy makers and legislative drafters appears low.

140. Accordingly, the EWG recommends that UNODC energetically and widely market these tools through direct links with justice ministries and competent international cooperation authorities of States, institutions such as the International Association of Prosecutors and Eurojust, and legal divisions of relevant international and regional organizations.

ANNEXES

ANNEX A – LIST OF PARTICIPANTS

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** Unable to participate at the 12-16 July 2004 EWG meeting. Subsequently reviewed the draft report and contributed to its settlement.*

ANNEX B - CHECKLIST FOR OUTGOING EXTRADITION CASEWORK PLANNING [43]

❑	*Earliest contact with Requested State*	Where the location of the person sought is known, communicate informally before making the request for provisional arrest and/or extradition to know all the requested States relevant requirements and acceptable fast communication/transmission channels.
❑	*Concurrent requests*	Check for them at earliest stage. If there are any, ensure the case for priority is prepared, communicated and negotiated soonest.
❑	*Legal basis*	Check whether an extradition request can be made to the proposed Requested State.
❑	*Arrest, search and seizure*	Check legal preconditions and limitations of the Requested State for each and pre-empt potential problems Check whether conditional release/bail is possible. If so supply (before arrest if possible) all relevant information on the issue.
❑	*Time Limits*	Check the time limits for receipt of the request in the Requested State following arrest and ensure the time limits will be met.
❑	*Format of documents and any evidentiary requirements*	Always check with the Requested State to make sure documents are in the correct format. Where evidentiary rules apply, check for evidentiary requirements in the Requested State, particularly as to the standard of proof required and the types of evidence needed, check whether they are in deposition or affidavit format, with one signed/sworn by correct officer of the State/judicial authority, are sealed together, etc, to ensure that they will be admissible in the Requested State.
❑	*Potential grounds for refusal*	The Requesting and Requested States should communicate at the outset of the process to identify any issues, which could be raised as potential grounds for refusal.
❑	*In absentia proceedings*	Warn the Requested State in advance if the proposed extradition request relates to such proceedings. Check the requirements of the Requested State for extradition in such a case, and ensure justifiable requirements will be capable of being met.
❑	*Rule of Specialty*	Ensure you identify all offences for which extradition will be sought, whether extraditable offences or not (this may not be possible for non-extraditable offences under domestic law). This avoids later problems with seeking waiver of the rule of specialty from the Requested State because you want to prosecute for another prior offence.
❑	*Language of request*	The request and accompanying documents should be made in or accompanied by a certified translation into a language as specified by the Requested State.
❑	*Submit a draft request for feedback*	Consider doing this, particularly if you are not familiar with the requirements of the Requested State, or the case is complex.
❑	*Hearings – Presence of Representatives*	Check whether police, legal/liaison representatives, consular officials may be present at foreign extradition proceedings to assist if needed. If so, ensure it is arranged and monitor the proceedings.
❑	*Transit arrangements*	Responsibility should be clearly fixed as to what authority will secure the necessary transit authorizations and care should be taken to avoid unnecessary risk factors. Ensure it is effectively planned, organized, conducted and monitored.
❑	*Surrender arrangements*	Check time limits and precise last day in the Requested State date by which the person must be surrendered. Calculate the local time and date equivalents. Organize and ensure entry of escorts to remove the person from the Requested State before that date.

[43] This is not an exhaustive guide. Due to the wide range of differences between States in their domestic legislation and practice in extradition requests, the EWG did not attempt to create universal checklists.

ANNEX C – CHECKLIST FOR THE CONTENT OF EXTRADITION REQUESTS, REQUIRED SUPPORTING DOCUMENTS AND INFORMATION[44]

Mandatory content/document requirements for all requests:

❑ *Identity of the person sought*	A description of the person sought and optionally all other information, which may help to establish that person's identity, nationality and location (including for example: fingerprints, photo, DNA material).
❑ *Facts and procedural history of the case*	An overview of the facts and procedural history of the case, including the applicable law of the Requesting State and the criminal charges against the person sought.
❑ *Legal provisions*	A description of the offence and applicable penalty, with an excerpt or copy of the relevant parts of the law of the Requesting State.
❑ *Statute of Limitation*	Any relevant limitation period beyond which prosecution of a person cannot lawfully be brought or pursued.
❑ *Legal basis*	A description of the basis upon which the request is made, e.g., national legislation, a relevant extradition treaty or arrangement or, in the absence thereof, by virtue of comity.

