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From a political to a judicial approach to extradition: A case for the consolidation of the requesting State's rights in domestic extradition procedures

William Julié, Sophie Menegon, and Juliette Fauvarque
Paris Bar, France

Abstract
This article purports to analyze the role conferred to the requesting State in domestic extradition procedures. Despite the existence of a judicial control over extradition, the majority of States included in this study continue to view extradition as a political prerogative of the executive and leave the requesting State with little or no means to defend its request. This article argues in favor of the consolidation of the role of judicial authorities in the determination of extradition requests, along with a reinforcement of the requesting State's ability to participate in this process.

Keywords
Extradition, international criminal law, European criminal law, judicial cooperation, judicial cooperation in criminal matters, extradition and human rights, comparative extradition law, extradition procedure, requesting State, international extradition

Corresponding author:
William Julié, International Bar Association, London, UK.
Email: wj@wjavocats.com

Introduction

Extradition refers to the transfer of a person from one State to another State that seeks to bring the requested individual to trial or to execute a custodial sentence against him or her. "The right to extradite is a right of the State and treaties only regulate it"[1]. This holding of the French *Cour d'assises de la Seine*, which dates back to the 19th century, emphasizes that extradition is a State-to-State act, concerned with State interests and dependent on diplomatic considerations. Yet, the development of the rule of law and the progress of human rights have emphasized the need to place international extradition under judicial control and to grant the requested individual some rights in domestic extradition procedures. The process whereby a State examines an extradition request is therefore no longer primarily driven by sovereign, diplomatic considerations, but more so by legal and human rights concerns, designed to ensure, inter alia, that the requested person will not face prosecution or detention on political or discriminatory grounds in the requesting State, that the facts which sustain the extradition request also constitute an offense under the law of the requested State, and that the requested person's basic human rights will be guaranteed in the requesting State.

This evolution from a dominantly inter-governmental to a regulated, legal framework raises some important questions as to what the rights and prerogatives of the requesting State should be in this process, and the extent to which it should be allowed to participate in the extradition procedure defined by the laws of the requested State. Obvious difficulties may arise in the attempt by a State to give voice to the interest of another State in having a fugitive brought to justice, and at the same time to preserve its own diplomatic interests and the defendant's most basic human rights, such as the right to a fair trial and the right not to be subjected to torture or inhumane or degrading treatment. These might be directly conflicting interests, and any sovereign State may naturally be inclined to favor the interests of the requesting State over the protection of the defendant's human rights, in the hope of obtaining a reciprocal treatment in the future.

The need to take into account these potentially conflicting interests explains the hybrid nature of domestic extradition procedures, which are often divided into a judicial phase and a political phase. During the former, a judge examines whether the legal conditions of extradition are fulfilled and whether the requested person would face a risk of being subjected to human rights violations in the requesting State. In the latter, the government of the requested State makes a final determination on the request, taking into account its own sovereign interests[2]. In this configuration, the interest of the requesting State in having the fugitive surrendered appears secondary.

What is the right balance between the sovereign interests of the two States involved in an extradition case, and to what extent should the requesting State be allowed to participate in the extradition procedure defined by the laws of the requested State or international law?

1. Cour d'assises de la Seine 13 December 1846, D.P., 1847, 4, 249 (In French: "*le droit d'extrader est un droit de l'État et les traités ne font que le réglementer*").
2. In most States, if the judicial authority opposes the extradition request, the government is bound by the court's decision and cannot execute the extradition request (for example, in France, Italy, the United States of America, Argentina, Austria, Brazil, Chile, Costa Rica, Finland, Greece, Haiti, Japan, Luxemburg, Norway, Sweden, Switzerland, Turkey, Uruguay, etc.). By contrast, under Belgian law, the government is not bound by the advice of the *Chambre des Mises en Accusation*, which is not considered a judicial decision. On this issue and the political nature of extradition in Belgium, see David Eric, *Éléments de droit pénal international et européen* (2nd ed., Bruylant, Bruxelles, 2018) 7.1.12; and Bernard, Diane and Doutrepont, Marie, "*Les juges belges face aux demandes d'extradition des Etats étrangers,*" in "*Les juges belges face aux actes adoptés par les Etats étrangers et les organisations internationales*" (Bruylant, Bruxelles, 2016) 83–151.

