

Northern Ireland Affairs Committee

Oral evidence: [Cross-border co-operation on policing, security and criminal justice after Brexit](#), HC 766.

Wednesday 7 October 2020

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Members present: Simon Hoare (Chair); Caroline Ansell; Scott Benton; Mr Gregory Campbell; Stephen Farry; Mary Kelly Foy; Mr Robert Goodwill; Claire Hanna; Ian Paisley.

Questions 1 - 54

Witnesses

[I](#): Gemma Davies, Associate Professor of Law, Northumbria University; Dr Rachael Dickson, Birmingham Law School, University of Birmingham; Dr Amanda Kramer, School of Law, Queen's University Belfast; Professor Valsamis Mitsilegas, Professor of European Criminal Law and Global Security, Queen Mary University of London; Professor Steve Peers, School of Law, University of Essex.



Examination of witnesses

Witnesses: Gemma Davies, Dr Rachael Dickson, Dr Amanda Kramer, Professor Valsamis Mitsilegas and Professor Steve Peers.

Q1 Chair: Good morning, everybody, and welcome to our session on cross-border co-operation and criminal justice post Brexit, and a very warm welcome, on behalf of the Committee, to our panel of academic witnesses. Could you please introduce yourselves and your organisation, for the record? You are very welcome here this morning, and thank you for finding the time to be here.

Gemma Davies: I am Gemma Davies, associate professor at Northumbria University in the school of law.

Professor Peers: I am Steve Peers. I am a professor of law at the University of Essex.

Professor Mitsilegas: Good morning. I am Valsamis Mitsilegas. I am professor of European criminal law and global security at Queen Mary University of London.

Dr Kramer: I am Amanda Kramer. I am lecturer in law at Queen's University, Belfast.

Dr Dickson: I am Rachael Dickson. I am a research fellow at the University of Birmingham.

Q2 Ian Paisley: The panel are welcome. It is nice to see you all here today. We will take your report as read by our colleagues, and we want to turn to the issue of the new barriers to cross-border criminal justice. I suppose the important word in that is "new" barriers. You have identified in your reports some stark conclusions. You say that "terrorist violence could erupt in the wake of a fostering of nationalist sentiment", and that the border could be used to delay prosecutions. A lot of people in Northern Ireland would say that it has always been thus.

Could you tell us two things? Have you considered the eruption of loyalist violence, or is this just written from one perspective? It does not appear to be mentioned in the report, and that seems to be an important part of the thesis, about nationalist violence. Secondly, do you think you have maybe over-egged the report in terms of writing what looks like the worst-case scenario of co-operation and the lack thereof?

Gemma Davies: That is a fair point in relation to the risks of the eruption of violence on both parts. On concerns about the fostering of nationalist sentiment and an increase in terrorist behaviour, to a certain extent we have seen some evidence of that in recent months. We have to bear in mind that those risks are multiplied by a number of different factors that are converging at the same time, so what we have tried to point out is that there is a risk of an increase in cross-jurisdictional



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criminality, potentially in smuggling—that could be of people and/or commodities—and of an increase in terrorist violence.

That is also at a time when a loss of EU police and judicial co-operation mechanisms might mean that we have a negative impact on operational effectiveness, compounded by a belief, whether that is correct or not, from those that would wish to exploit these opportunities, that the loss of certain mechanisms, such as the European arrest warrant, ECRIS and other mechanisms, will decrease the risk of detection and that there are a number of organisations well placed.

Q3 Ian Paisley: The issue is about new barriers. The issue of smuggling has been with us, unfortunately, right up until today. In the last 10 years there has been £1 billion of fuel fraud, which the Irish Revenue and HMRC appear to be unable to grapple with, and that is with total European co-operation. I am just wondering whether that can actually get any worse. The National Crime Agency does not seem to think it will get any worse; it thinks it will actually get better. Your suggestion in this paper appears to be that all of this cross-border crime is just suddenly going to get out of control and even worse. I am just wondering what the new barrier that is going to create that is.

Gemma Davies: The loss of EU criminal justice mechanisms potentially creates additional difficulties. We accept, obviously, that we already deal with cross-border smuggling in alcohol, fuel and cigarettes, but there are still a number of different aspects of Brexit that are unclear, dealing with free trade agreements and whether the UK will diverge from EU standards.

Q4 Ian Paisley: I want to go back to the issue, because you have raised this issue of smuggling, which is very interesting. If someone smuggles or dilutes fuel in the Republic of Ireland and they are caught, they are prosecuted by the Revenue authorities there. If they are caught in Northern Ireland, which is very seldom, they are prosecuted by HMRC. What is the barrier to that? What is going to make that even harder? There does not appear to be any barrier to that; you just need the will to address it.

Gemma Davies: Both the PSNI and the Garda work very closely together, and so a lot of those operations involve a lot of informal co-operation mechanisms. When we remove EU-level co-operation, we remove some of the legal architecture through which informal co-operation is facilitated, and we need to understand how that might impact informal co-operation.

Q5 Ian Paisley: I get that could be and may have an impact, but I would say that the impact may be minor. It may not be as doomsday as your paper tends to suggest. That is what I am worried about: are we over-egging the problems here that might arise? The commander of the Garda Síochána is a former RUC officer and head of crime in Northern Ireland. That suggests to me that there is actually going to be very good



continuing co-operation, irrespective of the political framework.

Gemma Davies: There is certainly a high level of will between the two forces, and I have heard repeatedly that the two have never worked together to a greater extent that they currently do. What the paper is attempting to highlight is not a doomsday scenario but that we have to be aware of and alive to the problems that potentially might be caused by the removal of these EU mechanisms and think about ways in which we can replace that legal architecture to ensure that the high level of co-operation that currently exists can continue and there is not a grinding down of co-operation over time, particularly as we might see a divergence, and particularly in light of the GDPR and Law Enforcement Directive.

What we heard is that, yes, there is a lot of informal co-operation, but there has to be a legal basis for that. Officers do not share information if there is no legal basis for them to be able to do so. The paper is highlighting that we have to be aware of those problems, not necessarily that, come 1 January, there is going to be an exponential rise in crime per se, but that over time we can see a drifting.

Q6 **Ian Paisley:** Your paper uses the words that transnational crime is about to explode. That is not even north-south; that is east-west.

Gemma Davies: Is that in my paper or is that in a different paper?

Q7 **Ian Paisley:** It says that transnational crime has the potential to explode. That is the east-west arrangement. That is across the channel. It appears to me a remarkable conclusion to be writing. The common travel area appears to be a problem. Moving around the whole of Ireland, which has always been the case since before we even joined the EU, appears to be a problem that would require more border patrols. I just sense that there has been an inflation of the problem in this paper. As I said in my earlier question, there has been a pandering to the nationalist concern but a complete decision to ignore anything that might inflate loyalist concerns about east-west infrastructure being put in place within their own country. I just think the paper has been one-sided on that.

Chair: I am going to ask Gemma Davies to answer that. I think I am right to say that it is only Gemma Davies who is part of the UK-Irish Criminal Justice Cooperation Network, which submitted the evidence that I think you are referring to. Our other witnesses are not linked to that submission. I may ask them to come in if they wish. Gemma Davies, just answer that point, please, from Mr Paisley.

Gemma Davies: We were not attempting to say that crime was going to explode. We were highlighting that there are a number of areas where there is a potential for an increase in criminality at a time when we had less formal co-operation mechanisms, and there were a number of different questions that were still to be answered that could impact the extent of crime. The paper is attempting to suggest ways in which we can ensure co-operation continues to the extent that it does so today.



Dr Kramer: I would just like to speak to some of the research that I have completed on similar themes. I was part of a team called BrexitLawNI that engaged in interviews. When we were completing this research, we were only able to gain access to nationalist paramilitary groups. We were not able to gain access to speak to loyalist paramilitary groups, which was absolutely a shortcoming of the research, but unfortunately a limitation that we were not able to control.

Within that research there is very much an emphasis, from the people that we spoke to, about Brexit fuelling the flames for them. Brexit was referred to as manna from heaven in terms of fuelling recruitment for their cause and in gaining support for paramilitary activity. That is not to say at all that I do not think there could be an issue in relation to loyalist paramilitary activity. That is very much a possibility. In particular, if we do see this expansion, there could be a reciprocal expansion in relation to paramilitary activity from the loyalist perspective.

Q8 **Ian Paisley:** Have you seen any evidence of paramilitary activity increasing?

Dr Kramer: Recently there were some statements made by MI5 in relation to the increase in paramilitary activity from dissident republicans. There have been statements in relation to the increase of paramilitary activity.

Q9 **Ian Paisley:** Is that Operation Arbacia you are referring to?

Dr Kramer: Yes. It is very much linked to that.

Q10 **Ian Paisley:** That was standalone, to do with a lot more worldwide terrorist issues and Ireland being used as that point. It does not necessarily follow that that would be linked to cross-border smuggling and criminality and issues internal to the island of Ireland, does it?

