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Comparing the Machineries of Extradition Between Functional and Cultural Approaches

Abstract: This Article aims to provide a comparison of three surrender schemes, namely international extradition, interstate rendition in the United States, and the European arrest warrant (EAW). If these three regimes fulfill the same function, they do so differently, using distinct terminology, relying on different legal sources, establishing separate procedures, and prioritizing the rights and powers of the actors involved along contrasting lines. A close survey of these variations highlights the existing gulf between these apparently similar techniques. It also provides a key to understanding these differences in light of the historical and political contexts in which extradition schemes are embedded. The comparison of extradition regimes opens a window onto the broader landscape, revealing competing ideologies and structural shifts at play in crime control policies. The evolution of surrender regimes illustrates the project of increased cooperation by which sovereigns, be they component states of a national federation or sovereign states in a transnational community, find ways to project their law enforcement power beyond their borders. It is noticeable in this respect that the EAW fits within a larger narrative traceable both in the United States and in the international community, which emphasizes the need for more intensive interactions between criminal justice systems to tackle the mobility of criminals and the growth of cross-border crime. This widely shared project, which ties together the local, the regional, and the transnational in the fight against criminality, confirms that the focus on state-based legal orders which dominates mainstream comparative law may not be enough to grasp the current legal evolutions. With the decline of the significance of traditional geopolitical divisions, it is now also necessary to compare institutions belonging to legal systems of different levels (national, regional, international) and extradition regimes stand as perfect candidates for such an academic enterprise.

Keywords: Extradition, Interstate rendition, European arrest warrant, Crime control, Legal formants, Functionalism, Legal culture, Comparative law methodology.

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INTRODUCTION

With emblematic cases and contested treaties widely featured in the media, extradition epitomizes the diplomatic and political nature of international cooperation in crime control.[1] Yet, when compared with extralegal, secret "extraordinary rendition,"[2] it is the legal dimension of extradition that stands out, as evidenced by its definition:

> [A] cooperative law enforcement process by which the physical custody of a person: (i) charged with committing a crime or (ii) convicted of a crime whose punishment has not yet been determined or fully served, is formally transferred, directly or indirectly, by authorities of one State to those of another at the request of the latter for the purpose of prosecution or punishment, respectively.[3]

The existence of ancient legal documents designed for the surrender of persons between sovereigns underscores extradition's deep roots in history.[4] In its contemporary form, this technique owes much to developments dating back to the seventeenth century. As the international community solidified into a horizontal aggregate of independent national legal orders, the rendition of fugitives between states ceased to serve primarily the political interest of the sovereigns[5] and became an international cooperation tool aimed at pursuing military deserters and fugitives from justice.[6] Before being formally developed as an international law technique, the surrender of fugitives was

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[1] The Assange case is probably the most visible of all recent extradition cases that conflate high international politics and common criminality. Likewise, the mass protest which followed the introduction of the 2019 Hong Kong extradition bill shows the political dimension of surrender schemes.

[2] "Extraordinary renditions," which are most of the time illegal, have been put under the spotlight by the United States anti-terrorist rendition program. THE RENDITION PROJECT, www.therenditionproject.org.uk (last visited June 1, 2023). They are not altogether new as evidenced by Paul O'Higgins, *Unlawful Seizure and Irregular Rendition*, 36 BRIT. Y.B. INT'L L. 279 (1960). *See also* M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25 (1973).

[3] DAVID A. SADOFF, BRINGING INTERNATIONAL FUGITIVES TO JUSTICE: EXTRADITION AND ITS ALTERNATIVES 43 (2016).

[4] IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5–7 (1971). Tracing the evolution of this technique through history reveals distinct phases that reflect changes in the political economy and the law of the international community. For an analysis dividing the history of extradition into several political stages, see M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 4*ff.* (1974) (distinguishing four periods in the history of extradition from ancient times to post-1948 developments).

[5] Extradition was never solely limited to political offenders, and the surrender of common criminals was not always excluded from ancient treaties. However, it seems that until the end of the seventeenth century, extradition primarily concerned political offenders, with the surrender of common criminals mostly being incidental. On the historiographical uncertainty surrounding this question, see SHEARER, *supra* note 4, at 5–7.