This article will first emphasize the lack of a uniform approach as to the rights of the requesting State from one jurisdiction to another and the prevalence of a significant imbalance at the expense of the requesting State in most of the legal systems analyzed in this study (Part I). It will then argue that the role of judicial authorities should be increased for extradition procedures to adequately reflect and consider the various stakes involved in an extradition case, from the sovereign interests of both the requesting State and the requested State, to the fundamental rights of the requested person (Part II).

Part I: The asymmetrical rights of the requesting State from one State to another

The majority of States analyzed confer very limited or nonexistent rights to the requesting State once an extradition request has formally been transmitted diplomatically (1). By contrast, a few other States have endeavored to design a more balanced model where the requesting State is granted some enhanced rights or is treated as a party to extradition proceedings before the domestic courts of the requested State (2).

1. The exclusion of the requesting State in the majority of jurisdictions studied[3]

Extradition requests are transmitted through a diplomatic channel; from Ministry of Foreign Affairs to Ministry of Foreign Affairs, and from Ministry of Justice to Ministry of Justice. Thus a "ministerial" phase generally takes place prior to the arrest of the requested person and the activation of the judicial phase of the extradition procedure. During this preliminary ministerial phase, the extradition request remains in the hands of the requested government, which is not constrained by any time limit to transmit the file to its judicial authorities. The requesting State has no evident legal means to compel the requested State to do so promptly. The requesting government may only exercise "diplomatic pressure" on the requested government to the extent that it is in a position to do so. This ministerial filter appears as an expression of the political nature of extradition and shows that the determination of extradition requests does not yet consist of an entirely legal, judicialized process.

Once the request has been transmitted to the judicial authorities, the requested person may be arrested, placed in custody and the extradition request must be submitted to a judge who will determine whether the legal conditions of extradition are fulfilled. In a majority of States, the requesting State is not considered a party to this extradition hearing, which deprives it of the possibility of making its case before the court, accessing the case file and rebutting the evidence presented by the requested person. Nor is the requesting State entitled to appeal a negative extradition decision at the various stages of the proceedings, as this is an exclusive right of the Public Prosecutor. The requesting State's interests are implicitly represented by the national Public

3. The legal systems considered in this article are France, Belgium, the United Kingdom, the Netherlands, Greece, Germany, Poland, Serbia, Spain, Italy, and the United States of America. This selection was not made pursuant to a specific comparative methodology but is rather the result of the authors' practical experience in dealing with extradition matters in Europe. The choice of jurisdictions was also largely influenced by a spontaneous survey led by the authors within an independent network of extradition lawyers who provided relevant information about extradition procedures in their own jurisdictions. The list of States hereby examined should therefore not be regarded as exhaustive in any way, and the use by the authors of phrases such as "the majority of jurisdictions" should be construed as the majority of jurisdictions analyzed for the purpose of this article.

Prosecutor, who, depending on the circumstances of the case, will more or less actively stand on the foreign government's side. This somewhat "exclusive" model is the one which applies, for example, in the Netherlands, where the requesting State, not being a party to the proceedings, is not allowed to argue or file written submissions directly in court, itself or via a lawyer. Similar systems apply in Greece, Germany, Belgium, Poland, Serbia, and the United States of America. In all of these jurisdictions, domestic procedural laws do not arrange for the requesting State's intervention, either explicitly or implicitly[4].

The requesting State is in a slightly better position in France, where Article 696-16 of the Code of Criminal Procedure provides that the requesting State may be authorized by the judge to make oral submissions at the hearing, even though it is not considered a party to the extradition case. The *Cour de cassation* has interpreted this provision as meaning that the requesting State does not have the right to file written submissions in the proceedings[5].