Dr Kramer: It does not necessarily, but the PSNI have made statements about increasing dissident republican activity as well, and we have been seeing this rhetoric. In the interviews that Dr Dickson and I engaged in with security and justice experts—all of them have to remain anonymous—there was very much a message in those interviews as well that there was an increase in paramilitary activity. I cannot say with certainty that that is absolutely linked to Brexit. The message that was coming to us was that there is some kind of correlation here. I cannot say that it is caused by that, but the messaging has been to us that there is a correlation here between Brexit and dissident republican activity.

Q11 **Chair:** Can I just ask all the panel, starting with those of our witnesses who have not as yet said anything, to confirm that it is your assessment—this speaks to Mr Paisley's point about there never before having been a greater degree of co-operation between the two police services—that the exchange of information that would then allow either authority to bring somebody into the court process, into the criminal justice process, cannot rely on just personal goodwill? It needs to have



agreement, treaty, protocol, call it what you will, in order to provide reliable evidence that prosecution can rest its case on in court. A “yes” or “no” answer would be helpful.

Dr Dickson: Yes, to give the briefest answer, I think that is the case. While goodwill definitely exists between An Garda Síochána and the PSNI, and has done and has developed over a long, complicated history—we will all no doubt agree—we cannot rely on that forever. We also need to think about how that will change over time with new recruits coming in, people who have grown up, have entered the force for different reasons, and do not have the connections that they have developed over 30 years of service. Training opportunities and opportunities for networking, for informal interaction, that are also provided by EU mechanisms, such as Europol offices and training and conferences that occur between police forces, are really important. Those things can be done, on an all-island Ireland basis and a UK east-and-west basis, to gain good relations and maintain good relations between the forces, but we cannot just rely on goodwill forever.

Professor Mitsilegas: A lot lies not so much in prosecution but in detection and investigation and in how the forces gather information. Here there are challenges, and we should always remember that, in the future, Ireland will remain bound by EU law. If the United Kingdom has a system of legislation, for example on mass surveillance, that is contrary to EU law, the Irish authorities will have problems in co-operating with the UK authorities if this is contrary to their obligations under EU law. We will probably talk later about data adequacy, and I can say more in this context. We had important judgments by the Court of Justice yesterday on that. The lack of capabilities in terms of EU law, and a difference in standards, may create obstacles.

Q12 **Ian Paisley:** None of this, you accept, is a new barrier. None of that is a new barrier. These barriers already exist and are things that we grapple with daily in our judicial system. There are differences in standards. There are differences in proofs. There are differences that have affected extradition for the last 50 years. These are not new barriers.

Professor Peers: To answer your question, you need some form of arrangement in place to transfer evidence, either for the purposes of trial or to transfer information between police services for the purposes of investigation. Also, let us not forget, later on in the process you need co-operation on issues like extradition or possibly the transfer of sentenced persons. All of those are issues that are subject to the talks and where there are EU rules that would be different depending on whether there is an agreement on these issues or not, defined to the extent of the difference.

One thing worth pointing out, though, is that since Ireland never opted into the European investigation order, our co-operation with Ireland on the transfer of criminal evidence is, in a way, less advanced than it is with other member states, on paper at least. It is possible that there are



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informal process that build on that and reduce the differences, but on paper at least we do not have the deadlines and fast-tracks, and so on, that we have with other member states in respect of the European investigation order, so we will not be losing that.

We will not be losing the Schengen Information System with Ireland yet, because they are not fully applying it yet. They may do very soon, but we will not be losing it in the sense of having had that in place for a number of years, as we have with the other member states.

There are definitely some gaps that will exist in some way, but strangely enough they will not be quite as much for Ireland in a couple of areas as they are for other member states.

Dr Kramer: I agree with what everyone else has said so far. There are a few new barriers that will be in place, simply because the UK will not be a member of the EU. In terms of data protection and databases that the UK might have access to, there will be some differences, but I agree with what everyone else has said so far.

Gemma Davies: I had already said what I needed to say in that regard, but I agree.

Q13 **Mr Goodwill:** Ian Paisley has already referred to the problems we have with the smuggling of fuel, alcohol, and tobacco, but I wonder what impact Brexit will have on new opportunities for criminality, particularly looking at tariff differentials between Ulster and the Republic, or even way that the common travel area could be exploited. Maybe I could start with Professor Mitsilegas and ask him whether he has any observations on that particular issue.

Professor Mitsilegas: I will give you a brief answer to that. There may be problems if there are differential tariffs, for example, to the extent that you link this phenomenon to smuggling. There, it is also a challenge to keep everybody connected with the exchange of information and intelligence in real time. As I mentioned, there is a question in terms of the responses and what will be lost, in terms of current access, if you like, to intelligence capability that is enabled by EU law, and whether this can be replicated otherwise.

Q14 **Mr Goodwill:** In terms of the common travel area, I know, as a former UK immigration Minister, we used to be a little frustrated that our exit checks could be circumvented by people arriving at Heathrow and leaving at Shannon; we did not know people had left the UK. Are there ways that that could be exploited in the future if we have less co-operation?

Professor Mitsilegas: This will depend a lot on what is agreed, if there is an agreement, and what happens with where the border lies. It is difficult to give a precise answer currently.

Q15 **Mr Goodwill:** Do any of the other witnesses have any observations about the way that the tariff border would impact opportunities for existing



criminal organisations or new entrants to exploit that?

Professor Peers: The main point would be that there would be a much bigger smuggling issue if there is no free trade agreement between the UK and EU, because at that point you immediately create an incentive for any UK products that would be subject to significant tariffs on entering the European Union to be sent through Northern Ireland and then across the land border. There would obviously be far more of that sort of trade than there is with any particular non-EU country.

Further down the line—it might be a year or two away—there starts to be an incentive, to the extent that the UK has a free trade agreement that the European Union does not with a non-EU country, perhaps the United States, Australia and so on, for products of those countries. Certainly, other than the United States, it is going to be significantly less trade than the UK has traditionally had with the EU. That is the biggest immediate issue, whether there is a free trade agreement or not.

As for the common travel area, the issue is not so much with non-EU citizens, because the UK and Ireland have always opted out of most EU law on non-EU citizens. Neither of them applies the Schengen Information System as regards immigration controls on non-EU citizens. That is not the basis of their co-operation. They have informal means of co-operation going back decades that are not really affected by the EU. The biggest issue is with EU citizens, because, of course, we have both been in a system where EU citizens have free movement between us. Therefore, we end up with a system where they still have free movement to Ireland but not, of course, to the UK, other than Irish citizens themselves. If someone really wants to enter the UK as an EU citizen, of course, they can use their free movement to get into Ireland and then consider crossing the land border in order to get into the UK. That really is the issue.

Hopefully, co-operation will still go on in terms of banned individuals and we can still have the co-operation we have had with Ireland for decades in terms of who you should not let in. Of course, Ireland, for EU citizens, is subject to different rules. They cannot simply accept the say-so of the UK on who they should admit or not, based on a Polish criminal record and so on. They have to make decisions bound by EU law. That does not mean admitting everyone in, but it does mean making a case-by-case decision in which the opinion of a non-EU country such as the UK is only one factor to take into account when deciding whether to admit someone with a criminal record from another EU member state, for instance. They should not be refusing them even if the UK would want to refuse them, and that of course creates the potential difficulty, at least in some cases, of criminality, and perhaps irregular migration as well.

Q16 **Mr Goodwill:** There would be criminals we deported from the UK on release from prison, and I am guessing that the threshold for deportation may well be equalised between EU and non-EU citizens, where currently they have to have a more severe sentence. Could we see a situation



where criminals who have been deported to, say, Poland, having served a sentence in the UK, could very quickly come back to the UK, using the Republic as an entry point?

Professor Peers: This is the sort of scenario where we would want to be using decades of informal co-operation with Ireland to share watchlists and so on, and also share information on Poles and Germans and Italians and so on. As I say, the difficulty is that, from the Irish point of view, they have to take a case-by-case decision. It may be strongly influenced by the UK, but it still has to be a case-by-case decision. I am sure they do not want someone with a murder or GBH conviction coming into Ireland; they would be rather minded to refuse them entry. When you get into older convictions for less serious crimes, where we might still want to refuse entry, it becomes harder for Ireland, under free movement law, to do so. It is that sort of level of criminality: the mid-range of criminality or past criminality, where free movement into Ireland but not into the UK might cause some difficulty.

Chair: That was a useful and interesting exchange.

Q17 **Mr Campbell:** It has been four years now since the Brexit referendum, and we are 12 weeks away from 1 January. I would just like to hear your views on what you think the likely co-operation will be on 2 January between the Garda Síochána and the police in Northern Ireland.

