

Select Committee on the European Union

Home Affairs Sub-Committee

Corrected oral evidence: Brexit: The European arrest warrant

Wednesday 29 March 2017

10.30 am

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Members present: Baroness Prashar (Chairman); Baroness Browning; Lord Condon; Lord Cormack; Baroness Janke; Lord Jay of Ewelme; Baroness Pinnock.

Evidence Session No. 1

Heard in Public

Questions 1 - 20

Witnesses

[I](#): The Rt Hon Professor Sir Francis Jacobs, Professor of Law, King's College London and former Advocate General, European Court of Justice; Professor Sir Alan Dashwood QC, Barrister, Henderson Chambers, Professor, City University and Emeritus Professor, Cambridge.

[II](#): Andrew Langdon, Chairman of the Bar, Bar Council; Dr Anna Bradshaw, Member of the Law Society's EU Committee and Of Counsel, Peters and Peters Solicitors LLP; Rosemary Davidson, Barrister, 6KBW College Hill.

Examination of witnesses

The Rt Hon Professor Sir Francis Jacobs and Professor Sir Alan Dashwood QC.

Q1 **The Chairman:** I welcome you both to the Committee and thank you very much indeed for your time and some of your written evidence, which has been extremely helpful for setting the scene for us. The rules of engagement are basically that there will be questions and a transcript of what you tell us. You will be given the transcript, and if you wish to correct anything, feel free to do so. If you feel, after you have read it, you want to send us any supplementary evidence, that would be welcomed too.

As you know, we are looking at the European arrest warrant and the Government's statement about wanting to move away from the jurisdiction of the European court. It would be helpful if you could tell us a bit about what you think the Government's intention is and what it amounts to in practice. I know a "red line" is not a good way of describing it, but it would be helpful to know what it amounts to in practice. Is there more than one interpretation of what they are trying to say to us?

Professor Sir Francis Jacobs: I can make a start on that, because it is the subject that I particularly wanted to address. It is unclear what is meant by the red line. One interpretation, and perhaps the most obvious, might be that the UK will no longer be subject to the jurisdiction of the Court of Justice, perhaps in no respect. To some extent that will be a consequence of Brexit, because the automatic jurisdiction of the court to hear disputes and the possibility for UK courts to refer to the Court of Justice will both disappear on exit.

However, it seems possible that there will be some remaining jurisdiction for the court. For example, UK companies will still be subject to the competition rules in some respects after Brexit. The Commission will be able to take decisions, and it must be open for the companies to challenge those decisions before the court if they wish to do so. Indeed, it is even conceivable that the United Kingdom might want to challenge a decision before the court. For example, if the United Kingdom was to grant a subsidy to a company that was exporting to the European Union and the European Union were to take some measure against subsidy, that is the kind of measure that could be challenged by the United Kingdom if it chose to do so.

Beyond that, we should note that the agreements that the European Union makes with the United Kingdom will be subject to the jurisdiction of the Court of Justice, at least on the European Union side in the sense that any question of interpretation that arises on the European Union side about those agreements can be referred to the Court of Justice. The interpretation given by the Court of Justice will be binding on the European Union, not of course on the United Kingdom. However, there will clearly be repercussions if the provision of the agreement is

interpreted in a particular way, which the European Union and its member states are bound to accept.

One more point is that it is possible that as a result of the agreements that are made between the United Kingdom and the European Union in the context of the negotiations there may be suggestions on the European Union side that the court should have a role in interpreting those agreements and possibly resolving disputes between the European Union and the United Kingdom. I suppose the United Kingdom might want to resist such provisions, but that will be a matter for the negotiation. One of the points, it seems to me, that comes out of this discussion is that it is not helpful to have an advanced view in the form of an absolute red line, because that may prejudice legitimate objectives of the negotiations.

I will stop there. The other question, of course, is the effect of case law, but we could leave that for later.

Professor Sir Alan Dashwood: I agree with everything that Sir Francis has said. It seems to me that the quotation from the Prime Minister's Lancaster House speech shows that the main idea behind this red line is what is seen as the restoration of the United Kingdom's legal sovereignty. The most important practical manifestation of that would be the Court of Justice no longer having jurisdiction, as Sir Francis says, or, more particularly, its rulings no longer having the status of binding authority for courts in this country.

I can well imagine that post Brexit the rulings of the Court of Justice may still be found to have persuasive authority, just as the rulings of Commonwealth courts have persuasive authority in our courts. If for instance the United Kingdom were able to negotiate an agreement with the European Union that broadly reproduces the framework decision on the European arrest warrant, in the future one of the provisions of that agreement might have to be interpreted by a court in this country. Useful help could be gained from looking at a recent judgment of the court relating to the framework decision. I can imagine that counsel would want to draw the court's attention to that and that the domestic court would wish them to do so. I cannot believe that the Government would want to prevent that.

Q2 **The Chairman:** In public discourse, the European court has been almost demonised as very intrusive. Is it more intrusive than any other international court?

Professor Sir Francis Jacobs: It is very difficult to compare the Court of Justice with other international courts. They have in general a rather limited jurisdiction. Often their jurisdiction is limited to disputes between states. Their decisions do not have automatic effect, so the role of other international courts is very different from that of the Court of Justice. The Court of Justice has a very special position in the European Union. Its decisions are automatically binding on all member states. They have direct effect and so on. It is very difficult to make comparisons, but

certainly it could be said that, because of the Court of Justice's position, its judgments are sometimes more intrusive than one would find in the decisions of international courts.

The Chairman: How does it compare with the International Criminal Court?

Professor Sir Francis Jacobs: That is a very specialised jurisdiction, where the International Criminal Court hears criminal cases and trials—prosecutions for crimes against humanity, genocide and war crimes. It is acting as an international criminal court, and that is very different from any jurisdiction that the Court of Justice has. It does not conduct trials of any kind in that sense.

I do not think that any such comparison can very easily be made. The same would be true of the International Court of Justice, as it would be for other international courts, even with the World Trade Organization appellate body, which deals with trade disputes. Again, it is only states that are parties, so the position is simply very different.

Professor Sir Alan Dashwood: Again, I agree. There are far more ways of bringing proceedings before the Court of Justice than there are before any other international tribunal, most importantly by way of references for preliminary rulings from national courts. Also, the subject matter of the court's jurisdiction is much wider. It corresponds to the range of competences of the European Union, with the possible exception of the common foreign and security policy. Rulings of the Court of Justice penetrate to the level of the individual in a different way because of the principles of direct effect and primacy. People can go to court in a member state and invoke a rule of EU law and cite a judgment of the Court of Justice in support of their contention. None of that applies to other international courts, and this is because of the particularly far-reaching nature of the European Union. It is what I call a constitutional order of states.

This of course affects member states of the European Union. The characteristic approach of the court could be described as integrationist, because it has to be. The court's job is to ensure the uniform application of EU law and the coherent development of the EU legal order. The relationship would be quite different with the UK if we became a third country and then called upon the services of the Court of Justice for some limited purpose such as overseeing the European arrest warrant arrangement.

Lord Jay of Ewelme: On that last point, both of you have talked about the implications of the European Court of Justice having direct effect. Can you envisage circumstances where we are outside the European Union and the Government accept that the European Court of Justice will have some kind of influence over certain aspects of policy but will not have direct effect? That seems to be the thing that politically at least is most difficult for the Government to accept.

Professor Sir Francis Jacobs: It seems to me that in some respects the United Kingdom may well want to rely on the case law of the court. For example, if the United Kingdom wants fullest access to the internal market, it will probably want to rely upon the case law of the court, which has gone a long way to establishing that internal market and sweeping away obstacles to trade and provision of services and so forth. To that extent the United Kingdom may well wish to rely upon past case law. The past case law would not be formally binding, clearly. None the less, it would be helpful for it to be followed in most cases. If it were not, there would be a very high degree of legal uncertainty, because every past point of law could simply be reopened and argued afresh. That would be undesirable.