The total deprivation of rights diminishes the adversarial nature of the proceedings and is likely to lessen the quality of the judicial debate as a result. The necessity to break away from the political conception of extradition and to recognize the importance of introducing an effective judicial control over extradition procedures explains why some States provide the requesting State with more or less significant avenues of participation and/or representation in extradition hearings.

2. The enhanced consideration of the requesting State's interests in some jurisdictions

Some States have endeavored to grant the requesting State certain rights or prerogatives in their judicial extradition procedures. Italy and Spain, in particular, have adopted such "mixed models," by allowing requesting States to be considered as parties in court subject to reciprocity and judicial authorization. The United Kingdom ("UK") has taken a step further by adopting a fully judicialized model, where the requesting State is considered as the opposing party to extradition proceedings and holds the same procedural rights as the requested person, irrespective of reciprocity.

a) The Italian and Spanish "mixed" models

The Italian Code of Criminal Procedure provides that the requesting State has the right to intervene in the extradition procedure through a licensed Italian counsel, provided that the same right is awarded to the Italian Republic in extradition procedures which take place in the requesting State, and subject to judicial authorization[6]. Once the intervention is authorized, the requesting State has access to the extradition file and enjoys the same rights as the other parties to the case: presenting briefs and documents, summoning witnesses, presenting oral arguments and importantly, the right to appeal the court's decisions.

As regards Spain, Article 14.1 of the Extradition Law provides that *"[t]he representative of the requesting State may intervene in the hearing and shall be summoned for that purpose if he has so requested and if the Court so decides, subject to the principle of reciprocity, for which purpose it*

4. See, for example, the Serbian Law on Mutual Assistance in Criminal Matters (Off. Herald of RS, No. 20/2009). The list of States referred to in this section shall not be regarded as an exhaustive list.
5. Cass Crim 9 April 2014, 14–80.436.
6. See Article 702 of the Italian Code of Criminal Procedure. The Italian *Corte di Cassazione* has recently emphasized the importance of reciprocity in this process by denying Mauritius the right to intervene in the absence of reciprocal rights for the Italian State (Cass Pen Sez. VI, 23 March 2017, 14237).

shall, where appropriate, seek the necessary guarantee from the Ministry of Justice."[7] Spanish case law has interpreted the scope of the rights enjoyed by the requesting State under this provision, ruling that the intervention of a requesting State in extradition proceedings is limited to the hearing and its preparation, as an "intervener" of the Public Prosecutor's Office. In practice, this means that the requesting State has the right to access the case file in order to prepare for the hearing, to file a written memorandum in favor of extradition before the hearing takes place (independently of the Public Prosecutor's), to intervene orally during the hearing and submit evidence, and, if extradition is granted and the requested person files an appeal against the decision, to file a written brief to challenge the appeal. However, if the Court rules against extradition, the requesting State does not have the right to challenge this decision, which is an exclusive prerogative of the Spanish Public Prosecutor. Nevertheless, if an appeal is filed by the Public Prosecutor, the requesting State is allowed to join the Public Prosecutor's appeal by filing a written brief in support of the Prosecutor's arguments[8].

By granting the requesting State certain rights and prerogatives in the extradition procedure, the Spanish and Italian "mixed models" demonstrate commitment to the necessity of fighting impunity internationally and recognize that States may have a strong, legitimate interest in having a fugitive brought back to justice. At the same time, they are cautions and maintain some limitations of the rights enjoyed by the requesting State in their legal systems, through filters of reciprocity (in both States) and judicial authorization (in Italy only).