Gemma Davies: While it is still hoped that there will be an agreement that will cover criminal justice, with 12 weeks to go we have to be realistic about the possibilities of that being ready in time. Even with the negotiations, which are ongoing, we know that we will lose ECRIS; we will lose Prüm; we will lose SIS II. If we are falling back on the 1957 convention for extradition and the 1959 convention for criminal records, there will still be co-operation. It is not that co-operation will cease to exist as of 1 January. It will continue, but we know that it will be slower, that it will be more cumbersome and that the real risk is that over time we will see a grinding of co-operation, particularly as we might see legal challenges in courts, either in Ireland or in the UK. As we move forward we need to ensure that we have bilateral agreements in place.

Q18 **Mr Campbell:** In most instances of criminals coming into either the Republic or Northern Ireland, whether it is for people-smuggling, goods or whatever illegal activity, if they arrive on the island of Ireland, would you accept that both the chiefs of the Guards and the police in Northern Ireland would find that it would be in both their respective interests to co-operate to ensure that those criminals either do not get the freedom to operate as they want to or are prevented from arriving in the first place? Would you accept that is going to be the case come 1 January?

Gemma Davies: I would accept that both the PSNI and An Garda Síochána would certainly be wanting to continue with co-operation, and obviously we have a number of different mechanisms for them to be able to do that. The speed at which certain types of information will be able to



be shared between the two will inevitably slow down, and extradition will be slower.

Q19 Mr Campbell: You talk in your paper about there being two distinct ways in which a more tangible border could lead to increased levels of criminality. Just in the past 24 hours, for example, the Guards have established checkpoints on a health basis because of the increase in the determination by the Government there to increase the level of pressure to try to suppress the virus. That has resulted in physical checks by hundreds of members of Garda Síochána. Nobody would regard that as a tangible border. That is a sensible arrangement. I would presume that those who would be able to get round the tangible border that you referred to in the paper could, if they wanted to, get round this one last night and this morning, given the hundreds of crossing points. Do you think this tangible border assessment is accurate? It is something that you think is a viable proposition, or is something that has been talked about for four years now but really has no chance of ever coming about?

Gemma Davies: There are decisions to be made about the way in which we continue to observe crossing of the border. If what we are proposing is that the PSNI would be regularly stopping people at the border outside of an immediate health crisis to check for passports or to check immigration status, then I would say that does change the policing of the border.

Q20 Mr Campbell: Has anybody suggested that might happen anywhere?

Gemma Davies: No, but we need to ensure that that does not happen.

Dr Kramer: The co-operation will be impacted more in the longer term rather than immediately, so it is difficult to say at this point. Because we do not know what the arrangements are going to look like, it is difficult to know how the co-operation might be impacted. I agree with what Gemma was saying in relation to potential issues around data-sharing and extradition. There are avenues to do this, but what it means is that these mechanisms for co-operation are a lot slower. There might also be some uncertainty in relation to the policing side of this: individual police officers may be not exactly sure what mechanisms they should be using for sharing information.

In the interviews that we engaged in this was something that was brought up: that police are problem-solvers and they are going to find a way, with the tools that they have, to do what they need to do, but if there are potentially dramatic changes in what is allowed, it might take some time to figure out. They would probably err on the side of being more cautious in sharing information. That has immediate implications in terms of what they are able to do tactically. A lot of police work needs to be done quickly to be effective. Concerns were shared with us about whether these investigations will be able to take place quickly and what that will mean in terms of bringing perpetrators to justice. Extradition is probably one of the issues there in relation to the changes.



Dr Dickson: Another thing to draw attention to is that, yes, physical border infrastructure along the land border is one way of bordering happening on 2 January, but bordering practices are not just outposts. Bordering is also a mentality, and it has been shown that people respond to feeling bordered in different ways. That could have an impact on the day-to-day ability of police to do their jobs and provide a policing service. In Northern Ireland, how things are perceived by particular communities will be important. Yes, there have been policing interventions in terms of the most recent health crisis that have not been accepted by everyone. There have been demonstrations and gatherings of people to organise against that, as people see that as an infringement on their rights. Those are things that we need to think about in terms of how those can be managed and how to do that sensitively and within the ambit of the law that will apply at that time.

I am certainly not suggesting that there will be a mass erection of posts at a particular time and there will be a lot of stop-and-search happening automatically on 2 January, but feelings about how those things will happen and filter into identity politics and identity policing in Northern Ireland should also be considered, and how to do that and how to manage that is very important.

Q21 **Chair:** Pray God it is not required, but if north–south border infrastructure is required, and it was all located in the Republic, what is your assessment of the impact that might have on those people who would claim to be, to use your phrase, feeling bordered?

Dr Dickson: It is about legitimacy, and legitimacy in terms of who is being policed and who you are being policed by. That is what the Patten report and the reforms that happened to turn the RUC into the PSNI were about. It was about policing by consent and everyone feeling legitimacy in terms of who is policing them. That could be problematic for people.

Q22 **Chair:** If the UK Government say, “We have not got the protocol”, because the Joint Committee has failed, et cetera, “but we are not going to stick anything up on UK territory north of the physical border between Northern Ireland and the Republic”, and the EU says to the Republic, “We are going to have to; these are going to be EU-manned posts, because we need to protect the integrity of our single market”, what is your assessment of how that would be received by the two communities in Northern Ireland? Dr Kramer is very bravely volunteering.

Dr Kramer: As I mentioned before, I was part of the BrexitLawNI project. One of the things we did was to go to some border communities and hold town-hall-style meetings with whoever wanted to come from the community and talk about Brexit and the potential impact this might have on them. This was years ago now; it was just following the referendum. We did not ask the background of people who attended, but it was open to the public so we assume that there was some kind of cross-sectional representation. There was very much a feeling that was discussed within those meetings that it was a kind of return to the past, particularly



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among people who lived through the Troubles. They were communicating to us that, if they had any kind of infrastructure that was placed on the border, it would be, as some people put it, retraumatizing. Some people used the language of taking them back to a place that they did not want to be reminded of.

Q23 Chair: That is interesting, but let us say that not on the border but away from the border, in a southerly direction, there is something sponsored, flagged, badged, policed and patrolled by the EU, rather than the Republic. Does that have any differential in how it is perceived?

Dr Kramer: I do not think that it necessarily would. My perception of what people were saying is that it is not about where it is coming from; it is about the infrastructure itself. It is the perception of creating more divisions between the north and the south. That seemed to be more of the messaging. They did not really seem to be talking about specifically UK infrastructure or it having to be right on the border. My understanding of what people were saying was that any infrastructure on or near the border would have that same effect of people feeling more divided and there being physical reminders of the division and of the conflict that happened in the past.

Even in those meetings, ordinary people, people who are not involved in paramilitary activity, said that if there is infrastructure on the border, they would go there themselves and take it down. That shows the level of disagreement that people have and how much it would impact them on an emotional level; they would be willing to go and tear down this infrastructure themselves.

Q24 Chair: That was both communities saying that.

Dr Kramer: I assume that it is both communities.

Q25 Chair: Can I press you for a little bit more academic rigour here? Given the sensitivities of the issues, I do not think we can base things on assumption. If one does not know the answer, if the answer is not known, then one might as well say that, but I am not keen to go into assumptions here.

Dr Kramer: We did not ask the background of the people who attended these meetings. In the meetings we did have political representation from both communities, so I can say that with certainty, but I cannot say with certainty, 100%, that there were both communities present. I am just assuming from the population that we had in the meetings.

Q26 Mr Campbell: I take it, Amanda, that you would accept the corollary of what you are saying. Everyone involved has said there is not going to be any infrastructure. The EU has said there is not going to be any. The UK has said there is not going to be any. Nobody in Northern Ireland wants it. Nobody in the Republic wants it. Set aside this mythical threat of violence, which has not emerged in the past four and a half years. I take it that the corollary is true: in the absence of all that, people are content.



Dr Kramer: I do not know that we can say that people are content, but I can say that that specific issue would not cause more problems.

Claire Hanna: I must say that it blows my mind that there are people still who do not understand that borders have a symbolic value and that there is a difference between imposition and consent; that people in 1998 voted for unhindered access to the island; that people voted against Brexit, particularly in border communities; and that people do not acknowledge the intellectual failure of literally giggling at how border infrastructure would impact people while simultaneously losing their minds about checks in the Irish Sea. I do not see how people cannot understand that there is a corollary there as well. Most rational people acknowledge that a border in any direction is wrong.

Chair: Let us have a question.

Q27 **Claire Hanna:** I am coming to my question, but I suppose if some people are going to giggle about it, I will happily articulate a similar point using words. In 2003 there was a British-Irish declaration on a potential north-south justice implementation body. Is that something that could come of age now? More broadly, what do good justice arrangements look like? What is the best-case scenario for how we manage this outside of the EU?