If the person sought is accused of an offence (but not yet convicted)[45]	
❑ *Warrant of Arrest*	The original or certified copy of a warrant issued by a competent judicial authority for the arrest of that person, or other documents having the same effect.
❑ *Statement of the offence(s)*	A statement of the offence(s) for which extradition is requested[46] and a description of the acts or omissions constituting the alleged offence(s), including as accurate as possible an indication of the time and place of the commission given the status of the proceedings at that time, maximum sentences for each offence, the degree of participation in the offence by the person sought and all relevant limitation periods.
❑ *Evidence*	Identity evidence is always required. Check whether sworn evidence is required. If so, check whether the witness must depose that he or she both knows the person sought and knows that the person engaged in the relevant acts or omissions constituting the relevant offence(s). Suspicion of guilt for <u>every</u> offence for which extradition is sought must be substantiated by evidence. Check in advance whether it must take the form of sworn or unsworn evidence of witnesses, or whether a sworn or unsworn statement of the case will suffice. If a statement of the case will suffice, check whether it has to contain particulars of every offence. Where sworn evidence is required, check if this has to show *prima facie* evidence of every offence for which extradition is sought. If so, clarify what is required and admissible to establish that or any lesser test. Ensure all is provided in the form required.
If the person sought is convicted of an offence	
(convicted, sentenced)	An original or a certified/authenticated copy of the original conviction/detention order, or other documents having the same effect, to establish that the sentence is immediately enforceable. The request should also include a statement establishing to what extent the sentence has already been carried out.
(convicted, sentenced *in absentia*)	A statement indicating that the person was summoned in person or otherwise informed of the date and place of hearing leading to the decision or was legally represented throughout the proceedings against him or her, or specifying the legal means available to him to prepare his defence or to have the case retried in his/her presence.
(convicted, no sentence imposed yet)	A document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

[44] This is not an exhaustive guide. Due to the wide range of differences between States in their domestic legislation and practice in extradition requests, the EWG did not attempt to create universal checklists.
[45] Some States also require an affidavit establishing probable cause that the person sought committed the crime in question.
[46] Identify all offences for which extradition is sought, in order to avoid difficulties and delays (principle of speciality).

Signature of documents, assembly of request and attachments:

❑	*Arrest warrants and Conviction/detention orders*	Check in each case whether the warrant or order must be signed by a judge, magistrate or other judicial officer, or Officer of State. Check whether the Officer of State must also sign each separate document.
❑	*Assembly of request*	Check whether all the documents included in the request and attachment must be bundled together, and what if any seals are required to prevent later arguments that documents have been added or removed.
❑	*Transmission of the request*	Ensure the request and attachments are transmitted by the channel agreed with the Requested State (not necessarily the diplomatic channel). Monitor the transmission and delivery to ensure crucial time limits are met.

Optional additional content / documents:

❑	*Identity of Authority*	Identification of the office/authority requesting the provisional arrest / extradition.
❑	*Prior communication*	Details of any prior contact between officers in the Requesting and Requested States.
❑	*Presence of officials*	An indication as to whether the Requesting State wishes its officials or other specified persons to be present at or participate in the execution of the extradition request and the reason why this is requested.
❑	*Indication of urgency and/or time limit*	An indication of any particular urgency or applicable time limit within which compliance with the request is required and the reason for the urgency or time limit.
❑	*Use of other channels*	Where a copy of the request has been or is being sent through other channels, this should be made clear in the request.
❑	*Language*	The request and accompanying documents should be made in or accompanied by a certified translation (of whole, not only part of the documents) in a language specified by the Requested State (or if that State permits more than one, the preferred language indicated after consultation).
❑	*Supplementary documents*	If the documents provided do not suffice after checking in advance of the request with the Requested State, provide the needed supplementary information/documents.

ANNEX D – EUROPEAN ARREST WARRANT

EUROPEAN ARREST WARRANT*

This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

(a) Information regarding the identity of the requested person: . . . . . .

Name: . . . . . .

Forename(s): . . . . . .

Maiden name, where applicable: . . . . . .

Aliases, where applicable: . . . . . .

Sex: . . . . . .

Nationality: . . . . . .

Date of birth: . . . . . .

Place of birth: . . . . . .

Residence and/or known address: . . . . . .

Language(s), which the requested person understands (if known): . . . . . .

. . . . . .

Distinctive marks/description of the requested person: . . . . . .

. . . . . .

Photo and fingerprints of the requested person, if they are available and can be transmitted, or contact details of the person to be contacted in order to obtain such information or a DNA profile (where this evidence can be supplied but has not been included)

(b) Decision on which the warrant is based:

1. Arrest warrant or judicial decision having the same effect: . . . . . .

. . . . . .