b) The British "liberal" model

Extradition in the UK is governed by the Extradition Act 2003, which goes further than the aforementioned Spanish and Italian legislation in that it effectively treats the requesting State as a party to extradition proceedings irrespective of authorization or reciprocity and does not restrict its appeal rights. Under ss. 28, 105 and 110 of the 2003Act, where the requested person is discharged at the extradition hearing or by the Secretary of State, the requesting government may appeal the decision to discharge before the High Court. The requesting State therefore enjoys the same procedural rights as the requested person, including the right to appeal the judge's or the Secretary of State's decision. The requesting State is represented by barristers instructed by the Crown Prosecution Service, in accordance with ordinary rules of criminal procedure in the UK. Most significantly, as a result of these unrestricted rights, any evidence submitted by the requested person is forwarded to the requesting State for comment and response.

In sensitive cases, the requested persons and witnesses might be reluctant to fully defend their case in the hearing for fear of retribution in the requesting State, which raises some important questions as to the extent to which requesting States should be able to participate in domestic extradition hearings, and whether some limits should be placed on their rights to access all of the case's materials and evidence. The following sections will address in more details how these concerns may be overcome and explore the main advantages and/or disadvantages of the different approaches described.

7. Ley de Extradición Pasiva 4/1985, Article 14.
8. Spanish National Court Criminal Chamber, 3rd Section, 2 November 2018, Order no. 514/2018.

Part II: The necessity to extend judicial control over extradition procedures and to strengthen the requesting State's rights

The different extradition models described reserve substantially different treatments to the requesting State. The consequences of these differences highlight the necessity to extend the scope of judicial control over extradition and to strike a fairer balance between the interested parties' rights and interests in extradition procedures (1) through the revision of international instruments or the overhaul of domestic legislation (2).

1. Striking a balance between the various interests at stake

The exclusion of the requesting State reflects a political conception of extradition, which arguably presents some advantages from the point of view of the requested State (a). However, this model fails to consider the interests of the requesting State and eliminates the legal guarantees which traditionally attach to judicial proceedings (b). Finally, it is not inherently protective of the requested person (c).

a) The protection of the requested State's interests

Limiting the rights of the requesting State ensures that authorities of the requested State are able to conduct their investigations and to determine the request in due independence, without the interference of the requesting State. The authorities of the requested State therefore retain a high degree of sovereignty in this process, and if the extradition judge denies the request, the requested government is only partly exposed to diplomatic repercussions, as this denial is not the result of a political decision but of an independent judicial decision (at least in jurisdictions where the government is bound by the decision of its judicial authority[9]). There are also obvious advantages in denying the requesting State the right to appeal a decision refusing extradition in terms of avoiding lengthy and costly proceedings, at the expense of both the requested State and the requested person, who is likely to be detained for a longer period of time as a consequence of appellate proceedings. Moreover, the fact that the requesting State is not able to access the case file and the evidence submitted by the requested person facilitates the person's claims and can therefore give an impression that the requested State's extradition process is more respectful of the requested person's individual rights.

As regards jurisdictions which arrange for the participation of the requesting State in domestic extradition procedures, however, an obvious advantage lies in reciprocity and the prospect of obtaining a more favorable treatment from the requesting State in the future. One may also argue that States are more likely to efficiently fight impunity at the international level if they ensure each other adequate representation in extradition proceedings.

b) The benefits of extending judicial control over extradition and allowing the intervention of the requesting State

We may ask why the requested State might still be reluctant to allow the requesting State to intervene in judicial proceedings. The fact that most legal systems continue to submit extradition

9. Supra n.2.

proceedings to a number of "political filters," such as the preliminary examination of the request by Ministerial entities, the representation of the requesting State by the Public Prosecutor only, and the political nature of the ultimate decision to extradite, illustrates that extradition has not fully emancipated itself from its dominantly political origins. Yet, extradition requests have become the subject of judicial control precisely in order to bring justice and legal certainty to this area of international politics. In a judicial approach to extradition, these political filters should not continue to apply so vigorously and should be abandoned in favor of a reinforcement of the rights of both the requested person and the requesting State.