Certainly in relation to past case law, and possibly even past case law in relation to direct effect, it may be in the interests of the United Kingdom to accept that. For future case law, the position may be slightly different. There will be the additional fact that the United Kingdom will no longer have the opportunity to fashion the case law, as it has been able to do in the past to some extent, influencing the case law by taking part in any case that comes before the court, as it has had the right to do. The position may be somewhat different in relation to future case law.

Then of course once again there is the question of the case law on the interpretation of the agreements that the United Kingdom makes with the European Union. Again, because that case law will be binding on the European Union, there may be situations in which it would be advantageous for the same interpretation to be applied in the United Kingdom.

Professor Sir Alan Dashwood: There may be a useful analogy with the position under the EEA agreement. The EFTA court follows the jurisprudence of the Court of Justice but takes its own decisions, and these are not directly effective within the EFTA countries. It seems to me quite conceivable that lessons can be drawn from that model.

Lord Cormack: I must make it plain that, like the Irishman, I would not start from here, gentlemen, but we do have quite a mess. As a non-lawyer I address with great diffidence two immensely distinguished lawyers. If we have, as I hope we will, an amicable arrangement and a series of negotiations, would it be at all feasible for us to have a legal representative who would be more or less permanently stationed at the court? Could that happen? It would not be part of it, clearly—it would not be a judge—but it would be so that we can have constructive developments. When we have to refer to past case law, as you have alluded to, and so on, would it be helpful if we had a legal representative at the court?

Professor Sir Francis Jacobs: Frankly, I do not think that is possible. I do not see a way in which that could be done. The only position the United Kingdom could take as a third state, as it is called, would be to intervene in a case where its own interests were directly affected. It

would still retain that possibility, but as a general proposition I do not think that would be possible.

Professor Sir Alan Dashwood: It would be very difficult to achieve that without amending the treaties, which of course nobody wants to do. Again, I go back to the EEA model. It does seem to me that in that model, as you know, there is an EFTA court that has judges from the three EFTA countries based in Luxembourg. They have a close relationship with the Court of Justice. They all know each other, and they follow each other's jurisprudence.

For some of the purposes of any future arrangement between the UK and the EU, it seems to me quite possible for the UK, if it is determined not to become a member of the EEA, at least to "borrow" the EEA's institutions. In that case it would be possible—and we certainly would not have to amend the EU treaties to do this—for a UK member to sit with the EFTA court when issues arose under the agreement between the UK and the EU. No less a figure than Professor Carl Baudenbacher, who is the President of the EFTA court, has indicated very clearly in lectures and articles that he has published recently that he thinks that is a viable solution.

Q3 Lord Cormack: That is something that perhaps we should follow up on. Could I go to the specific of the European arrest warrant and seek your help? The Home Secretary made a statement in which she said, "I certainly agree with the principle that the European arrest warrant is an effective tool and is absolutely essential to delivering effective judgment to the murderers, rapists and paedophiles" et cetera. She says, "It is a priority to ensure that we do remain part of it and I can also reassure Honourable colleagues throughout the House that this is something European partners want to achieve as well". How do you interpret that?

Professor Sir Francis Jacobs: I have difficulty with that idea, because it does not seem at all clear how it will be possible for the UK to remain part of the arrangement if it is outside the European Union. It seems, as the Committee has already suggested, that the best that could be hoped for would be an arrangement on the same lines as Norway and Iceland have. That is obviously less than satisfactory. Even that may be difficult to attain because of the different position that the United Kingdom would have compared with Norway and Iceland. That, it seems to me, is as far as we can go at this stage.

Lord Cormack: I rather agree. Are both of you, with all your immense experience, having been Advocate-General and so on, being consulted by Ministers and others? Do you feel that your advice is being sought?

Professor Sir Francis Jacobs: The answer in my case is that it has not. In one respect I can understand that position. That is not simply because the advice may be not worth having but because the Government generally take the position that they do not consult former members of courts as a general convention. That may be the explanation. I think Professor Dashwood has been more fortunate than I have in that respect.

Professor Sir Alan Dashwood: I am afraid for that reason I have to give a cagey answer, which is that I have been consulted but that is all I can say about it.

Lord Cormack: It is somewhat reassuring to know that at least.

Q4 **The Chairman:** What are the implications of the Government's intention to end jurisdiction of the European Court for mutual recognition of judicial decisions generally and for the European arrest warrant specifically?

Professor Sir Francis Jacobs: In relation to the mutual recognition of decisions generally, there are the very serious problems arising in the field of civil and commercial judgments of what will happen to the present system of automatic recognition and enforcement of judgments given in other member states? The repercussions of that are very serious and have already been spelt out in a report of the Committee. That applies to family decisions as well.

In relation to the European arrest warrant, we do not know what is going to come out. It looks as if we will have a system that is less effective in some respects than the present system. For example, there is the risk that nationals will be excluded, and that will be a very large hole in the system if that were to take place. The prospects are not very good in the context of the European arrest warrant.

Professor Sir Alan Dashwood: Depending on how intense the mutual recognition is, I do think, as I said earlier, there will be scope for courts in this country to treat rulings of the Court of Justice, including in this field, as persuasive authorities. That is clearly the intention of the harmonisation approach that is adopted under the Iceland-Norway agreement and might be adopted in relation to the UK as well. It is expected that close attention will be paid by the courts on both sides to the development of the case law, and that can be effective.

Q5 **Lord Condon:** I wondered if we could go back to alternative dispute resolution mechanisms if we are not going to have full access to the Court of Justice of the European Union. In the House of Commons, the Secretary of State for Exiting the EU hinted that there might be a number of bespoke approaches to alternative resolution mechanisms. There will be perhaps one for trade, one for home affairs and justice, and perhaps other models for other specific areas.

In the area of home affairs and justice, do you have a view on what an alternative dispute mechanism might look like, what its limitations are bound to be and what the implications are of those limitations? If the alternative mechanism is not somehow European court lite and a totally new model, what shape and feel might it have?

Professor Sir Francis Jacobs: I would say that it depends very much on the area in question. If one is looking at enforcement of criminal judgments and the European arrest warrant and suchlike, the only dispute mechanism that you can have, it seems to me, is a court. There has to be a court available to review any decision affecting the liberty of

the individuals. The court must have the jurisdiction to review and if necessary quash any decision, or alternatively to decide to give effect to it. That can only be done by a court, it seems to me.

Although the language of arbitration is used in this context in places in the White Paper, that is a totally inappropriate concept in this particular context. Of course there could always be measures on the interstate level for ironing out disagreements in the way in which a particular arrangement is being applied. That of course is quite possible. But in terms of what we ordinarily understand by resolving disputes, it must affect the individual, and that can only be done by a court.

It is also rather difficult to generalise, because the different fields covered are so variable. I am not sure that it is helpful, if I may say so, to try to second-guess what might come out of the negotiations. It might be more helpful to indicate what arrangements would be preferable from the point of view of finding a satisfactory solution in these different fields, and then testing what comes out of the negotiation in the light of those criteria.

Lord Condon: In your very helpful paper that you have given us, Sir Francis, you said that pragmatism should be at the forefront rather than ideology. It was interesting that, just before I came to this meeting, in trailing the seven or eight page letter that will trigger Article 50, the Government are clearly softening their language around the court. That is the suggestion that has been leaked this morning.