Professor Peers: We are probably going to come back to some of the details of the proposals of the two sides. In many ways they are roughly in the same ballpark in terms of future co-operation. If there were to be a successful negotiation on at least the justice and criminal law parts—we could either preserve that separately or the whole thing—that is the realistic best-case scenario: that a degree of additional co-operation, above and beyond the basics of the Council of Europe on extradition and mutual assistance and other issues, is still preserved on the basis of what the UK and EU have proposed.

One of the other witnesses said the Prüm arrangements would not still continue. In fact, both the UK and the EU have proposed something similar to the Prüm arrangements continuing. It is even in the table of contents of the EU proposal; you see the word “Prüm”. Again, that depends on the two sides probably having a successful overall negotiation, certainly on criminal law and policing, and obviously on data protection as well. That is the best-case scenario.

An alternative, if there is not an overall deal between the UK and the EU, is to try to think of what the UK and Ireland could do bilaterally. We might also have that concern about other EU countries. It is going to be difficult to do anything bilaterally on data protection, if there is no data protection adequacy decision, because EU member states are more bound on that than they are on other issues. As far as we know from the case law of the EU court, other forms of criminal law co-operation are not an exclusive competence of the EU, so we could still be talking to Ireland separately about issues of extradition and mutual assistance in evidence;



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Ireland would be perhaps in an easier position to negotiate with us than it would be on data protection. That would be perhaps the best fall-back specific to Northern Ireland if we do not have an overall deal with the European Union.

Q28 Claire Hanna: Would an implementation body in the manner of the one the British and Irish Governments explored in 2003 be a useful tying-together body for that?

Professor Peers: I have not looked at the details of how that body would work, but yes, if there is a big, important bilateral deal between the UK and Ireland, an implementation body might be useful and might be a place to bring up issues of implementation, interpretation and so on.

Q29 Claire Hanna: In the withdrawal agreement negotiations there were talks about a fast-track surrender agreement—this is a UK negotiating goal, I understand—based on a Norway–Iceland model. I do not know what the levels of crime between Norway and Iceland are, but would you be able to speak to that? Is that still a UK negotiating goal? Is that something that would have useful application on the land border on the island of Ireland?

Professor Peers: The idea of fast-track extradition was actually a joint negotiating goal. It is in the political declaration that both sides signed, and it is also in both sides' proposals to have a fast-track extradition process. The EU is basing it on its agreement with Norway and Iceland—I think almost exactly the same text—which is very similar to the European arrest warrant. It has a lot of the same features, with a few exceptions. There is a political offence exception. I can imagine that being relevant if there were some sort of terrorist-related crimes, particularly in Northern Ireland. That is the way in which terror suspects have always tried to escape extradition, although the drafting in recent years internationally and in the proposals tries to exclude terrorism from being considered a political offence, so you should, ideally, be able to prevent that being used.

There are a few other exceptions. Dual criminality is not necessarily waived, so you might still have to double-check, whereas you do not have to under the arrest warrant, whether the other side has also criminalised the same activity. That might be relevant in some cases. States could refuse to extradite their own citizens, but Ireland has not traditionally refused; the UK has not refused. This is more of an issue for Germany and so on. The EU proposes to copy that almost exactly into their proposal. The UK proposal is fairly similar, but it has a few other exceptions, such as where someone is still wanting to give evidence or where there is a proportionality test and things like that. There are still some differences between them, not vast. I do not know how easily they can be overcome, but they are within touching of each other in terms of a different type of fast-track, not quite the same as the European arrest warrant but with some of the same features.



Q30 **Claire Hanna:** What is the requirement of commitment to the ECHR in any future arrangement on justice? Is there a risk if any agreements do not build in that commitment and commitments to the Council of Europe legal instruments and co-operation in criminal law?

Professor Peers: This of course crosses over with the Good Friday or Belfast agreement itself referring to the ECHR and its implementation in Northern Ireland. This is where maybe the biggest gap is between the two sides. The EU wants to include within the text a commitment to the ECHR and its implementation, and to say that the justice co-operation will automatically be suspended if the UK denounces the ECHR or basically terminates the national implementation, or profoundly limits the national implementation of the ECHR. The UK says, "We do not want to mention that specifically, but we are happy to have a general termination clause that either side could invoke", and it would still be open to the EU to invoke human rights as a ground under this general termination clause.

In a way, some people find this as a profound difference in approach. It is more a question of political optic than the legal nitty-gritty, because even under a general termination clause, the EU could say, as the UK Government point out, "You have denounced the ECHR; you have ripped up the Human Rights Act, with nothing to replace it", hypothetically, "so that is it. We are choosing to unilaterally terminate", which they could do. In fact, the EU courts, the national courts, would immediately have reacted anyway to the UK doing that. This difference ought to be overcome. Neither side should be refusing to negotiate a reasonable compromise here.

Mr Buckland said yesterday that the Government have no plans to leave the ECHR. If we have no plans to leave the ECHR, then is there necessarily a problem including it in a text? If the EU would be able to cancel it anyway, do they really need to insist on including it in a text? There should be some scope for compromise here.

Q31 **Claire Hanna:** Are there risks if it is not nailed down? What are the risks if the UK disavows the ECHR?

Professor Peers: I do not know if there is much risk on the EU side, because they would still have this unilateral termination clause, which both sides could agree on in principle. They would still be able unilaterally to say, "We cannot continue co-operation any longer, because you have left the ECHR", which would also, of course, be a Belfast agreement issue as well. They could just use that unilaterally. They could write it into their legislation ratifying the future agreement that, from their point of view, they will unilaterally terminate the justice and home affairs part if the UK were to either leave the ECHR or not have a replacement for the Human Rights Act—specifically in Northern Ireland, if they wanted to say that, to reflect the Belfast agreement. You could take that approach.

Whether the EU is willing to compromise on this, I do not know, but there is not much of a difference between the EU's and the UK's positions in



practice. Even if you do not mention this issue in the agreement, the EU courts and national courts are going to get involved anyway. There has been a long history of the Irish constitution and extradition issues with the UK. They will all get involved, with a great deal of concern, if the UK rips up the Human Rights Act or leaves the ECHR.

Professor Mitsilegas: I have a general point, as an answer to all the questions raised by the Committee member. Whether there is an EU–UK agreement or whether there is a bilateral agreement between Ireland and the United Kingdom, Ireland and the other EU member states, in their relations with the UK, will have to comply with EU law. We should not forget this. In terms of the ECHR and implementation, future divergences between the EU and the UK, especially in terms of human rights protections, will inevitably hinder co-operation. There are already problems in the field of data protection.

Currently, you could argue that there is close alignment in terms of ECHR commitments and so on. The European Court of Justice says that, even after Brexit, extradition can continue because the UK has committed to the ECHR. The greater the divergences in the future, if they arise, the greater the obstacles to co-operation, because it will be very difficult for authorities and Governments to co-operate if the courts say that this is unlawful. This is a general point to inform the debate.

Chair: All I would say to Professor Peers about us having no plans to leave the ECHR is that always reminds me of Michael Heseltine’s saying that he could envisage no circumstances where he would challenge Mrs Thatcher for the leadership of the Tory party. Two days later that was exactly what he was doing. Look at the language, I would always say.

Q32 **Caroline Ansell:** I wanted to ask, on extradition and specifically the European arrest warrant, how you see no longer being able to deploy this tool, and what impact that will have on crime agencies in combatting cross-border criminality. I understand it is difficult in the absence of that context of what might go on to replace it, and I know colleagues on the Committee will drill down a little on that subsequently. How do you see the impact of the European arrest warrant?

Professor Peers: I have already referred to some of this in my last answers. We know that after the European arrest warrant applied, the numbers who were extradited and the speed of extradition increased across the EU. That includes the UK as well. For the UK, some of that may anyway have been the impact of domestic law, because of the overhaul of the Extradition Act at the same time. Of course, that impact, which is purely domestic, will still continue. It is not fully dependent on the European arrest warrant. However, what other countries do is dependent on whatever replaces the European arrest warrant, which is either going to be the Council of Europe convention that was the original, slow process that applied before 2004, or it is going to be a fast-track process similar to what the UK and the EU have proposed.



As I said, they are fairly close to each other but not quite identical in the negotiations. The fast-track has things like deadlines and a whole series of simplifications very similar or identical to the European arrest warrant. There may not be a huge change if that fast-track were actually negotiated. There will be cases of people saying, "This is a political offence that cannot apply under the arrest warrant". There will perhaps be cases of people saying that there is extra constitutional protection that maybe would not have been so easy to convince the courts of in the context of the European arrest warrant. There will be a few cases like that.

Overall there will not be a huge impact if you keep a fast-track running and in place. There will be a rather bigger impact, but not ending extradition by any means, if we do not have a fast-track in place as a replacement.

Q33 **Caroline Ansell:** Quite a lot has been made of the informal co-operation that exists. One of the witnesses said that never before have there been such good, strong joint working arrangements. How significant is the arrest warrant in that whole landscape of joint working?

Professor Peers: It is always hard to judge how an informal arrangement is actually working. One thing about the arrest warrant is that for a number of years they have been exchanged on the basis of the Schengen Information System between the UK and other member states.