[6] Exceptions may nonetheless be found, as some international treaties made no exception for political offenders. Additionally, the *attentat* clause, which stipulates that attacks on a head of state be grounds for extradition, was adopted by many governments in response to anarchist attacks at the end of the nineteenth century. It should be recalled that the evolution of police cooperation in Europe from the early twentieth century owes much to the fight against politically motivated crime. *See further* PETER ANDREA & ETHAN NADELMANN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS esp. ch. 2 (2006).

practiced between states that were more or less closely confederated, such as the German states, the Swiss cantons, or the American colonies. Theory followed practice, and the term "extradition," which first appeared in France at the end of the eighteenth century, gained recognition as a term of art in English law by the middle of the nineteenth century.[7] Since then, the development of extradition law has reflected the difficulties and progress of crime control across borders. With expansive transnational interaction in criminal justice in recent decades, the practice of extradition has evolved under contrasting influences: on the one hand, the increasing demands of national security and the "punitive turn" in criminal justice; on the other hand, the need for due process at the global level. The European arrest warrant (EAW), established in 2002 in the European Union to facilitate the transfer of suspects or convicts unlawfully at large, perfectly illustrates the tension between these two ideological facets of international crime control.

Just as there are diverse histories of international law,[8] so too can the origins and evolution of extradition law be subject to various historical narratives. The choice between a global[9] or national [10] viewpoint offers as many pathways to telling this history. However, to be comprehensive, such an account also requires attention to the spatial diversity of this institution.[11] The extradition technique circulated in different settings and materialized in various legal frameworks, revealing that behind its apparent conceptual unity, extradition actually refers to a set of rules and practices that are highly variable. Although it serves as a mere connector between distinct jurisdictions and does not belong to any specific legal tradition, labeling it a legal transplant may seem counterintuitive.[12] Yet, extradition is a typical example of a legal technique that is transposed and reshaped by the sociolegal context. The early compacts for surrendering fugitive criminals between American colonies, the nineteenth- and twentieth-century bilateral extradition treaties between nation-states protective of their sovereignty, and the multilateral extradition arrangements of late modernity based on geographical proximity or political affinity, all reflect the circulation of a single technique in various settings. Beyond their conceptual similarities, their procedural differences reflect the extent to which legal transplants are influenced by the landscape

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[7] SHEARER, *supra* note 4, at 12.

[8] Martti Koskenniemi, *A History of International Law Histories*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 943 (Bardo Fassbender, Anne Peters, Simone Peter & Daniel Högger eds., 2012).

[9] SHEARER, *supra* note 4, at 5–22.

[10] Paul O'Higgins, *The History of Extradition in British Practice: 1174–1794*, 13 INDIAN Y.B. INT'L AFF. 78 (1964).

[11] *See* Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39 (1981) (representing a first attempt to distinguish extradition practices along geographical lines).

[12] ALAN J. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974) (coining the concept of legal transplant to indicate the moving of a rule or a system of law from one country to another). *See further* JÖRG FEDTKE, *Legal Transplants*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 550 (Jan M. Smits ed., 2d ed. 2012); David Nelken, *Towards a Sociology of Legal Adaptation*, *in* ADAPTING LEGAL CULTURES 7, 7–20 (David Nelken & Johannes Feest eds., 2001).

of reception, by domestic law as well as politics and culture, or in other words, the constraints of local "legal formants."[13]

This Article aims to provide a comparison of three surrender schemes, namely international extradition, interstate rendition in the United States, and the European arrest warrant. While identifying commonalities between these three regimes offers new pathways to understanding the evolution of surrender practices, measuring their differences also helps explain the influence of "legal formants." Indeed, if international extradition, U.S. interstate rendition and the EAW fulfill the same function, they do so differently, using distinct terminology, relying on different legal sources, establishing separate procedures, and prioritizing the rights and powers of the actors involved along contrasting lines. A close survey of these variations not only highlights the existing gulf between these apparently similar techniques, but also provides a key to understanding these differences in the light of the historical and political contexts in which extradition schemes are embedded. From this perspective, a comparative approach appears to be the best way to capture the conceptual originality and the sociolegal significance of the EAW, a newcomer in the field of extradition law.