I wonder whether the alternative dispute mechanisms in relation to justice and home affairs might be some moderated recognition of the Court of Justice. Or it could be some interpretative body that sits between it and the United Kingdom that somehow enables the Government to keep their so-called red line but in fact defer to the main thrust of the case law and decisions coming out of the court.

To me, as a former practitioner in the field, there does not seem to be a real alternative model other than the court. Perhaps the alternative dispute resolution mechanism may be a narrative that recognises its influence but somehow also enables us to talk about the sovereignty of our own courts.

Professor Sir Francis Jacobs: Yes, it will of course be possible to exclude formally any binding effect of the court's decisions, but they will still carry great weight. What is not even feasible is to exclude any reliance on the court's case law. It could not be prescribed that parties are not allowed to refer in court to the case law.

Lord Condon: The other parties, particularly if they are EU members, will still have access. We cannot deny them that.

Professor Sir Alan Dashwood: It is important to be clear on that. The courts resolving disputes will be national courts. The issue is whether there should be some equivalent of the preliminary rulings procedure. There was no preliminary rulings procedure applicable to the UK in the field of policing and judicial co-operation in criminal matters, including

the European arrest warrant, until 2014. The UK did not opt in to the rules that were introduced into the Treaty by the Treaty of Amsterdam. That does not mean that we should not work hard in order to try to create some kind of preliminary rulings mechanism in the future.

It seems that the two sides under the Iceland and Norway agreement are content to replace a preliminary rulings procedure with close monitoring of case law on both sides. I would see that as a possible alternative but a less satisfactory one. I would be attracted by the possibility of a preliminary rulings procedure, which in order to satisfy the red line on judicial sovereignty should be one that is advisory rather than binding.

The Chairman: Sir Francis, you rightly said that it is better not to second-guess negotiations. I agree with that. You say it is better to frame criteria against which to look at the outcome. What might those criteria be against which to judge the outcome?

Professor Sir Francis Jacobs: As I said, that will depend on the area in question because different mechanisms may be appropriate in different contexts. If it was a trade dispute, that might lead to a different mechanism for resolving disputes from that for enforcing criminal decisions. It is difficult to generalise on that. It does seem to me that one should start with the idea that the most satisfactory form of dispute settlement in general is a decision by a court—and not necessarily by the United Kingdom courts, because if there is going to be a genuine mechanism for resolving disputes between states, it has to be independent.

It is not sufficient to say that the United Kingdom courts must decide these issues, because European courts also decide those issues. It does not resolve the dispute. If there is to be a resolution to the dispute, one has to start with the assumption that judicial sovereignty is not really attainable in that area any more than it is attainable under the World Trade Organization system. That involves accepting decisions of an international court.

Professor Sir Alan Dashwood: I am sorry to keep coming back to the EEA, but their solution is really a very ingenious one. This applies to the internal market and it does not apply to the European arrest warrant. I do not know why. I have not been able to find out why they did not simply enlarge the jurisdiction of the EFTA court. Perhaps the judges are essentially economic lawyers rather than criminal.

That issue has been very ingeniously resolved in the EFTA court by having what is known as a two-pillar structure. The enforcement of the rules on the EU side is in the hands of EU institutions, the European Commission and the Court of Justice, and on the EFTA side by the EFTA Surveillance Authority and the EFTA court. These parallel institutional systems have worked so well in practice that there has not ever been a need to have recourse in respect of disputes about case law to the arbitration system that is provided for by Article 111.

There may have been discussions in the joint committee, but it has never come to the point of a breakdown, which can be sanctioned under the EFTA system by the imposition of safeguard measures, or even by the partial suspension of the agreement. It has never come to that point. There is this parallel system that leaves the courts of the EFTA countries effectively outside the scope of the jurisdiction of the Court of Justice but nevertheless guarantees sufficient homogeneity between the two systems to avoid significant disputes.

Lord Jay of Ewelme: I have a quick supplementary question that shows how young I am: are there any precedents from before 1973 that are relevant to what might happen after 2019?

Professor Sir Alan Dashwood: I cannot think of any. Can you?

Professor Sir Francis Jacobs: There are certainly important precedents from before 1973, such as the cases establishing the direct effect of European law.

Lord Jay of Ewelme: Before we joined the European Union we must have had relationships with the European Court of Justice as it then was. Is there anything there that is relevant to what would happen afterwards?

Professor Sir Francis Jacobs: The only case that occurs to me is the Dyestuffs case. It was an early competition case that affected British companies, including ICI at the time. There were questions about the jurisdiction of the European Commission over companies outside the European Community. I think the United Kingdom put in some submission on their part, although I am not sure what its basis would have been. The answer, therefore, is that there was very little interplay at that time.

Q6 **Baroness Browning:** You have mentioned Norway and Iceland and the arrangements there. Clearly it will be important for the Government to agree a bilateral agreement with the EU. Also, there is the problem of the Schengen requirement, which both Norway and Iceland have agreed to. When it comes to the court, the court has no jurisdiction over disputes as far as Norway and Iceland are concerned. Then we come back to the case law, which, again, you have mentioned several times, and there is provision for constant review of the case law. Could you talk us through how in practice, as far as Norway and Iceland are concerned, that constant review of the case law is working?

Professor Sir Alan Dashwood: I do not think it has started yet. I am not even sure that the agreement has entered into force.

Professor Sir Francis Jacobs: It has not.

Baroness Browning: In which case, what are the practical problems if the UK were to somehow try to replicate a non-Schengen agreement on the same grounds as Norway and Iceland?

Professor Sir Alan Dashwood: If I may make one point about that, I am not particularly concerned by our not being a member of Schengen. After all, we have been part of the EAW system from the very beginning, including, as I said earlier, without the benefit of the preliminary rulings procedure that most of the member states accepted. We have never been a member of Schengen. That has not prevented us from being actively involved in the system. I do not believe that there is any close connection between the removal of frontiers and free movement of the Schengen system, and a well-functioning arrest warrant type of system.

The UK is going to be a very important partner for the other member states in security matters. It is important for us but it is also very important for them. It is much more important than to have Norway and Iceland on board. I believe there will be a very good chance of negotiating a sensible agreement. I believe that there is real political will on both sides to achieve something like that.

The harmonisation approach that is provided for in Article 37 of the agreement is clearly not as effective. It does not provide the same assurance of a consistent approach that a preliminary rulings procedure would provide. But it could work effectively if it is taken very seriously by both sides, as I am fairly sure it would be. It would require setting up a permanent monitoring facility on both sides.

Baroness Browning: It is very encouraging to hear that you are seeing it in that way. The idea that somehow we should try to seek to identify an agreement rather on a par with Norway and Iceland is probably a bit of a red herring. A bespoke agreement, because of the mutual interest in security that you clearly identified, which I would certainly agree with, is probably the route for the UK—a bespoke agreement based on mutual recognition and importance on both sides of security matters.

Professor Sir Alan Dashwood: I agree, and the most effective possible mechanism for ensuring the consistent development of case law.

Professor Sir Francis Jacobs: I do not like to dampen the optimism in that field, but there are some underlying issues that might be raised. For example, exchange or surrender of prisoners is subject, according to the case law of the court, to certain standards of fundamental rights. Although from the United Kingdom point of view there was no problem whatever with respect for fundamental rights in the United Kingdom, there is no independent adjudication on that issue after Brexit. That might pose a problem.

Similarly, in relation to the exchange of information about criminals and terrorists and others, there are certain underlying standards of data protection that have to be observed, where standards might diverge if the United Kingdom was no longer a member of the European Union. There are those underlying issues that are likely to be raised but perhaps can be resolved.

Professor Sir Alan Dashwood: I did not mean to suggest that it would be easy.

Baroness Browning: I do not think any of us think any of it is going to be easy.