2. Enforceable judgement: . . . . . .

. . . . . .

Reference: . . . . . .

* This warrant must be written in, or translated into, one of the official languages of the executing Member State, when that State is known, or any other language accepted by that State.

(c) Indications on the length of the sentence:

1. Maximum length of the custodial sentence or detention order, which may be imposed for the offence(s): . . . . . .

. . . . . .

2. Length of the custodial sentence or detention order imposed: . . . . . .

. . . . . .

Remaining sentence to be served: . . . . . .

. . . . . .

. . . . . .

(d) Decisions rendered in absentia and:

- the person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia,

  or

- the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia but has the following legal guarantees after surrender (such guarantees can be given in advance)

Specify the legal guarantees

. . . . . .

. . . . . .

. . . . . .

(e) Offences

This warrant relates to in total: . . . . . offences.

Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person:

. . . . . .

. . . . . .

. . . . . .

Nature and legal classification of the offence(s) and the applicable statutory provision/code:

. . . . . .

. . . . . .

I. If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State:

□ participation in a criminal organisation;
□ terrorism;
□ trafficking in human beings;
□ sexual exploitation of children and child pornography;
□ illicit trafficking in narcotic drugs and psychotropic substances;
□ illicit trafficking in weapons, munitions and explosives;
□ corruption;
□ fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities' financial interests;
□ laundering of the proceeds of crime;
□ counterfeiting of currency, including the euro;
□ computer-related crime;
□ environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
□ facilitation of unauthorised entry and residence;
□ murder, grievous bodily injury;
□ illicit trade in human organs and tissue;
□ kidnapping, illegal restraint and hostage-taking;
□ racism and xenophobia;
□ organised or armed robbery;
□ illicit trafficking in cultural goods, including antiques and works of art;
□ swindling;
□ racketeering and extortion;
□ counterfeiting and piracy of products;
□ forgery of administrative documents and trafficking therein;
□ forgery of means of payment;
□ illicit trafficking in hormonal substances and other growth promoters;
□ illicit trafficking in nuclear or radioactive materials;
□ trafficking in stolen vehicles;
□ rape;
□ arson;
□ crimes within the jurisdiction of the International Criminal Court;
□ unlawful seizure of aircraft/ships;
□ sabotage.

II. Full descriptions of offence(s) not covered by section I above:

. . . . . .

. . . . . .

(f) Other circumstances relevant to the case (optional information):

(NB: This could cover remarks on extraterritoriality, interruption of periods of time limitation and other consequences of the offence)

. . . . . .

. . . . . .

(g) This warrant pertains also to the seizure and handing over of property, which may be required as evidence:

This warrant pertains also to the seizure and handing over of property acquired by the requested Person as a result of the offence:

Description of the property (and location) (if known):

. . . . . .

. . . . . .

. . . . . .

(h) The offence(s) on the basis of which this warrant has been issued is(are) punishable by/has(have) led to a custodial life sentence or lifetime detention order:

- the legal system of the issuing Member State allows for a review of the penalty or measure imposed on request or at least after 20 years´ aiming at a non-execution of such penalty or measure,

and/or

- the legal system of the issuing Member State allows for the application of measures of clemency to which the person is entitled under the law or practice of the issuing Member State, aiming at non-execution of such penalty or measure.

(i) The judicial authority, which issued the warrant:

Official name:

Name of its representative*: . . . . . .

. . . . . .

Post held (title/grade): . . . . . .

. . . . . .

File Reference: . . . . . .

Address: . . . . . .

. . . . . .

Tel: (country code) (area/city code) (…) . . . . . .

Fax: (country code) (area/city code) (…) . . . . . .

E-mail: . . . . . .

Contact details of the person to contact to make necessary practical arrangements for the surrender:

. . . . . .

. . . . . .

*In the different language versions a reference to the 'holder' of the judicial authority will be included.

Where a central authority, has been made responsible for the transmission and administrative reception of European Arrest Warrants:

Name of the central authority: . . . . . .

. . . . . .

Contact person, if applicable (title/grade and name): . . . . . .

. . . . . .

Address: . . . . . .

. . . . . .

Tel: (country code) (area/city code) (…) . . . . . .

Fax: (country code) (area/city code) (…) . . . . . .

E-mail: . . . . . .

Signature of the issuing judicial authority and/or its representative:

. . . . . .

Name: . . . . . .

Post held (title/grade):. . . . . .

Date: . . . . . .

Official stamp (if available)

ANNEX E – EXTRADITION TIMELINE