As I mentioned in a previous answer, Ireland has not yet applied the Schengen Information System. Necessarily, we have different arrangements with Ireland, some of which may be informal. In the border region, if you are pretty sure that someone is 10 or 20 miles either side of border and you know where they traditionally lived or worked, and that is who your suspect is, then perhaps a call to the police station in that town is your best way of executing your European arrest warrant quickly, especially in the absence of the Schengen Information System, because, with the absence of the Schengen Information System applying between the two, then a police officer in Northern Ireland or on the Irish side checking the information about someone that has just been brought into the police station is not going to find a European arrest warrant in the same way that someone in Kent might in relation to someone from France.

That is also the same for stolen vehicles and other stolen products that get registered in the Schengen Information System. We do not have that relationship with Ireland, so in a way we do not have it to lose with Ireland in the way we have it to lose with other member states. If it is a stolen car, that is more likely to be an area where there would be informal co-operation than perhaps between the UK and France or the Netherlands.

Q34 **Caroline Ansell:** That is a very helpful illustration. You also referenced the convention as the default arrangement should there not be an



agreement. My understanding is you then move from the judicial to the diplomatic. How do you see those diplomatic channels? Would they be robust enough, particularly around speed, which you have mentioned now in several different instances?

Professor Peers: That was traditionally a bottleneck of slowing the process down. You could have some kind of bilateral arrangement with Ireland to simplify some of the process. We did have a backing of warrants process that existed with Ireland before the European arrest warrant. You could try to revert; hopefully someone has a draft sitting around somewhere that they could propose to the Irish Government as a quick fix, as some kind of other simplified system that perhaps could remove the diplomatic element of the process and keep it between judicial authorities, as it is now under the European arrest warrant. It would perhaps include a number of other fast-track features, like deadlines and so on, which would at least preserve some of what we have under the European arrest warrant.

Dr Kramer: I agree with everything that Steve Peers has said. I just wanted to add that, if we were to rely on diplomatic channels, one of the issues is that we remove a lot of the transparency that came with the European arrest warrant. Moving from diplomatic channels to judicial channels, there is more transparency when arrest warrants are being dealt with through the courts rather than through diplomatic channels. That is also something to be mindful of.

Q35 **Chair:** Is there any evidence that there is a greater chance, or more success, if it is done through diplomatic or judicial, forgetting the speed element?

Dr Kramer: There have been more processed through the judicial channels than through the diplomatic channels. However, the context would be different. The relationship between Governments or between criminal justice agencies is now different than what was taking place before the introduction of the European arrest warrant. It is probably difficult to say.

Chair: One is better to rest and rely upon formal entities rather than professional relationships that ebb and flow.

Dr Kramer: Yes, definitely.

Dr Dickson: The UK has nothing to lose in terms of our relationship with Ireland, because it does not currently operate SIS II, but it is implementing SIS II at the moment. Ireland has everything to gain from operating SIS II by the end of 2020. It will have direct alerts and integration with the EAW. It will gain that in its interactions with other EU member states. Part of the reason it has not been implemented is not a reluctance on the Irish counterpart to be involved in it. It is a big, complex technological system that has taken time for Ireland to see whether it can sign up to the commitments, in terms of the infrastructure and resource to implement it. It is not that Ireland is lagging on



implementing SIS II; it has taken time. That is something to consider that could be a barrier: that it might gain all these capabilities that could affect its relationship with the UK going forward.

Another thing to highlight about the EAW is that one of the criticisms that it received from its implementation was that it became a harsh measure and that it was used a default for minor crimes. People were being extradited for minor instances, and that is something we should try to build in to any new arrangement. There are supplementary measures that have emerged to try to counter that and protect people, such as the European protection order, the European investigation order and the European supervision order. Ireland does not sign up to those at the moment but it obviously has the option to join them at any point, as that is the circumstance of its opt-out under the protocol. They are things that the UK position should maybe take into consideration; there are less harsh ways to co-operate, and those two should be factored in.

Professor Mitsilegas: Following on from Rachael's comment, the European arrest warrant is currently a highly integrated system that ensures speed, judicial co-operation and an obligation, in principle, to surrender a person on the basis of mutual trust. The challenge will be whether this will be replicated with the UK as a third country, both in terms of the legal aspect, whether there will be an EU-UK or an Irish-UK agreement, but also in terms of the practical aspect. Even if there is an agreement that shares the same deadlines as the European arrest warrant to ensure speed, it is also a prioritisation for the national authorities, such as Ireland, to treat the UK request as a matter of the same priority as they would deal with requests from other EU member states.

What Rachael mentioned in terms of the incorporation of the Schengen capabilities in Ireland is very significant, because under EU law Ireland has an obligation to comply with very tight deadlines to surrender people to other EU member states. The challenge for the UK, even with an agreement, is to ensure this level of speed.

Gemma Davies: I just wanted to add briefly that Ireland has made legislative preparations for falling back on the 1957 convention. That is their default position that they are preparing for if we have no deal. Hopefully, the EU and the UK can overcome some of the difficulties that they are having with negotiations, and things like proportionality are much easier to overcome in relation to a UK-Ireland bilateral agreement. If we were looking at a bilateral there are possibilities for moving forward much quicker than there are with the multilateral agreement.

Q36 **Chair:** Valsamis, can I just take you back to your mentioning there of the UK as a third country? To the best of your knowledge, and given the exceptional circumstances—namely, the land border between Northern Ireland and the Republic, the physical linkages between the continent and the UK as a result of the Channel Tunnel, the ease of cross-channel



movement, et cetera—is there any impediment to, effectively, a like-for-like replication of what exists now, with the UK as a third country, or does the status of third country prohibit replication, either in whole or in part?

Professor Mitsilegas: It will depend on what kind of legal agreement will be reached, especially talking about extradition. There may be an EU-UK agreement on extradition or security, which provides tight deadlines, or a bilateral agreement. The challenge there is to replicate what already exists. As I mentioned before, the key will be what the obligations and timelines are for extradition, what the grounds for refusal to extradite are, and what the operational priority will be in the states that operate the system, especially in terms of resource limitations. I cannot second-guess what might happen in the future. The Irish authorities might decide to prioritise a request from the United Kingdom, due to all the reasons you mentioned in your question. It will depend, first, on the legal arrangements and, secondly, on the operational priority.

As Gemma mentioned, if we fall back to the Council of Europe convention, the most likely outcome will be that co-operation will really slow down. You do not want to go back to the 1950s when you already have internally a very sophisticated and speedy system of surrender.

Q37 **Chair:** Let me ask the question again, which I hope might get a “yes” or “no” answer. As a third country, if there is the political will between the UK Government and the EU, notwithstanding the fact that we become a third country, does that legally prohibit, if there is a political will so to do, the entire replication of what exists today between the EU and the UK, albeit as a third country? Is there some law that specifically says, “No, there are things that we can only do if you are a member of the EU, which we will never have with a third country”?

Professor Mitsilegas: You can closely replicate in the field of extradition. The main issue is whether you can continue to have a judicial process or whether you will revert to diplomatic channels, and what the grounds for refusal will be. It is a bit more difficult, in terms of data protection. That is what Steve mentioned earlier. In terms of EU databases, it is very difficult to legally see how a third country can be fully integrated to EU databases as such, in the same way as an EU member state. When we talk about the European Criminal Records Information System and so on and so forth, things may be a bit more complex.

Chair: You say difficult and complex, but not legally impossible.

Professor Mitsilegas: It will depend on what is agreed, in terms of an agreement.

Chair: That is a given, but it is not legally impossible.

Professor Mitsilegas: In the field of extradition it is not impossible.

Chair: I am talking about your supplementary point, about data and



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information share.

Professor Mitsilegas: It is really difficult to see. “Impossible” is a strong word for a lawyer.

Chair: It is a very strong word for a politician.

Professor Mitsilegas: You can argue that there are strong legal barriers to allowing a third country to take full advantage of everything that EU law gives to its members.

Chair: That is helpful.

Q38 **Scott Benton:** Even if there is no agreement in place between the UK and the EU with regards to extradition, we should still be able to utilise legislation from 1957 to extradite people. If there is a political will in Dublin to work towards a bilateral extradition agreement with the UK, is there any reason why extraditing people should take longer than it does at present?

Professor Peers: That may be a question partly of Irish constitution law, because there were always arguments under the Irish constitution, under the previous system, prior to the European arrest warrant, about extradition to the UK. I imagine some of those concerns might be raised again. Subject to that, I do not know of any reason why Ireland could not sign up to something identical to the European arrest warrant on a purely bilateral basis. As I say, it is very likely that there will be some criminal defendants who will raise Irish domestic constitutional issues.