More generally, the analysis of extradition mechanisms offers a keyhole perspective on profound changes impacting the fight against criminality at both national and global levels. What might initially seem like a mundane micro-comparison of autonomous legal techniques actually opens a window onto the broader landscape, revealing competing ideologies and structural shifts in the globalization of crime control policies.[14] The evolution of surrender regimes illustrates the project of increased cooperation, where sovereign entities—whether component states of a national federation or sovereign states in a transnational community—find ways to project their law enforcement power beyond their borders. Notably, the relatively recently established EAW fits within a broader narrative evident both in the United States and in the international community, which underscores the need for more intensive interactions between criminal justice systems to address the mobility of criminals and the rise of cross-border crime. This widely shared project, which ties together local, regional, and transnational efforts in the fight against criminality, confirms that focusing solely on state-based legal orders, which dominates mainstream comparative law, may be insufficient to grasp the current legal evolutions.[15] With the declining significance of traditional geopolitical divisions, it is now also necessary to compare institutions from legal systems at different levels (national, regional, international),[16] and extradition regimes

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[13] On the notion of legal "formant," see Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pts. 1 & 2), 39 AM. J. COMP. L. 1, 343 (1991).

[14] *See* ANDREA & NADELMANN, *supra* note 6, at 235–37 (offering an international point of view on the transformation and securitization of crime control policies). *See also* COMPARATIVE CRIMINAL JUSTICE AND GLOBALIZATION (David Nelken ed., 2016).

[15] Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1115*ff*. (2001).

[16] Horatia Muir Watt, *Globalization and Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 599 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

stand as prime candidates for such an academic endeavor. To carry out such a comparison, the surrender schemes under review must first be described and analyzed independently. Once the terms of comparison are clarified and the fundamentals of extradition identified (Part I), it then becomes possible to discover relevant points of comparison (*tertium comparationis*) and to interpret the cultural contingencies of each of these extradition schemes (Part II). The inventory of similarities and differences between these three legal regimes offers an illustration of how a comparative case study can actually reconcile the functional approach of comparative law and the primacy of culture (Conclusion).

I. MAPPING THE FUNDAMENTALS IN EXTRADITION (TERMS OF COMPARISON)

While a doctrinal description of comparable legal institutions provides a useful starting point for identifying technical similarities and differences, it alone is insufficient to fully grasp their variations. As extradition schemes evolve, understanding why they are similar or differ requires historical context.[17] This is especially pertinent when the goal of the comparison is to link the transformation of the institution under review to broader evolutionary trends. Therefore, the subsequent sections will trace the genealogy of international extradition, interstate rendition, and the EAW, and describe their main structural features in the light of their respective histories.

A. International Extradition Between Sovereign States

Ancient diplomatic documents show that the surrender of political offenders was practiced in antiquity, and reports of individuals being delivered for common crimes in the Middle Ages are evidence of early instances of rendition.[18] But it was only the fractioning of the European legal space, long considered unitary, into sovereign entities, that spurred the development of modern extradition law. With the rise of nation-states in the sixteenth and seventeenth centuries, surrender could no longer be based on scholastic arguments, such as the authoritative *lex loci delicti* of the *communitas christiana*.[19] Instead, the classics of international law laid down new theoretical groundwork. Under these doctrines, extradition was envisioned as a duty between co-equal sovereignties. As scholars debated whether this obligation was a clear legal duty (Grotius, Vattel) or an imperfect obligation (Puffendorf), diplomatic practice underscored that to secure the full force and effect of international law, any extradition request should be based on a special compact.[20] This shift, alongside intensifying international relations and increased mobility between states, marked a new phase in the history of rendition.

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[17] James Gordley, *Comparative Law and Legal History*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 16, at 754.

[18] SHEARER, *supra* note 4, at 5–7.

[19] JOSE PUENTE EGIDO, L'EXTRADITION EN DROIT INTERNATIONAL: PROBLEMES CHOISIS 27–31 (1991).

[20] BASSIOUNI, *supra* note 4, at 6–9.

From the early nineteenth century, the proliferation of bilateral extradition conventions and influential treatises[21] shaped this technique of interstate cooperation. Rules and procedures established at this time persist today, such as the requirements that extradition requests be made through diplomatic channels and that the requesting state must provide an act of accusation or condemnation with its request. The political offense exception, which excludes political crimes from extradition, and the rule of specialty—prohibiting the prosecution of a fugitive for crimes other than those he was extradited for—also emerged in nineteenth-century treaties. Since then, international practice has consistently demonstrated that there is no legal duty to extradite under customary law.[22] Consequently, international treaties provide the main legal basis for extradition obligations, which can also arise from national legislation based on comity, reciprocity, or ad hoc extradition arrangements in the absence of a treaty.