Lord Condon: Sir Alan, in answering Baroness Browning you mentioned the requirement for a permanent monitoring process. Could you elaborate for us on what that might look like? Is that people? Is it quasi court? What would a permanent monitoring process entail?

Professor Sir Alan Dashwood: I am speaking off the top of my head, because they have not, as far as I know, established one yet under the Norway and Iceland agreement. I could see it as an office with staff a that have this particular remit to follow. I suppose also it would be possible to designate a group of academics and civil servants who might keep each other informed. They do not have to be working together in the same office. They might be but they do not have to be.

Lord Condon: That is in relation to a bilateral deal involving the EU and us, so presumably EU representatives and UK representatives.

Professor Sir Alan Dashwood: I think it would be best if everyone was in touch with everyone else, yes, and drawing attention to the case law that each side regards as important.

Professor Sir Francis Jacobs: What Article 37 provides for is keeping under review the case law and exchanging the case law between the parties. That is a very basic form of co-ordination.

Professor Sir Alan Dashwood: There is something about setting up a mechanism.

Professor Sir Francis Jacobs: "A mechanism shall be set up to ensure regular, mutual transmission of such case law". That is all.

Q7 **Baroness Janke:** My question concerns the default position should the UK leave the EU with no agreement in place. What is your view on the Council of Europe's Convention on Extradition? Given that some countries have already rescinded this, would this amount to a cliff edge? How would you see things proceeding in those circumstances?

Professor Sir Francis Jacobs: There is general agreement that the European Convention on Extradition adopted by the Council of Europe is not an adequate substitute for the European arrest warrant. It is rather limited and also, of course, there is the possibility of the exclusion of nationals, which again would be a very large gap in the system. I am not an expert in this field, but I believe there are other defects in that convention. It is generally recognised that it will be necessary to devise up-to-date arrangements for surrender. There would be some difficulties in doing so, particularly the problem of enforcement and maintaining uniform standards.

As for the cliff edge, it does seem to me that if there is no agreement at the time that the United Kingdom exits the European Union, there will be a cliff edge. It will be necessary to negotiate those arrangements with each of the 27 member states of the European Union, and that will obviously take some time. It is not at all clear what would happen in the interim unless some transitional arrangements were put in place.

Baroness Janke: As Professor Dashwood said in his opening remarks, the European Court of Justice might still have some persuasive role to play if such a situation did arise.

Professor Sir Alan Dashwood: In litigation, yes, as a persuasive authority that I am sure courts in this country would take very seriously. I find it hard to believe—I am trying to get the metaphor right—that our government would allow the country to fall over a cliff edge. There would have to be some interim arrangements, even if only unilateral ones. If it was beginning to look as if there would be no agreement on this issue, some provision would have to be made. There would have to be an amendment to the Extradition Act 2003, and Part 1 territories would have to become Part 2 territories. There would be a problem with those member states that have rescinded their legislation implemented with the convention.

I am not sure how many of these there are apart from Ireland, although that is a very important example. I am perfectly confident that interim arrangements will have to be made. I suspect that they will be agreed. I am not so sure that it will be as difficult to negotiate a bilateral agreement with the EU as a whole. I do not think it will take us 13 years, as it did Iceland and Norway, because it has been done already and because we are already subject to the European arrest warrant. We are not suddenly going to begin oppressing prisoners the moment we leave the EU.

It must be understood that human rights protection will be as good post Brexit as it was pre Brexit, when everybody was perfectly content to have the UK as part of this set-up. I do not believe it will be so difficult, but it may of course not be possible to achieve within the two years. A possible interim arrangement would be an effective continuation of the present system but under a special interim agreement, perhaps with the Court of Justice giving advisory rather than binding rulings on the interpretation of this new agreement.

Baroness Janke: Or for a given period on something on the lines that Lord Condon is talking about around an interpretative body or a qualified role over a period of time.

Professor Sir Alan Dashwood: Yes.

Q8 **Lord Jay of Ewelme:** Baroness Janke's question leads on to the questions I wanted to ask about transitional arrangements. It has been suggested that European arrest warrants that have not yet been executed would continue to be enforced under Section 16 of the

Interpretation Act 1978. I confess that I was not really aware of the Interpretation Act 1978 before this hearing. Could you say a bit more about what would happen with extradition requests on the day after Brexit if no alternative to the European arrest warrant has been put in place? What might be the relevance of the Interpretation Act 1978? This goes back in a sense to avoiding the cliff edge or whatever one wants to call it.

Professor Sir Francis Jacobs: In relation to the situation on day one after exit, it would be essential for some arrangement to be in place; there would have to be some transitional agreement. There seems no reason why the transitional agreement should not maintain the existing arrangements for some time, possibly with the exclusion of new references to the Court of Justice or something of that kind. That would seem to be absolutely essential.

In relation to the Interpretation Act, I refreshed my memory of that provision. It seems to me that that would allow in some circumstances for existing procedures to continue, even after Brexit.

Professor Sir Alan Dashwood: I agree with Sir Francis's answer. Section 16(1)(e), if you are interested in looking it up, talks about a repeal of legislation not affecting "any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation", and so on. It seems to me that it is specifically designed to cover this kind of situation. It echoes Article 70 of the Vienna Convention on the law of treaties, which, also in international law, preserves existing rights, obligations and what they call legal situations.

Lord Jay of Ewelme: Would one have to negotiate some transitional arrangement, or if there is no long-term arrangement reached and one just reaches day one afterwards, does one fall back on the Interpretation Act 1978? Would one have to negotiate something, and would that be more complicated than negotiating a final agreement? I am trying to work out what would have to happen in order to avoid a really difficult position on day one after Brexit.

Professor Sir Francis Jacobs: I would think that it would be necessary to negotiate a transitional agreement, and the precise terms of that agreement, including what the position is in relation to existing procedures and so forth, would have to be clearly established. Of course it will be easier to do that than to start afresh and negotiate a new arrangement.

Lord Jay of Ewelme: It would be easier.

Professor Sir Francis Jacobs: It would be easier simply to maintain the status quo in almost its entirety than to negotiate a new arrangement.

Professor Sir Alan Dashwood: Section 16 would really only help with matters such as a case where an arrest warrant had already been issued but not yet executed. For any future arrest warrants, we would certainly

need interim arrangements. I agree with Sir Francis that the best way of doing this is to continue the existing system in so far as we can.

Lord Cormack: Do I infer from what you are saying that successful negotiations would be those that resulted in a near replication of what we have already?

Professor Sir Alan Dashwood: In this particular field, yes.

Q9 **Lord Jay of Ewelme:** Assuming that there is no final agreement and therefore there has to be some transitional agreement, would you envisage that the UK might continue to submit to the jurisdiction of the CJEU during the phased process of implementation? To put it another way, would there be any alternative to doing that if one had some sort of transitional arrangement?

Professor Sir Francis Jacobs: It is difficult to see even what the UK's intentions are in relation to that, because the White Paper refers to the EU institutions in that context. Again, that would depend upon the negotiation. There may be some pressure from the European Union in the event of transitional arrangements that more or less preserve the status quo that the jurisdiction of the court should continue for that period, too. That might be acceptable in the context of the negotiation as a whole.

Q10 **The Chairman:** There is one final question, which is about own nationals. Can you see any prospect of the 27 EU countries considering extraditing their own nationals to a post-Brexit Britain that has not submitted to the European court jurisdiction, is not part of Schengen and has not opted into the suite of criminal justice directives?

Professor Sir Francis Jacobs: It would seem to me to be highly desirable to exclude the exception so that the states' nationals can be surrendered. It may not be easy to obtain that. It was an achievement of the European Union that it was able to overcome that exception, which in some member states had a constitutional status. That cannot easily be overcome, so there is a difficulty there in excluding the exception. It would be desirable, it seems to me, for the United Kingdom to press for the exclusion of the exception and to be ready to surrender its own nationals in that context.