I do not think that the EU has ever tried arguing that this is an exclusive competence of the EU, or that anything besides data protection, in this field of criminal judicial and police co-operation, is an exclusive competence of the EU. Data protection is different because there you have a lot of harmonised rules and an adequacy process in place, so it is quite hard to agree something bilaterally, or at least subject to that. You have to always keep the EU framework in mind.

People in the Commission always seem to claim exclusive competence over things. I have never heard them claim it about the whole field of extradition or any whole field of criminal law co-operation. Unless they suddenly start making arguments about it, it ought to be possible to negotiate something bilaterally with Ireland.

Q39 **Scott Benton:** You have elaborated on the data side on some of the barriers. Are there any other constitutional barriers to seeking that bilateral agreement, from Dublin’s point of view, which you have not already mentioned?

Professor Peers: Are you asking about the Irish constitution? What was your question exactly?

Scott Benton: It was just in terms of whether or not there were any constitutional barriers to seeking a bilateral agreement with the UK, from



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the Irish Government's position, apart from what you have mentioned about the data potentially.

Professor Peers: I am not an Irish constitutional lawyer but I know there has been an issue before in terms of our previous extradition relationship. From an Irish constitutional point of view, I cannot say for sure that there is a barrier that exists. An Irish constitutional lawyer could give you a much better answer to the question.

Chair: That has maybe teed up another evidence session.

Gemma Davies: We know that Ireland has prepared to fall back on the 1957 convention. We know that there are problems with using that. A lot of those problems cannot be avoided, but some of them can. For example, regarding the time limits there could be an agreement with Ireland that we would try to ensure that those maximum time limits were not met. It is clear that a bilateral agreement would remove a lot of those barriers.

There are certain restrictions on the EU-UK agreement. It can be very close to the EAW but there are certain areas where there are problems. For example, not all EU member states will extradite their own nationals unless it is under the EAW. There are certain limits to what the EU can agree, bearing in mind that all member states have to be happy with the agreement.

There are other things to take into account. From an EU perspective, it has to ensure mutual trust under the EAW, and an agreement with the UK will remove a lot of the other EU co-operation mechanisms that help to underpin mutual trust in an EAW.

There are examples of extradition agreements between member states and non-member states that go beyond the EAW. The Nordic arrest warrant is an example of that. That is applied between the Nordic countries, which include Sweden and Denmark. It is modelled on the EAW but actually goes closer than the EAW. For example, there are lower minimum penalties, there is a complete abolition of double criminality and there are no territorial restrictions. That is an example of an agreement that enables closer co-operation than is possible under the EAW.

Nordic countries had an area of open borders pre-Schengen, and they have a shared legal history and shared languages. That necessitated the need for even closer co-operation between those countries. I would say that those circumstances exist between the UK and Ireland. If there was political will to be able to negotiate a bilateral agreement, the same restrictions that apply for an EAW-style agreement between the UK and the EU would not necessarily apply. I already mentioned, for example, that an agreement about proportionality would be much easier to agree between the UK and Ireland than it would be with the EU, which believes that proportionality is being dealt with in other ways.



Q40 **Ian Paisley:** Those answers have been very helpful. Steve and Valsamis, do you agree that what already exists is not actually a panacea when it comes to extradition? I am not just talking about extradition into the United Kingdom of people who are wanted from the EU, but even people within the EU being extradited from other countries within the EU. For example, a couple of years ago Brussels refused to extradite the Catalan leader from Brussels to Spain for trial. I wonder what your feelings are on that dispute and all the rest of it. The extradition procedures across Europe have not been a panacea, and what we are probably now getting to is an opportunity to fix some of these problems with extradition.

Professor Peers: Whether it is a panacea depends on your perspective. It is not a panacea in the sense that there will still be some people who successfully resist the process under the European arrest warrant. The European arrest warrant provides for exceptions anyway, so in a way it should not surprise us that they have not all been removed. It also contains a human rights element, which a lot of the case law of the EU courts has turned on in the last few years, in terms of whether prosecutors are independent when they issue European arrest warrants and whether there is a general rule-of-law problem in Poland in particular; that is an issue that is going back to the EU court next week for another hearing.

Any extradition process, no matter how you simplify it, is going to come up with some individual cases that look unfair from the defence point of view, where people will be sympathetic to those who are seeking to resist extradition, as well as those where you may be more sympathetic to the prosecution and the victims concerned, where there might still be too much of a delay getting hold of someone you really want to prosecute or enforce a sentence against.

How effective the European arrest warrant is is a relative question. We know that it is more effective than what it replaced, because we know there are more extraditions than before, and they are a lot quicker. There were some cases where people were lingering around in jail, which is a problem from the point of view of fair trials and the presumption of innocence before they get to trial, because of an extradition process being very extended. Some of those problems have been reduced because the extraditions happen quicker than they used to.

Of course, that is an average. There will still be people waiting a long time and there will still be people who feel there has been a miscarriage of justice, or prosecutors who feel that they have not got someone they want to get, either at all or as quickly as they wanted to get them.

Q41 **Ian Paisley:** On that analysis, would you agree that it potentially could get better in terms of addressing some of these problematic areas? This is an opportunity to make it better.

Professor Peers: That is partly what the UK proposal seeks to do, by introducing exceptions on proportionality, for instance, which are quite



reasonable, from the point of view of having seen some of the European arrest warrant cases that were over the top, such as trying to execute a European arrest warrant for a carpenter who took a wardrobe away because he was not paid in Poland. That was his way getting a construction lien for not being paid. The Poles issued a European arrest warrant for theft. Apparently there was a case of a European arrest warrant for someone who drunk someone else's beer at a party at university or something like that. That would seem a rather ridiculous sort of thing.

Mixed in with that, there are some very serious cases of rape, violence, bodily harm and murder, where you obviously want it to work well.

Q42 Ian Paisley: We have had serious failings with the current system, the revised system. Certainly in the last 10 years that I have been a Member of Parliament we have had failures to extradite people who were wanted for serious crimes from Brussels to the United Kingdom. We have had serious problems trying to extradite some people from the Republic of Ireland into Northern Ireland for trial. We are dealing with a problem area, and this could end up fixing it

Professor Peers: Yes, possibly. It may be that some of the things that the UK is asking for, like proportionality, which the Commission has negotiated, would be more acceptable to Ireland, and that negotiating on the basis of the UK text bilaterally with Ireland might be more successful than negotiating with the UK as a whole. From Poland's point of view, you cannot have a proportionality test, because legally, from their point of view, you have to issue an arrest warrant; you have to try to prosecute every crime. Other countries, without the same legal approach to legality of prosecutions, like Ireland, may be more flexible in terms of what they can accept negotiating with the UK.

Q43 Stephen Farry: Thank you to all of the witnesses for the research that they are doing on these important areas. Just to pick up from Ian's point, I certainly would see this as a retrograde step. I am somebody who grew up during the Troubles, like many others, and we remember the huge problems that existed prior to the European arrest warrant in terms of extraditing terror suspects in particular. Let me ask the panel, first of all, if they wish to comment on what the risk of that type of situation returning may be. Without going into any specific cases, could they comment on the fact that some defence lawyers have already cited the potential loss of the European arrest warrant as a reason not to grant extradition as things currently stand?

Dr Kramer: There is a chance that, if we are relying on the 1957 convention, extradition could become more complicated, for the reason that you have said. It is very dependent. If it is moving back to diplomatic channels, from where the EAW is dependent on judicial channels, this brings in the possibility that decisions can become more political, whereas before it was judges making decisions based on the rules. More political influences can come into play if we are relying on



diplomatic channels for making these decisions. It is difficult to say what the future is going to look like because it is difficult to know what the political context will be in relation to that relationship between the two Governments. There is absolutely more of a chance that that will happen if we are relying on the 1957 convention than the current arrangements.

Gemma Davies: I agree with Dr Kramer. Extradition has always been a well-litigated area because the stakes are high. We always say that, if ever there is any legal uncertainty, that is inevitably going to result in an increase in challenges. We had those under the European arrest warrant. Following on the 1957 convention, just as one example, there is a reinstatement of the dual criminality principles. That potentially could be one area where we see an increase in litigation.

Q44 **Stephen Farry:** My second question is at the other end of the spectrum. It is in part inspired by an answer that Rachael gave a few moments ago; I will ask her and anyone else who wishes to comment on it. It relates to issues around things like enforcement of judgments, which cuts across both criminal and civil justice issues. This is about situations, for example, around enforcement of child maintenance orders and other types of situations where we have existing judicial co-operation. What are the consequences for that type of area in the event that the current arrangements expire at the end of the transition period?

Dr Dickson: Those arrangements are underpinned by mutual recognition and the facilitation of mutual legal assistance. That will be important to maintain to ensure that there is still mutual recognition of those decisions in both jurisdictions. In our research we had similar discussions with some of our interviewees, who raised things like child protection orders, non-molestation orders and criminal record checks for applications for jobs and things. It is really important that those are still maintained and that people cannot subvert systems of scrutiny and responsibility in terms of their actions. That is important.