First, the impossibility for the requesting State to appear at the extradition hearing alters the adversarial nature of the proceedings. The overall justice of extradition proceedings is dependent on the ability for the requested State to design a balanced model which appropriately considers the adversarial interests at play, as prescribed by the rule of law in any other type of judicial proceedings, irrespective of the quality of the parties. In jurisdictions which do not allow the requesting State to participate in the extradition procedure, the interests of the requesting State can only be represented by the Public Prosecutor, who ends up in an ambiguous position. On the one hand, it must defend the arguments of the requesting State before the court. On the other hand, the Public Prosecutor does not act on behalf of the requesting State; it acts on behalf of society and must ask the court to deny the request if the legal conditions of extradition are not fulfilled.

This dual role places the Public Prosecutor in an unusual, delicate position which may arguably compromise the independence of the judicial process, especially in jurisdictions where the Public Prosecutor acts under the authority of a member of government, namely, the Minister for Justice, as is typically the case in France. In these circumstances, we may legitimately wonder how the Public Prosecutor may simultaneously represent the interests of its own government and those of the requesting government, and at the same time act independently—as is required of all members of the judicial authority. Allowing the requesting State to defend its case in court would put an end to this sense of ambiguity, as the Court would be able to assess the legality of extradition by reference to all of the interested parties' arguments—those of the requested person, of the Public Prosecutor, and of the requesting government. This configuration would be more aligned with ordinary criminal proceedings and the participation of the requesting State as a "quasi-party" to the case could easily be arranged for along the lines of pre-existing mechanisms of criminal procedure[10].

It goes without saying that the procedural rights afforded to the requesting State should also apply to the requested person. Whilst the European Court of Human Rights gives persons facing extradition a number of minimal rights, the latter have not been fully harmonized and substantial differences persist from one State to another. For example, in Belgium, the decision of the *Chambre des Mises en Accusation* does not constitute a judicial decision but simply a confidential opinion to the Minister, hence the requested person is not considered a party to the procedure. The Minister of Justice is the only recipient of the judge's opinion and the requested person is not entitled to appeal that opinion before the *Cour de cassation.* Most importantly, if the *Chambre des Mises en Accusation* issues a negative advice to the extradition request, the Belgian government may nonetheless decide to grant the request[11]. These limitations to the rights of the requested person and the strength of the judge's decisional power emphasize the Belgian government's attachment to a political conception of extradition, which can only entail limited rights for both the requested

10. On this point, see Part II. 2.
11. Ibid 2. For more information on the Belgian extradition procedure, see https://rm.coe.int/168042d6d0, and Bernard, Diane; Doutrepont, Marie, *Les juges belges face aux demandes d'extradition des Etats étrangers,* in: *Les juges belges face aux actes adoptés par les Etats étrangers et les organisations internationales* (Bruylant, Bruxelles, 2016) 83–151.

person and the requesting State. In these circumstances, the further judicialization of extradition should naturally include a readjustment of both the requesting State's and the requested person's rights.

Secondly, the lack of a strong judicial control enhances the risk that extradition requests be the subject of diplomatic and political pressure. In the "Moreno-Garcia case," a Belgian *Chambre des Mises en Accusations* had on three different occasions issued a negative opinion to a Spanish extradition request, and political pressure from the Spanish government convinced the Belgian government to nonetheless grant the extradition request. The decision of the Belgian government was eventually struck down by the *Conseil d'Etat*[12]. The European Arrest Warrant, which bypasses the intervention of political authorities, shows that a judicialized procedure is more likely to diminish the risks of disruptive political pressure in extradition cases[13].