Professor Sir Alan Dashwood: I agree with Sir Francis. If the UK wants to achieve the kind of effective surrender system that would approximate closely to the present one, we would have to, and would probably be perfectly happy to, enact the kind of accompanying measures that the union will from time to time enact, but we would do this by way of UK law.

The Chairman: Thank you very much indeed. We are very grateful to you for your time and it has been very useful. As I said, we will send you the transcript, and if there is anything you wish to add further, please feel free to do so. Thank you very much.

Examination of witnesses

Andrew Langdon, Dr Anna Bradshaw and Rosemary Davidson.

Q11 The Chairman: You have been observing the proceedings and you know what the rules of engagement are, so I will not go over them again. Before we get into any questions, however, it would be helpful if you could introduce yourselves and tell us a little about yourselves. That would be very helpful. Who would like to start?

Dr Bradshaw: My name is Anna Bradshaw. I am here on behalf of the Law Society of England and Wales, specifically their EU committee, and I am a practicing solicitor at Peters & Peters Solicitors.

Rosemary Davidson: I am Rosemary Davidson. I am a barrister practicing in extradition. I have practised in this area for about 10 years. In 2007, I was seconded for a time to the Crown Prosecution Service Extradition Unit, so I have some experience of the mechanics of it at that end. I have an academic interest in the Brexit issue and how that is going to impact on this area of practice.

Andrew Langdon: I am Andrew Langdon. I am Chairman of the Bar. I am a criminal silk. This is not my particular field of expertise, but I have the benefit of being surrounded by experts, so I hope I can speak for the Bar Council and give the Committee some assistance.

Q12 The Chairman: Thank you very much indeed. I would like to begin by hearing from you about the implications of the Government's intention to end the jurisdiction of the European Court. What are the implications of that for mutual recognition of judicial decisions generally and the European arrest warrant specifically?

Andrew Langdon: If I may say so, it seems to me that this Committee captured the position very well in its most recent report by saying that, if the Government continued to apply their anti-CJEU stance too rigidly, that would severely limit their post-Brexit options for adequate alternate arrangements. I was heartened to hear Lord Jay say—no doubt, we will discover very soon—that there may be, indeed in the letter, some hint of a softening of that position.

Lord Jay of Ewelme: It was Lord Condon.

Andrew Langdon: I am so sorry. Lord Condon made that point.

Lord Condon: I am perhaps over-relying on Adam Boulton and Sky News, but there was a hint that perhaps there might be a softening of the language.

Andrew Langdon: There was, and that has been echoed in other things recently. Time will tell, but it seems to me, especially having heard two such eminent professors of the subject, that it is becoming clearer by the moment that there has to be a place for some attention to be paid to the decisions of the courts of both contracting parties.

To the general part of your question, speaking in relation to civil and commercial law, the Bar Council's submission has been that, post Brexit, if we have something like a Denmark-EU jurisdictional agreement, in order to give effect to the intended red line there will have to be some sort of clause that is not for the interpretative jurisdiction of the Court of Justice but for due account to be taken of the decisions of the courts of all contracting parties. Some similar language is there in the Norway-Iceland agreement.

On a more practical note—as a practitioner, I suppose it is the practicalities that matter—it is worth bearing in mind that until quite recently, 2014, the CJEU did not have express jurisdiction in relation to this field. Domestic courts were perfectly able to develop case law without there being any significant divergence. It may be that one overstates the risk of divergence hereafter. It is also worth bearing in mind that there are other influences in play, not least Strasbourg, the Convention on Human Rights and, as it were, other forms of protections and guidance, which ought to militate towards avoiding divergence.

Ultimately, if there is divergence, I suppose our legislature is in a position, should it choose to do so, to correct the position. That is by way of a broad overview

Rosemary Davidson: In some ways, the question of jurisdiction itself is a bit of a red herring in this area. As has been noted by previous witnesses, whether or not there is technical jurisdiction over the UK, the UK courts will continue to follow very closely what the CJEU does in this area. One of the main reasons for that is, in relation to extradition in particular, extradition arrangements are at their most effective when everybody is applying the same rules in the same way.

If you look at the early case law on the framework decision before the CJEU had technical jurisdiction over the UK, what the English courts said was, "Okay, our job is to interpret Part 1 of the Extradition Act for domestic legislation, but that was enacted to give force to the framework decision, so we need to look at what that says". When there were CJEU rulings, the British courts said, "We need to look at how that court has interpreted that, because that is what everybody else is going to be doing". Even in the later cases such as Assange, the Supreme Court said, "We are not technically bound by the CJEU case law, but, still, we are going to reach the same decision, because ultimately the system will only work if we are all doing the same thing".

Whether or not we are technically subject to this jurisdiction in the future, the truth is, for the reasons that have already been pointed out, the UK courts will follow very closely what the CJEU rules in this area.

Dr Bradshaw: The Law Society has consistently expressed its support for the European arrest warrant mechanism and hopes the Government's red line will not jettison the UK's ability to continue to participate in the European arrest warrant scheme, or something akin to it, post Brexit. As far as mutual recognition instruments more generally are concerned, it

seems to us that the likelihood is that the fate of the European arrest warrant scheme will determine the ability of the UK to participate in other justice and home affairs instruments post Brexit as well.

For the Law Society, it is not just a question of how the Government's red line is to be negotiated in this particular instance. More importantly, it is a question of how the Government are going to negotiate a model that works not just for the European arrest warrant but for other useful mutual-recognition instruments—and, indeed, other forms of criminal justice co-operation other than mutual recognition-based ones.

Looking ahead, the risk, and the Law Society's fear, is that criminal justice co-operation in the EU will evolve in a way that the UK cannot participate in. By that, I mean there is a real problem with the inquisitorial/adversarial divide if criminal justice co-operation in the EU in the future moves away from mutual recognition towards more substantive harmonisation. Then the UK would not be able to participate, even if it wished to, in future instruments that might be very beneficial.

Q13 The Chairman: On what grounds might one argue that the European court is more intrusive than other international courts?

Andrew Langdon: I tend to agree with what has been said this morning already in relation to that. One is comparing two really very different things. Putting it in its simplest terms, no one gets plucked out of Bristol and sent to Luxembourg to stand trial before the Court of Justice. The Court of Justice has a role in interpreting legislation that applies across Europe. In one sense, it is more intrusive because it has that effect upon our laws, but in another sense it is not intrusive in that it does not engage itself with trying individuals or indeed conducting any sort of trial. That obviously applies to other supranational courts that have been mentioned.

There will be different views as to this, but on a practical level it does seem to us that the impact of the decisions of the Court of Justice can be overstated in terms of our daily life.

The Chairman: Has that been the case? It has almost been demonised.

Andrew Langdon: There is a lot of misunderstanding and confusion as to what all these courts actually do. There may be a wide public misunderstanding of the impact of the Court of Justice and the European court in terms of the way we live our daily lives. Of course, it is intrusive in the sense that it has the capacity to affect or nudge our laws in a particular direction. To that extent, of course, it is intrusive.

The Chairman: Do either of you want to add anything?

Rosemary Davidson: Sometimes the "intrusive" label goes to issues of sovereignty, because the concern is that the ECJ makes rulings that are binding on UK courts. In the example given in relation to the International Criminal Court—and I agree you are really comparing apples and pears—that court in fact proceeds on an express basis of

complementarity, where it only brings prosecutions when member states either cannot or will not. There is a mechanism specifically built into its rules to try to allow for sovereignty concerns.