Another factor in that is that the retention and deletion of data and expiration of those is still maintained, so that people do not have things attached to their names that have expired. That was another concern that was raised by the authorities involved in those orders. Mutual recognition will be important to maintain and to build into any agreement.

Q45 **Stephen Farry:** Rachael, what are the risks at present in relation to those areas, in the event that we do not have that type of mutual recognition or the agreements going forward?

Dr Dickson: It cuts across criminal and civil. In civil justice you incur loss, so people will lose out on payments, if it is monetary to them, or the ability to access certain things. It is hard to give examples without having an example to give. For child maintenance, that means that someone could abscond from their payments and not be pursued. Again, it could mean that people could subvert systems. If someone was employed



working with children in one jurisdiction and that was removed from them, they could be in employment working with vulnerable people in a different place without being detected. The risks could be quite high. It is hard to know, and it depends on individual cases, in terms of the actions people would be willing to take. In terms of safeguarding, that is something that we want to be seen to be doing in society, and so it is important to give due attention to those issues.

Stephen Farry: I saw Amanda nodding a few minutes ago.

Dr Kramer: I was just agreeing with Rachael. We did that research together. That was her part of it.

Q46 **Mary Kelly Foy:** Good morning, everyone. That has all been very helpful. If there is no deal agreed by the UK and the EU, there will need to be collaboration between the UK and Irish Government in order to replace the European arrest warrant, whether or not that will go on the fall-back position of the 1957 agreement, with all the problems that might raise. In your view, what alternative means of co-operation on extradition could the two countries employ? Additionally, do you see a risk that extradition will become more political in the absence of a European arrest warrant?

Gemma Davies: The first question was about the possibility of collaboration in a no-deal scenario. First of all, we have to think about the extent to which Ireland is free to be able to enter into bilateral agreements with the UK as a member state. A lot of the areas that we are talking about in police and judicial co-operation have shared competency, so Ireland is only free to enter into an agreement if the EU has not exercised its competency in that area. In the event of no deal, Ireland would be free to enter into a bilateral agreement.

If an agreement is under negotiation, I am open to others who perhaps have more knowledge of those specific areas of law. I know that Article 4 of the Council decision that implemented the withdrawal agreement does make some provision for Ireland requesting permission to negotiate bilateral agreements. It is not just for Ireland; I think it is also Spain and Malta. There has to be the agreement of the Council and they would have to agree a final text. There is certainly some provision there already to be able to look to see whether negotiations could start now, even though the UK and EU are still negotiating in this area, either on the proviso that whatever agreement was reached would end if there was a UK-EU agreement, or otherwise. There is definitely provision there for negotiating a bilateral agreement, and, as I say, if the EU is not exercising its competence then Ireland is free to enter into agreement with the UK.

I would argue that we need to do that fairly quickly, because these things are time-consuming. It would be reasonably quick between the UK and Ireland, because of a shared language, legal history and so forth.



Nonetheless, it does take time, and with 12 weeks to go, we are ticking down the clock.

Professor Peers: As I said before, apart from data protection, these are areas of shared competence, where, in principle, Ireland could negotiate with the UK. I do not think the Commission has ever really challenged that. However, as long as negotiations for the future relationship are underway, it could be argued that, because they include issues of police and judicial co-operation, there is an obligation of good faith on Ireland to be restrained from negotiating separately. That would end if negotiations ended. Arguably, Ireland is legally obliged to negotiate collectively as long as the EU is involved in negotiating collectively on these issues. There might be a certain amount of blurring as to when that might end.

To come back to the previous answer on the withdrawal agreement, yes, the withdrawal agreement does provide, on the EU side, in its conclusion, for Ireland, Spain and Cyprus to negotiate separately with the UK, but that is only about implementation of the protocols on the withdrawal agreement. There are some issues there with the Northern Ireland protocol that might impact a little on police co-operation, but not directly. They might deal with trade and smuggling issues, but not directly deal with the criminal or policing aspect of that process because that is not directly about implementation of the withdrawal agreement.

It would perhaps be an argument as to why the principle of good faith for Ireland may be a little bit more flexible, because if we were heading for no deal or we are not sure if the negotiations were going to be successful, there would be a better argument for Ireland to, at least in the spirit of that process, start to talk about these issues with the UK in the event that a deal was not successful.

Gemma Davies: I agree with Professor Peers. I perhaps did not make that clear, but I agree that once the EU is involved in negotiations, even in an area of shared competence, then it is exercising its competence. Ireland, as part of the Council, has given permission for that, so it does complicate things while there is a negotiation ongoing.

Mary Kelly Foy: Does anyone else want to come in, particularly around whether you see a risk that extradition becomes more political between the two, in the absence of the arrest warrant, not that I am wanting to put words in anyone's mouth?

Q47 **Chair:** Could I just pick up on Mary's point? You are academics, and I do not say that disparagingly. Can I just invite you to look at it from the end of the domestic political telescope, as far as the Republic is concerned, but looking at it from the safety and security aspect of citizens of the United Kingdom? Sinn Féin has been doing pretty well in the Republic, as we know, which has caused political difficulties in formation of Government, et cetera. Are we not better not to have to rely upon bilaterals, because the domestic pressure in the Republic, particularly from Sinn Féin, not to do bilateral stuff with the UK is going to be pretty



strong with the potential for destabilising the foundations of the Republic's Government? If the duty of all Governments is to keep their people safe, are we better advised to steer well clear of the personal, the diplomatic and the relationship, and keep to the supernational headline issues or solutions?

Professor Mitsilegas: I will try to answer both your question and the previous question. One of the main innovations and aims of the European arrest warrant was to depoliticise extradition. This is why you have a requirement to verify the criminality and very limited scope for the so-called political offence. If we fall back to the Council of Europe, the re-politicisation issue depends on a number of factors. It depends on whether dual criminality will be reintroduced, the scope of the political offence exception and whether the process will remain judicial or will go back to political executives, or, as it was called in this session, diplomatic channels.

Even if we do not have a bilateral agreement between Ireland and the UK, falling back to the Council of Europe convention will raise these challenges, which will be challenges of how to implement them in bilateral requests, because extradition requests will continue to exist. This issue will have to be faced whether there is a bilateral agreement or not.

Going back to your question, Chair, in terms of efficiency and speed, if you want to avoid a bilateral agreement—I am agnostic about whether this would be counterproductive—you have to look at how you can boost what the Council of Europe convention gives you in terms of speed and efficiency. Certainly, the level of efficiency from a law enforcement perspective is much lower than what we have now with the European arrest warrant.

Q48 **Chair:** Can I go back to the data exchange thing? All of our witnesses have indicated the importance of access to databases. In terms of it having a high, medium or low impact, could you give us your assessment of the effect that a loss of UK access to the security and justice databases of the EU would have on security and policing co-operation, specifically in relation to tackling cross-border crime on the island of Ireland?

Professor Peers: I would probably say it is medium, partly because the Schengen Information System does not yet operate as regards Ireland. We would not be missing anything that we do not have at the moment. It is likely to operate soon, so we would be missing out on that potential future opportunity. We continue with the relationship that we have with Ireland in terms of pursuing someone for extradition. The extradition process may change, but the way you contact other police forces to get hold of someone you want for extradition is going to be the same as it is at the moment, and the same for stolen vehicles and so on, because Ireland is not participating in that system.



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It is different with things like Prüm or possibly the Passenger Name Record system. The UK has always been quite interested in those. There is a fair amount of data in those that it uses. The UK is a big user of the European Criminal Records Information System, so it would be disappointing to lose that.

The question is about how much of it could be reproduced bilaterally and what legal arguments are you going to get from advocates about whether some bilateral arrangement with Ireland is consistent with EU law on data protection or not. That is where you do have, in principle, an exclusive competence, where the EU has occupied the field in terms of what member states can negotiate on most aspects of data protection.

Q49 Chair: Let me conjure up a specific scenario. A group of ne'er-do-wells secrete a load of handguns in a vehicle somewhere in deepest, darkest Romania. They drive across the continent of Europe, and some of their activity has given rise to suspicion, so they are on a tracking radar. They arrive in the Republic, cross the border into Northern Ireland, get on a ferry and land in the port of Liverpool. This is not theoretical, because it has happened. Suddenly we find those Romanian-sourced handguns being used in inter-gang warfare between Manchester and Merseyside. Without access to databases, a bilateral merely with Ireland would not help us very much, would it not?

Professor Peers: It depends on what the Irish authorities knew about this particular route. If they had suspicions then the data protection law of the EU says that even if there is no adequacy decision you can still transfer information in relation to an imminent public security threat rather than have a database as a whole. In relation to a particular threat, you can always call up or use whatever means apply to let the non-EU authority know about that particular security concern. That would be an example of where that might be very useful, assuming that the Irish knew about it.