Thirdly, the exclusion of the requesting State from the extradition hearing is contradictory to the requesting State's right to litigate the requested government's ultimate political decision to deny extradition. The division of extradition procedures between a "judicial phase" and a "political phase" in States like France or Belgium implies that the ultimate decision to grant or deny extradition takes the form of an administrative decision which may be challenged accordingly by the requested person or the requesting State before the supreme administrative judge, namely, the *Conseil d'Etat* (in both France and Belgium). Since the 1990s, a number of decisions of the French *Conseil d'Etat* have granted standing to the requesting government to litigate the failure by the French government to issue an extradition decree where the extradition request has received a positive opinion from the Investigating Chamber[14]. Even though this legal action cannot lead to the automatic issuance of a decision to extradite (the judicial authority cannot issue the decision itself), these judgments recognized the legal nature of extradition and the binding force of international agreements pertaining to extradition: when the legal conditions of extradition are satisfied under a Treaty, which the State has willingly signed and ratified in accordance with its Constitution, extradition is a legal obligation of that State. There seems to be no apparent reason why the requesting State should be able to participate and initiate legal action in the ultimate, political phase of extradition, but not in the initial judicial examination of the request.

c) The requested person's interests

It should be stressed that the complete exclusion of the requesting State is not necessarily in the interest of the requested person. We may intuitively be inclined to think that the more power the requesting State has, the more chances the requested person has of being extradited. Nevertheless, the exclusion of the requesting State from the extradition hearing has a propensity to diminish the quality of the extradition hearing and the soundness of the court's decision, which can in turn prove detrimental to the requested person.

If the requesting State were asked to defend its extradition request in court, it would have to fight the allegations of the requested person against extradition and would necessarily have to bring at least some evidence, be it minimal, as to why it has reasons to believe that the requested individual has committed an offense serious enough to justify extradition. It would also have to justify why the

12. Conseil d'Etat 1 February 1996 no. 57973, and 5 February 1996 no. 58012. For more details, see David, Eric, *Éléments de droit pénal international et européen* (2nd ed., Bruxelles, Bruylant, 2018) 7.1.14.
13. On this point, see Part II.2.
14. For example, see Conseil d'Etat 15 October 1993 no. 142578; or Conseil d'Etat 14 December 1994 no. 156490.

request satisfies the legal conditions of extradition under the law of the requested State or the applicable international instrument. Finally, it would have to convince the court that the requested person would not face a denial of justice contrary to Article 6 ECHR or detention conditions contrary to Article 3 ECHR. In these circumstances, the requesting State would be less inclined to issue an extradition request unless it has sufficient reasons to seek extradition, and the extradition judge would not settle for unsubstantiated, general allegations against the defendant.

Typically, the United Kingdom applies higher standards than other European States in deciding whether the requested person will be subjected to torture, inhumane or degrading treatment if surrendered to the requesting State. By contrast, judges who are asked to rule on the legality of an extradition request without a full, adversarial debate are likely to make less informed decisions and to grant extradition more easily. In this regard, a number of French decisions have granted extradition requests by relying on mere diplomatic assurances of the requesting State that the requested person's human rights would not be violated upon extradition. For example, the *Cour de cassation* generally considers that diplomatic assurances from the Russian Federation are sufficient for the Court of Appeals to reject the requested person's claims that he would face trial or detention contrary to Articles 6 and 3 ECHR if extradited to the Russian Federation[15]. By contrast, the British High Court expressly acknowledges the systemic violence which exists in many penitentiary institutions in Russia, and the impossibility for British consular authorities to effectively monitor these assurances on Russian territory, as grounds to deny extradition requests from the Russian Federation[16]. Therefore, it appears from the highly reasoned case law of UK courts that creating greater rights for the requesting State in the extradition procedure also creates greater obligations incumbent on the latter, and that States which treat the requesting State as a party to the proceedings do not extradite more often than others—quite the contrary.

Finally, it is worth noting that after an extradition request has been disposed of at the national level, the person sought may move to have an Interpol Red Notice removed before the Commission for the Control of Interpol's Files ("CCF"), or an alert in the Schengen Information System ("SIS") deleted before the competent European and/or national authorities. In this regard, a more reasoned judicial decision on extradition from a national court is likely to be given more weight by the CCF and to lead to the prompt removal of an arrest warrant which lacks the necessary evidence or does not fulfill the legal conditions of extradition, which is beneficial to the requested person.