In the other analogous court, the European Court of Human Rights, although those rulings are binding in the sense that the UK Government are obliged to give effect to them, our courts are not bound by them. Under the Human Rights Act, they just need to take them into account. It is really only the CJEU whose decisions have this binding effect—and that may be the source of where this perception of intrusiveness comes from.

Dr Bradshaw: The only thing I would add is that the principle of complementarity that operates in the International Criminal Court, which Ms Davidson mentioned, would not easily sit with the European arrest warrant scheme, not least because the ICC's jurisdiction is so narrow. It deals with a very limited range of offences, and it is difficult to transplant that type of jurisdiction to a very different jurisdictional remit.

Lord Jay of Ewelme: Picking up on what Andrew Langdon said about the lack of proper public understanding of the role of the European Court of Justice, whose job is it to ensure there is a better understanding of the proper role of the European Court of Justice?

Andrew Langdon: It is the job of us all, I suppose. The Bar Council and many other such bodies are constantly trying to do what they can in relation to public legal education. However good one is at communicating, it may be a dry old subject for the classroom, but it ought not to be. Indeed, we have been recently involved with the Citizenship Foundation in trying to bring these subjects closer to the minds of citizens. I apologise if that sounds like a rather trite reply, but it does seem to me that, if there is not a collective effort on behalf of us all, it is not going to succeed.

The Chairman: At one level, has there been almost a wilful misunderstanding between the European court and the European Court of Human Rights?

Andrew Langdon: There is a question mark in our minds, is there not, as to those who seek to foster a feeling against what the European courts do? They either deliberately or negligently muddle things up. Who knows? It probably depends on whom one is thinking about.

Q14 **Lord Cormack:** Dear me. Let me provide a quote, as I did to our previous witnesses. You have already heard this. Our Home Secretary, Amber Rudd, made the statement that the European arrest warrant is "an effective tool that is essential to the delivery of effective judgment". She said, "It is a priority for us to ensure that we remain part of the arrangement". How do you decipher her words?

Andrew Langdon: It is very difficult, is it not? There is a certain wry amusement at the fact the former Home Secretary also articulated, in a different context, all the reasons why the European arrest warrant was an essential part of—

Lord Cormack: Indeed, yes.

Andrew Langdon: It is almost impossible to decipher the words in a way that is helpful, although, as Sir Francis himself said, it is going to be less satisfactory formulating something like the Norway-Iceland agreement. That seems to be what most who have applied their minds to this subject think may be the way forward.

I would like to echo something that Rosemary Davidson has just said. The whole point of the European arrest warrant is its uniformity. As soon as you have any divergence as to form, you run certain risks. The evocative example is of a policeman in Bulgaria filling in paperwork that he knows is slightly different when it comes to the UK. That is going to get put to the back of the queue. The whole point about this subject is that uniformity is essential.

That is why it is very difficult to square, bluntly, leaving with staying, which is really what is at the heart of the question. The answer, however, is that we must replicate something as closely as we can to maintain uniformity. I suppose we have to be careful in that regard about how we promulgate the exceptions or the bars to extradition that we seek. There have been some recent amendments to the Extradition Act where we are, as it were, wanting our own additional bars to extradition. That is a difficult area when it comes to the design for the future.

Lord Cormack: To what extent are you and your colleagues being consulted on this by government Ministers? I asked this question of our previous witnesses and got a varied response.

Andrew Langdon: As far as the Bar Council is concerned, we have been publishing our Brexit papers on each area, including this. We have been engaging with government departments, who come to our premises. If I may say so, we have some of the best experts in the field who can help with it. Up until now, we have all been suffering from the same problem of not understanding quite what the focus is and quite what the model may be. Indeed, in the course of this discussion we are all trying to anticipate and inevitably we are speculating. Let us hope that very soon we will have something we can get our teeth into.

Lord Cormack: You would judge—you said this a moment ago and it was echoed by one of our other witnesses—that successful negotiations will be those that result in a near replication of what we already have.

Andrew Langdon: Yes, inevitably. That is the hallmark of this, because in order to make it efficient—

Lord Cormack: It is an awful lot of wasted time, is it not? Did either of you wish to comment?

Rosemary Davidson: That is right. From the EU's point of view in this, they want something as uniform as possible. In the Norway-Iceland agreement, they have something that is quite similar to the EAW system but with some differences. On the question of ease of negotiation, if what

we want is to replicate the Norway-Iceland agreement exactly or exactly the EAW agreement, that would be an easier sell than a third EAW-style agreement, which would be the UK-EU one.

Dr Bradshaw: The Law Society's position is very similar to that, too. Our clear preference is to stay in an arrangement that is as similar to the existing one as possible. The next best would be some form of Iceland-Norway model. As to how realistic that is to negotiate, we do not profess to express a view—but we do note that Denmark has recently had some difficulties with its agreement to remain a participant of Europol. Obviously, the fear is that the same arrangement Iceland and Norway might have been able to negotiate might not be extended to the UK. In addition, Denmark does not participate in the Norway-Iceland arrangement, as and when it comes into force. Ireland would have the ability to opt-out of any arrangement that was agreed with the UK in due course. There would still be an agreement with the EU plus Ireland and Denmark.

Q15 **Baroness Browning:** You heard the responses to my question about the outcome of a bilateral extradition agreement in terms of the model of Iceland and Norway. The point was made—it is a very important point—that both sides would want to maintain the mutual exchange of information and expertise as it stands at the moment. In a way, that helps, because clearly that is different from the situation when Norway and Iceland were negotiating.

Given the Government's red line on the European court, we could end up with an agreement where a provision for the constant review of case law was the only way in which the UK could have a role, if you like, in terms of making sure we were in line with those who are signed up to the European court. As practitioners, how would you see that case-law review taking shape? How would you access it? How would you want it to be reviewed in order for it to be useful? Although extradition agreements can take a long time, I understand that very often speed is needed. Being up to speed with the latest case law would be rather important for lawyers generally.

Andrew Langdon: It is difficult not to smile at the thought of there being a body whose job it is to ensure that we each have each other's case law, because we live in a time when it is instantly available everywhere. No lawyer worth his salt is going to go into court, frankly, without knowing what the most recent cases are on both sides of the fence, if I could put it that way, whatever the express provision is in relation to whether we should be having due regard to or reviewing the case law.

As it was put earlier, imagine for a moment the contrary rule: no one is to mention any other decision of any other jurisdiction, however relevant it may be; it is forbidden territory, and we are to airbrush it out of all our thinking processes. You only need to say it to see how frankly ridiculous that is. Without wanting to suggest that the language is unimportant, as a matter of practical reality, lawyers will continue to go to court, when

the occasion arises and there a real point to be argued, with the relevant case law at their fingertips. Sometimes their lordships will need reminding, but many of their lordships will know them anyway.

Again, one has to be practical and robust about this. Whatever the outcome, we are going to be having regard to what is being decided in the Court of Justice. The language in which we say we are having regard may be a matter of political importance, but in terms of the reality—and, one hopes, the outcome of the decisions in court—I am an optimist.

Q16 Baroness Janke: My question, again, is a similar question on the Council of Europe's Convention on Extradition. We heard from the previous witnesses that this was inadequate. However, should the UK exit from the European Union with no agreement in place, what do you believe will be the default position? How might this work?

Rosemary Davidson: That question also referred to whether there was going to be a problem with some member states having revoked implementing legislation. You have to decouple those two issues. The first question is: what is the international law position? Is there an agreement in place under which we can continue to extradite? There is a good argument that we could still rely on the European convention.