If the Irish did not know about it, but let us say that the Romanians and the Germans did en route, then you would want some kind of relationship with them as well. They might not know where the guns are going, for instance. They may not know the plan is to end up in the north-west of England, in which case they might not have thought to contact us anyway. That is where losing the database access to the Schengen Information System would be important, because that vehicle might have been under surveillance or the guns might have been on the system as something to be tracked if they were stolen from somewhere, let us say. We would then not be getting access to that information from Romania and Germany.

Q50 Chair: Do any of our other witnesses want to posit a reflection on that scenario?

Gemma Davies: I agree that it is quite common for transnational crime to include more than one country. If you are dealing with an organised



gang that is operating from multiple countries, that is where European co-operation mechanisms really come into their own. In that particular scenario, being recognised in Ireland would be important for the UK to be able to then be aware that this particular risk was entering into the UK.

We know that access to SIS II, even though Ireland is not yet operational, is important for border policing purposes. We need to be able to operate with our closest partners, and ideally we want to be able to do that through an EU-level agreement. If that is not possible, a bilateral agreement may be necessary. Most people would agree that it would be easier to have one agreement that covered all EU countries. That is much easier to agree and it is much easier for police to know that they are not dealing with multiple different ways of communicating with different countries. If that is not possible, that is when the need for bilateral agreements will particularly come to the fore.

Professor Mitsilegas: I agree that your example brings to the fore the added value of EU-wide coverage. The Schengen Information System is obviously crucial, but so is any intelligence, for example, that Europol can provide, or you could have joint investigation teams. In my view, these are less complicated for the UK to join than data from the Schengen Information System, but obviously a pan-European mechanism might give you greater effectiveness in your example.

Q51 **Chair:** We have two ways of dealing with the competing single market trade at the moment, have we not? We have the withdrawal act protocol, subject to Is and Ts being dotted and crossed through the Joint Committee, and then we have the emergency provisions, so described by the Lord Chancellor, contained in the UK Internal Market Bill. Which of those scenarios runs the greater risk of seeing an increase in cross-border crime north-south? I take Ian Paisley's point that it is there and has existed since he was a boy, as it were, but what about in terms of increasing it?

Gemma Davies: Because the Northern Ireland protocol is de facto keeping Northern Ireland in the EU single market, that creates a situation in which the Irish border is remaining open and goods are circulating in Northern Ireland and can move across the EU single market without the need for checks or controls. In that scenario, the smuggling problem that exists across the Irish border does not radically expand, as a UK-EU customs frontier.

The way I understand it is that there could be a potential increase in risk if the UK Internal Market Bill means that one part of Great Britain decides to lower standards, because those would not be confined to Great Britain but would circulate across it. Those goods that are produced to a lower standard would therefore be cheaper and there might be an incentive to smuggle those goods into Northern Ireland and then onward to the EU. It is not an immediate risk but it potentially causes problems moving forward if there is an incentive to move goods to Northern Ireland for the purposes of accessing the EU.



Q52 Mr Goodwill: That works in the other direction. For example, we have just signed a deal with America to allow us to export our salmon and smoked salmon to them, and to do so we have had to agree to sign up to not shoot seals and cetaceans, so we now have a higher standard in the UK than we had in the EU, so we could potentially see imports coming into the UK that would not meet the higher UK standards than the EU. It could happen in the other direction.

Gemma Davies: Yes, that is right.

Professor Peers: The answer to the question is really dependent on what happens with the UK Internal Market Bill, whether it goes through as drafted and whether it is actually applied in terms of those contentious provisions.

Chair: I want you to work on the basis that it becomes an Act as drafted and that the circumstances are needed whereby it has to be implemented. It is as is and live.

Professor Peers: In that case the question is about what the EU's response is. Does it have some kind of border check, either because there are subsidised UK products, because of how the state aid provisions do not work, or because it is worried about exports from the European Union not being checked, because that is what the Article 6 dispute over the protocol is about—whether there should be export declarations or some other controls on exports from the European Union via Northern Ireland? In that case it is a question of both imports and exports that might, in some cases, have to be checked.

How do you actually do that? Do you have spot-checks in part of the Republic at the border or near the border? Do you create a barrier between the Republic and the rest of the European Union and have the checks as they come in and out of ports in Ireland? At that point the EU and Ireland would have to decide on what they do in that respect. Of course, that then conditions what the consequences are for criminal law and how that pans out in practice.

Q53 Chair: Let us briefly turn away from things to people. Are the replacement mechanisms for data-sharing proposed by the UK and the EU in their currently stated negotiating positions sufficient to maintain the security of the common travel area in a post-Brexit world?

Gemma Davies: The replacement for the EAW adequately replaces the European arrest warrant. It looks as if Prüm and PNR will go ahead. In terms of the main problems, there is the loss of ECRIS. Although we will fall back on the 1959 convention, and there is some provision for the improvement of that, some of the technical details of what those improvements will look like and how electronic exchange will take place are in a technical report that has not yet been published, so the extent to which that would be acceptable is not clear.



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As we have talked about, SIS II is a problem. The PSNI use that, particularly at ports, but Ireland is not yet operational. Moving forward, we could potentially see that that would be a gap.

Professor Peers: I would come back to my previous answer. The biggest issue is likely to be with EU citizens, where Ireland, in principle, has to admit them or at least examine on a case-by-case basis whether to admit them, or may not even necessarily check people as they come in, because they are not supposed to check everyone in detail as they come in if they are an EU citizen. If those are people who the UK would wish to deny entry to—because of prior criminal convictions or security suspicions, or because they are intent on what would then be irregular migration, considering that free movement of people no longer applies—and they do that either into Northern Ireland or via Northern Ireland into Great Britain, that is the obvious concern that arises.

You could attempt to address that via continued close co-operation with Ireland and a common travel area, but it cannot completely fill the gap of cases where there will be EU citizens who come in, who Ireland do not know about or will not or cannot deny entry to, but where we would wish to do so.

Q54 **Stephen Farry:** This question has been largely addressed in previous answers, so I will ask it as a fairly general question. What do the panel think about the prospects of getting this addressed between now and the end of December, bearing in mind we have probably less than 90 days? What happens if we fail to achieve that?

Dr Dickson: My honest answer is probably that the prospects are slim. There is just not a lot of time. If you look at negotiations, as we have talked about, it has been four years; we are not going to get much done in 90 days.

The key thing would be to make moves to show interest and commitment. We have alluded to this, but a key takeaway from each of us has been showing mutual trust and good-faith co-operation. There is the need for good will, to work together and to make progress. Showing those now would be a good way to build foundations for what will come next.

On the discussions we had earlier in the session about what will happen on 2 January, the date is not the most important thing; it is about the long-term consequences. We need to make moves to say, "These are the options. These are the priority of our options, and this is what we want and why we want to commit to it". The "why" part is really important. We have mentioned that it is about keeping people safe, the integrity of the common travel area and ensuring that things operate as smoothly as possible. It will be very important to hammer home those messages.

Gemma Davies: I agree with Rachael's assessment that the prospects are slim. The EU wants to move ahead with an overarching treaty.



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Criminal justice co-operation is not sitting by itself; it is at the whims of other areas that are perhaps more difficult. Although I agree that the differences between the UK and the EU in criminal justice co-operation, particularly in relation to extradition, are relatively small, and I can see how they could be potentially overcome, the likelihood is that we are not going to have an agreement in place in time.

In conclusion, the principle of EU citizenship has always been at the heart of European criminal justice co-operation and the need for the European arrest warrant and other mechanisms. Brexit changes the status of UK citizens who will no longer enjoy EU citizenship, but it does not change the tenets of the Good Friday agreement. Citizens of Northern Ireland and the Republic of Ireland can choose citizenship. They are free to live, work and study. The need for those co-operation mechanisms between the UK and Ireland remains as evident as ever, and we need to find ways of overcoming those difficulties to ensure the safety of the common travel area and that any of these concerns that we have about increases in crime do not come to fruition.

Dr Kramer: I agree with what Gemma and Rachael were talking about. I do not think that this issue has got enough attention in relation to the broader Brexit negotiations. The issue in general has been side-lined and it is only recently that it has been getting the attention that it should be getting. The one thing that I want to emphasise, which I hope does not get lost, is the human rights element of this. We have spoken about this in bits and pieces, but it is really important that moving forward there is a prioritisation to make sure that whatever mechanisms and agreements are put in place, they have a strong human rights component to them, and that that priority does not get side-lined just in the interest of maintaining security. It is really important that that is one of the other objectives.

Stephen Farry: Chair, this Committee is a shining exception to the neglect of this wider issue of judicial security co-operation.

Chair: Indeed. We shine as a beacon on all of those matters, Stephen, and you are right to remind us.

Can I thank all of our witnesses for their contribution this morning? I have learnt two things: there is no such thing as an easy question, and in this arena there is no such thing as an easy answer. You have certainly given us a lot of food for thought, and for that we are extremely grateful. Thank you very much indeed.