For all these reasons, we must see beyond the impression that the interference of the requesting State is dangerous per se from a human rights point of view and recognize the importance of establishing a more balanced model between the legitimate interests of the various parties to an extradition case. Admittedly, the requested person may legitimately fear the requesting State's intervention in sensitive cases, but it will be up to the requested State to take these concerns into account by adapting the rights it is willing to confer on the requesting State, for example, by limiting the intervention of the requesting State to cases in which it has been authorized by the judge, along the lines of the Spanish and Italian "mixed models." A multitude of solutions could be deployed in

15. See, for example, Cass Crim. 11 April 2018, 18–80.705, in which the *Cour de cassation* considered that the Court of Appeals did not violate the European Convention on Extradition by relying, to grant an extradition request, merely on diplomatic assurances from the Russian government that the requested person, a member of the Chechen community, would not be tried and detained in circumstances contrary to Articles 6 and 3 of the ECHR.
16. See, for example, *Alexey Shmatko v The Russian Federation* [2018] EWHC 3534. See also https://www.matrixlaw.co.uk/resource/the-end-of-extraditions-to-russia-for-the-foreseeable-future-by-james-stansfeld/

order to design more balanced models that would adequately guarantee all of the interested parties' rights and interests.

2. The possible enhancement of the requesting State's rights through the adoption of international agreements or the overhaul of national legislation
   a) The adoption of international or regional instruments

A first way in which States may establish appropriately balanced extradition models is through the adoption of regional, multilateral instruments based on a system of mutual trust and confidence, such as the European area of freedom, security and justice. Member States of the European Union have been keen to facilitate extradition procedures between themselves even prior to the 1999 Council of Tampere and the subsequent adoption of the European Arrest Warrant ("EAW") Framework Decision on 13 June 2002, as may be evidenced by the adoption of the 1996 Convention on Extradition Between Member States.

By enabling a system of direct transmission between judicial authorities, the EAW has instituted an unprecedented balanced model between the interests of the issuing and executing States, as well as the requested person's rights. Even though the EAW Framework Decision does not impose the holding of an extradition hearing in which the issuing judicial authority is represented as a party, it guarantees the issuing authority a timely decision and Article 15.3 specifically provides that "*the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.*" At the same time, the EAW also emphasizes the importance of the respect for fundamental rights and the rule against discrimination. This preoccupation for human rights is largely reflected in the case law of the European Court of Justice and domestic courts, as may be illustrated by a recent Dutch decision which ruled that it will no longer execute Polish EAWs, over concerns that the country's courts are no longer independent[17]. The EAW and the interpretation of the Framework Decision by national and European judges therefore make it clear that enhanced cooperation, established on a multilateral basis, is capable of ensuring the requesting State's interests in terms of trust and efficiency, and of protecting the fundamental rights of the requested person.

b) The adoption of bilateral instruments

In the absence of a multilateral context encouraging harmonization, States may alternatively draft new or amend bilateral agreements promoting more efficient, judicialized extradition processes. Under these revised bilateral agreements, the Contracting State could enjoy enhanced rights or prerogatives by comparison to those contained in national legislation governing extradition, which can be superseded by international agreements providing otherwise. For example, the French Code of Criminal Procedure specifically provides that provisions of the Code of Criminal Procedure on extradition apply only in the absence of an international agreement, or with respect to matters not covered in the relevant international agreement[18]. Therefore, international extradition treaties may provide otherwise than the Code of Criminal Procedure and confer the requesting State a particular status.

17. https://www.politico.eu/article/dutch-netherlands-courts-to-stop-extraditing-poland-suspects/
18. French Code of Criminal Procedure, Article 696.