Although there is this question about domestic implementation of legislation, nobody has rescinded their membership of the convention. All 27 member states and the UK have signed and ratified that. There is a debate in the academic literature I have seen about whether, as a matter of international law, Article 31 of the framework decision, which provides that that should apply in place of the convention, has in fact ousted it in international law terms. However, if all parties agreed that they would revert to using the European convention, it seems to me that that would be a fallback position. In fact, in the early days of the framework decision, the German implementing legislation was struck down by the constitutional court, and they had a period of time where they could not receive EAWs, and they reverted to reliance on the European convention, so there is a precedent for that.

The next part of the question relates to whether there are practical difficulties around member states having revoked implementing legislation. I think that perhaps that problem is overstated. It is a very normal part of extradition negotiations that you agree the agreements at international level, and then at domestic level people implement them using implementing legislation. Certainly in the UK, amending that is quite simple. At the moment, European countries are Part 1 countries. They are designated by Order in Council. If you wanted to change them to Part 2 so that they relied on the European convention, you would just make another order in council. I understand the position to be similar in Ireland, in fact. They have a Part II of their Extradition Act 1965. If we were to revert to the European convention, they can designate us—I think it is a Minister's order in Ireland—for the purpose of Part II.

What we previously had with Ireland before the EAW was a similarly expedited system that was not based on treaty; it was based on reciprocal legislation here and in Ireland. That is what they have rescinded—Part 3 of their Extradition Act 1965. I do not know how complicated it would be for them to put that back in place, but we would still have the fallback of the European convention. What it would mean in terms of Ireland is that our extradition relations would be as ineffective as they have ever been with Ireland.

I am not suggesting this as, necessarily, a desirable outcome—but if the concern is a complete cliff-edge, it seems to me that, if everybody agrees that the European convention is a fallback, the domestic-law side of that would be quite straightforward.

Dr Bradshaw: I would only add that the position in other member states should be possible to confirm. It would be helpful if certainty could be arrived at sooner rather than later, because it is not helpful in practice. We have already seen examples immediately following the referendum of people seeking to resist their extradition to the UK on the basis that there is uncertainty about how the UK would, for example, comply with its commitments under the Charter of Fundamental Rights and more generally with the convention rights. If this uncertainty continues, the likelihood of these arguments resurfacing also increases. They were firmly rejected by the Irish High Court, but that is not to say that other member states' courts will take the same approach, whether now or in the future.

Andrew Langdon: If I may, I think we all agree with what was said this morning: the 1957 position is not an adequate substitute. It conjures up the vista, again, of the process no longer being a purely judicial one, but extradition requests being made through diplomatic channels and so on—with all the complications and time constraints. Nobody who knows the field is advocating that that is any sort of satisfactory fallback position.

Baroness Janke: It is theoretically possible but in reality it would be much less satisfactory than the arrangements we have in place.

Andrew Langdon: Yes, it is very difficult to see that anyone—obviously, I am thinking of the other member states—would want that to be the outcome. Of course, what none of us really knows is the extent to which, if at all, this topic we are discussing is some sort of negotiating pawn. We are all horrified at the thought it may be, given what is at stake. Security and safety are at stake, so we are all rather hoping it is not going to be used in that way.

Baroness Janke: Could the European Court of Justice have a persuasive role in extradition procedures in the future? Could there be a way found so the case law and authority of the court might be used in a slightly different way in future?

Andrew Langdon: Yes.

Rosemary Davidson: Yes.

Q17 **Lord Jay of Ewelme:** Following on from Baroness Janke's questions, I really wanted to talk about what the position might be if we are on our way to negotiating some new arrangement but have not yet reached that point in two years' time, so there is a need for some kind of transitional arrangement. What sort of transitional arrangement might that be? I suppose the question is to you as practitioners: what do you see might happen on day one after Brexit if no alternative to the European arrest warrant has been put in place? To ask the question I asked earlier on, what is the relevance of the Interpretation Act 1978? You might not have had a chance to mug up on it before coming here, but it was certainly new to me.

Andrew Langdon: No, I certainly have. I am going to give the credit to Rosemary Davidson, who I think first alerted us all to the possible relevance of Section 16 of the Act in an article she wrote. No doubt in a moment you will hear from her. Having looked at it, however, I agree that, on the face of it, in relation to European arrest warrants that have already been issued, it may have a role in that rather bleak picture we conjure up of everything having gone horribly wrong. It may have a role in relation to the validity of their continuance post the cliff edge, if I can put it that way, but that is only the handful that will currently exist, however, in relation to the future position.

As far as the UK is concerned, there is obviously a certain amount it can do in terms of, if I can put it in this rather graphic way, taking people to the border, if there has been a request. What happens beyond the border is obviously much more difficult to imagine. It is the other way around: it is the requests we are making to have those who are in other member states brought before our courts. If the mechanism has fallen away, that may run into serious difficulty.

Lord Jay of Ewelme: This is a practical question. If we are trying to get somebody from Bulgaria back here because he has murdered somebody here, would it become in any event more difficult, therefore, for us on day one afterwards if there has not been an agreement?

Andrew Langdon: There is always scope, as there used to be before European arrest warrants, for direct conversations and requests to be made between governments on a case-by-case basis, which we may recall in the distant past and which obviously still exists in relation to countries beyond Europe. In that example, if all else has failed, I suppose specific requests, with all that involves, may—I hesitate to say they may become the norm—be available to us.

Rosemary Davidson: Again, you have to separate the transitional process at the international level from the domestic process. Assuming a real Armageddon scenario, where you have negotiated no alternative and you have negotiated no transitional agreement—i.e. at the international level there is total stalemate—at the domestic level, in one sense, you could just leave the legislation in place and continue to process all the

EAWs we have here. That could be our choice and that would be a perfectly reasonable way to proceed. As has been pointed out, we would not have any control over how our outgoing requests were treated abroad.

The significance of the Interpretation Act arises at the point at which we repeal the bits of our domestic legislation that cover EU extradition. There are really three categories of case that you would look at. First, there are cases that have finished but we have not yet surrendered them. Julian Assange is the most well-known example of that category. At any point at which the legislation is repealed, however, you are likely to have a number of people who just have not been put on the plane yet. Then you will have people whose cases are ongoing, i.e. people who are due to turn up to court on day two after Brexit. What do you do about their cases? Then you will have EAWs that have been issued and certified by the National Crime Agency, but in respect of which an arrest has not yet been made. What the Interpretation Act does in relation to those cases is it says that, where you have an Act that gives rise to a right or a liability—and in this case we are talking about liability to extradition—if it is repealed, what you do not take away are the rights and liabilities that had already arisen.

This means Julian Assange cannot suddenly bring a judicial review against his surrender and say, “The Act under which my extradition was ordered no longer exists, so there is no longer a basis for my extradition”. Similarly, it would give you a basis to carry on your existing extradition proceedings. On a practical level, that means when people turn up to court, you do not then have to say to the requesting authority, “I am sorry, but it has all changed. You need to issue a new request”. You can keep going on the existing ones.

It seems reasonably clear that you could continue to arrest on warrants that have been certified and start those proceedings. The Interpretation Act preserves proceedings that have already begun or are in contemplation, because the warrant has been certified. What it cannot do is preserve the position in relation to requests that have not yet been made. What you would have in the absolute Armageddon situation is a preservation of existing proceedings: those ones could keep going. You would really be left, however, as Andrew has said, in a situation where you can make what are called ad hoc requests. In a very serious case, you would want to do that—but one caveat I would add to that is not all foreign jurisdictions allow ad hoc requests in their domestic law. Most do, but there are some foreign jurisdictions—and I am afraid I do not know whether this applies to any of the EU 27—whose domestic law provides that you can only conduct extradition under the guise of a treaty or a convention.

Dr Bradshaw: That was very comprehensively dealt with, but I would add that as the prospect of a cliff edge draws closer, if that is what we will end up with, that will inevitably have an effect on how requests are made and received in the lead-up.

Q18 Lord Jay of Ewelme: If, in two years' time, we are reckoned to be six months away from some final agreement and we decide there needs to be some interim arrangement, would that be fairly easy to negotiate, in your view, or would it be complicated to negotiate? Would it be more complicated to negotiate than a long-term agreement? Will we just decide to fall back on the Interpretation Act? How would you judge that?

Andrew Langdon: I do not know whether this is politically naive, but, given the common interest all the member states will have in there being a workable system, the thought occurred to me that if, unhappily, with a few months to go we still have not understood where we are going in terms of a new agreement, a simple agreement that there is a transitional postponement of current arrangements until such time as we have reached an agreement would be very sensible.

Lord Jay of Ewelme: You mean you would stop the clocks.

Andrew Langdon: Yes, but of course I can hear that others with different interests across the piece arguing for the same thing. As most commentators accept, this does seem to be terribly important. It may be something where, exceptionally, everyone is capable of agreeing, "Look, we have not sorted it out yet. Let us continue the current arrangements until we have".

Lord Jay of Ewelme: Common sense will prevail.

Andrew Langdon: I hope so.

Lord Condon: You cannot be sure.

Lord Jay of Ewelme: Do either of you have comments?

Rosemary Davidson: I agree with that. If what you want is for the status quo to carry on, I would have thought that would have been a reasonably simple negotiation, subject to deciding exactly how you are going to give force to that. If what you want transitionally is something new, that has obvious scope to become a negotiation in itself. It does not seem to me that that would be a very sensible way to proceed.

Dr Bradshaw: I would agree. The only slight wrinkle is the length of time it has taken for the Iceland-Norway agreement to be agreed. As you heard earlier, the agreement has yet to come into force. I understand that is because the EU member states and Iceland have yet to deposit their notifications and declarations under the arrangement.

Lord Cormack: That is not very encouraging when you consider the size of Iceland and Norway, is it?

Q19 The Chairman: You touched on this, but can I ask a question on own nationals? Can you see any prospect of the EU 27 extraditing their own nationals to a post-Brexit UK that is not part of Schengen and has not opted into the suite of criminal-justice directives—and vice versa?

Rosemary Davidson: It would be very difficult for the EU 27. For many of them, it is a constitutional issue. When the framework decision was introduced, there were some significant legal challenges in member states. As I said earlier, in Germany the implementing legislation was struck down. Several of them have had to amend their constitutions. To take Germany as an example, the amendment to the German constitution is very confined. They will extradite their own nationals within the EU—and that is it. It is a case of having to conduct negotiations on other negotiations in this context, and trying to persuade member states that it is worth the political risk for them to seek to negotiate to amend their constitutions internally. That is the practical difficulty that stands in the way there.

The Chairman: Is there anything you wish to add?

Andrew Langdon: No. I agree with that as a matter of history and politics. Standing right back from all that, it does seem rather an odd position to end up in if, as it were, we have reached a position whereby there is that degree of mutual trust. The idea that we as a jurisdiction will be lessening or abandoning the defences available for anyone who is tried in this country to give others a legitimate excuse to say they no longer have confidence would be an extremely surprising take—but that ignores realpolitik, I suppose.

As to the converse question, the view seems to be, yes, we will be prepared to extradite our own nationals to EU member states again. We have reached a position whereby we have sufficient respect by and large—and I am speaking very generally, of course—for the protections that are available. It would be very surprising for us to take a different attitude to that now.

Dr Bradshaw: The concern would be about a race to the bottom. In that sense, it is easy to forget what the position was before the European arrest warrant. I suppose the risk is that the UK might feel the need to reverse the trend of over a century and, on the basis of reciprocity, start refusing to extradite its own nationals if requesting states or receiving states were to do the same. There is a provision in the Iceland-Norway arrangement that would permit them to do exactly that.

Q20 **Lord Condon:** You were present and you heard our discussion with Sir Francis and Sir Alan on the potential alternative dispute resolution mechanisms, particularly in the field of justice and home affairs issues. Is there anything you would like to add to or build upon what they said? Are there any templates, precedents or alternatives that we might consider or review in the absence of having the European court to deal with dispute resolution?

Andrew Langdon: No. If I may say so, I think we understand that ultimately there has to be a court, but it may not be difficult, in theory anyway, to envisage some parallel court to the Court of Justice. It was very interesting to have the insight in relation to the EFTA court as a

possible model, presiding over disputes over interpretation that arise. Theoretically, and perhaps in reality, it could work.

Having said that, it would be very surprising if such a court did not have—whatever the right language is—due regard to what was going on in the Court of Justice. Let us face it: it would be a court that would be created to try to enable those who have an interest in saying it to say, “We have a red line because we have another court now”.

Lord Condon: Forgive me for interrupting. In the modern world, would you see that as a real physical court or a virtual court where people on both sides are communicating and agreeing? I cannot quite work out the shape or format of it.

Andrew Langdon: No. You are in good company, because in relation to the modern world and virtual technology we are transforming what we do domestically. I suppose the answer to that is perhaps it will be a virtual court, but whether we are physically in the same place or not, there will be some sort of court—some sort of decision-making process with power and authority. However, it rather depends upon a lot of good will on the part of the other member states to co-operate in creating or acknowledging the authority of such a beast. We can understand what some of the politics may be there. If I may, Dr Bradshaw touched on a subject earlier that seems important to us, which is that it is essential that any such body should be based on principles of mutual recognition. Of course, Ireland still has a common-law system, but we are some sort of anchor on the way in which things evolve along an inquisitorial route. Without us, there is a danger there.

The only other thing I would say as an aside is that the Court of Justice are judges who do not have a background as criminal lawyers, which is not me being rude about them; they acknowledge this themselves. It may just be—perhaps this is being too optimistic—that some new court that had pan-European criminal expertise within it could be created in some way to take hold of this subject area.

Lord Jay of Ewelme: Do you mean pan-European in the sense of being EU plus others?

Andrew Langdon: Yes.

Lord Condon: Would it be created to replace the court?

Andrew Langdon: It would be to deal with this aspect of the court’s jurisdiction, I suppose. That is the thought. If there is a problem in relation to that, it is easier to fix it by putting more criminal judges into the existing Court of Justice. As I say, I think we were all encouraged by what we heard earlier as to the potential model of the EFTA court, which manages the two-pillar structure.

Rosemary Davidson: In terms of precedents, if you look at extradition arrangements and EU mutual legal assistance measures, there are some precedents. However, it is worth bearing in mind that in this context

“dispute” can mean a dispute as to the interpretation of the treaty—and that really is the preserve of the court—but there are often disputes that arise in this context around practical issues.

In relation to the EAW, I am not sure whether “dispute” is the right word, but there was certainly an issue between some states in Europe who effectively have an obligation to prosecute, so they were issuing EAWs for what we consider to be very minor offences. That meant the UK experienced a high volume of extradition traffic. That is not to do with the interpretation of the framework decision. That is very much a practical issue. What you see in many extradition arrangements—and in mutual legal assistance arrangements—are mechanisms for political resolution of those disputes. That might mean an obligation on the parties to seek resolution as soon as possible, and sometimes they might appoint specific people whose job will be to resolve disputes. However, they really are geared to the practical, political-level resolutions that can arise.

In relation to interpretation issues, really the only model you have is the Iceland-Norway one, where it is left to the ECJ on behalf of the EU and national courts on behalf of the other signatories to the treaty. That is aligned through this duty of constant review.

The Chairman: That is all from us. Thank you all very much on behalf of the Committee for your time this morning. It has been extremely helpful. If there is anything further you wish to send us after you have thought about the questions, please feel free to send us some supplementary written evidence.