Most extradition agreements are silent on the rights of the requesting State. The European Convention from 1957, which is the largest multilateral instrument on extradition, does not indicate whether the requesting State should or should not be conferred procedural rights in the examination of the request by the authorities of the requested State. The same observation can be made of bilateral extradition agreements, if we consider, for example, the United Nations Model Treaty on Extradition,[19] which expressly leaves procedural questions to the discretion of each State's domestic laws ("*[t]he requested State shall deal with the request for extradition pursuant to procedures provided by its own law, and shall promptly communicate its decision to the requesting State*"[20]).

All bilateral extradition treaties ratified by France, for example, are silent on the rights of the requesting State within the French extradition procedure, except for the 1996 Extradition Treaty between France and the USA, which contains singular provisions. A document entitled "Agreed Minutes on Representation," annexed to the Treaty, specifies that "*each country wishes to provide the other with the greatest degree of legal representation and legal advice as would be permitted under its constitution and laws*" and that "*the two countries further agreed to provide each other legal advice and representation (including representation in court) at least equal to that given to any other country pursuant to an extradition relationship whether existing at the present time or entered into in the future.*" The document then sets forth the specific advantages that each Contracting Party must receive under the Treaty, including the ability for the United States "*to conduct a continuing written defense of its extradition request,*" to seek to postpone the extradition hearing in order to allow the US government the opportunity to argue its position and to submit additional memoranda in response to the oral arguments put forward by the defense, and to allow an authorized US representative to communicate with the Public Prosecutor prior to the extradition hearing, "*to the same degree permitted to the [French] Ministry of Justice.*" These unusual provisions clearly grant the US government a status of "quasi-party" to the proceedings; however, it is uncertain how these peculiarities might work in practice as the USA has not sought to avail itself of these prerogatives in the past.

c) The amendment of domestic procedural laws

Finally, States should consider the overhaul of domestic procedural laws towards a readjustment of the requesting State's rights in extradition cases (and, where necessary, those of the requested person too). The liberal UK model could be followed with a view to perfecting the judicialization of extradition procedures. However, such a radical transformation could be at odds with the legal traditions of States which, like France and Belgium, continue to perceive extradition as a predominantly State-to-State act. In this regard, the more moderate and flexible Spanish and Italian models should be regarded as the possible basis for the revision of domestic legislation in States which persistently exclude the requesting State from extradition procedures.

The redefinition of the rights of the requesting State could also draw from the rules governing victim representation and participation in criminal trials which exist in some jurisdictions. For example, in France, the institution of the civil party allows alleged victims of criminal offenses to access information about the status and the contents of investigations and to be represented in court by counsel. However, this status only entails limited appeal rights. Another interesting mechanism to draw from is that of criminal seizure, which in a number of States applies to situations where

19. UN General Assembly Resolution 45/116, 14 December 1990.
20. Ibid, Article 10.

certain goods or documents not belonging to the defendant are seized by criminal investigators. The French Code of Criminal Procedure grants the owner, as an interested party to the case, certain limited rights, such as the right to appeal a decision to seize property or to seek restitution of that property.[21] This status does not however entail a right for the third party to access the case file.[22] This well-established, hybrid status applicable to victims or interested third parties in ordinary criminal procedure could easily be transposed to requesting States in extradition hearings, so as to grant the latter certain minimal rights and prerogatives which would greatly improve the quality of extradition law, without necessitating a radical reassessment of traditional procedural laws.

To conclude, the fact that a handful of States have been keen to further judicialize extradition proceedings by allowing the intervention of the requesting State on top of those of the requested person suggests that the inclusion of the requesting government in the proceedings is not in itself prejudicial to the sovereign interests of the requested State, or the individual rights of the requested person. The sovereignty of the requested State and the interests of the requested person appear rather to be best protected by a strong, independent and impartial judicial authority, mindful to preserve the rule of law and the grounds for refusing extradition which States have inserted in international agreements.

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ORCID iD

William Julié https://orcid.org/0000-0002-7634-1085

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