Technical diversity in domestic laws and gaps in the bilateral extradition treaties network prompted international efforts for further harmonization in the twentieth century. The first solutions, such as regional arrangements based on multilateral treaties or reciprocating national legislation, emerged from the international community to enhance extradition efficiency. Notable examples include the Commonwealth Scheme, the Arab League Extradition Agreement, and the European Extradition Convention, all designed in the latter half of the twentieth century.[23] More recently, the United Nations developed a Model Treaty on Extradition.[24] This cooperative trend has been reinforced by other multilateral conventions that expand the scope of international extradition law by including lists of offenses considered extraditable under specific conventions, such as those addressing white slave traffic, counterfeiting, torture and degrading treatment, and drug trafficking, which can serve as a legal basis for surrender in the absence of an extradition treaty.

The UN Convention Against Transnational Organized Crime, adopted by the UN General Assembly in November 2000, stands as perhaps the most ambitious example of this type of convention.[25] It mandates that a series of offenses be deemed extraditable in any existing extradition treaty between states[26] and enshrines the principle *aut dedere aut judicare* when

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[21] By the end of the nineteenth century, scholarly treatises on extradition law proliferated in academic communities across continental Europe and the United States. For an exhaustive bibliography, see *Research in International Law*, 29 AM. J. INT'L L. (Supp.) 32 (1935).

[22] MALCOLM N. SHAW, INTERNATIONAL LAW 686 (6th ed. 2008); *cf.* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. Rep. 24 (Apr. 14) (Joint Declaration of Evensen, Tarassov, Guillaume and Aguilar Maudsley, J.J.) ("In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out.").

[23] SHEARER, *supra* note 4, at 51–66.

[24] G.A. Res. 45/116, Model Treaty on Extradition (Dec. 14, 1990).

[25] For an overall view of the convention, see Dimitri Vlassi, *The UN Convention Against Transnational Organized Crime, in* TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL? 83 (Mats Berdal & Monica Serrano eds., 2002).

[26] United Nations Convention Against Transnational Organized Crime, art. 16(3), Dec. 12, 2000, 2225 U.N.T.S. 209.

extradition is denied on the grounds of the nationality of the alleged offender.[27] This convention is the cornerstone of a procedural regime that develops various tools to facilitate international cooperation in criminal matters,[28] including the promotion of best practices for extradition.[29] This development coincided with the Security Council's creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the establishment of the International Criminal Court (ICC), all of which possess the authority to request the surrender of persons found within any state's territory.[30]

Overall, these instruments and the gray literature produced by various Conferences of the Parties and UN expert working groups are designed to facilitate extradition, progressively crystallizing the alternative obligation to extradite or prosecute into a rule of international customary law.[31] Both municipal and international courts contribute to this development. High-profile rulings, such as the House of Lords decisions in the Pinochet case[32] or the judgment of the International Court of Justice on *Questions Relating to the Obligation to Prosecute or Extradite*,[33] are contributing to the formation of an embryonic "common law of extradition."[34] This evolutionary process coincides with substantive changes in the general framework of extradition. Two opposing trends should be distinguished here: the emergence of individual rights in the extradition process, which creates new conditions for surrender, and the increased level of cooperation among states, which, conversely, facilitates the transfer.

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[27] *Id.* art. 16(10).

[28] See the work of the Conference of the Parties to the UN Convention Against Transnational Organized Crime, www.unodc.org/unodc/fr/treaties/CTOC/CTOC-COP.html (last visited June 1, 2023). *See also, e.g.*, U.N. OFFICE ON DRUGS & CRIME (UNODC), MANUAL ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION (2012), www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

[29] *See* UNODC, REPORT OF THE INFORMAL EXPERT WORKING GROUP ON EFFECTIVE EXTRADITION CASEWORK PRACTICE (2004), www.unodc.org/documents/legal-tools/lap_report_ewg_extradition_casework.pdf.

[30] *Compare* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 29, May 25, 1993, U.N. Doc. S/RES/827, *and* Statute of the International Tribunal for Rwanda, art. 28, Nov. 8, 1994, U.N. Doc. S/RES/955 (both providing that "[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including . . . the surrender or the transfer of the accused to the International Tribunal"), *with* Rome Statute of the International Criminal Court, art. 89, July 17, 1998, 2187 U.N.T.S. 90 (providing that "States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.").

[31] *See further* Int'l L. Comm'n, *Final Report: The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), in* REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY, 57 U.N. GAOR Supp. No. 10, UN Doc. A/69/10 (2014), *reprinted in* 2 Y.B. INT'L L. COMM'N 91 (2014), U.N. Doc. A/CN.4/SER.A/2014/Add.1 (Part 2).

[32] Bartle & the Commissioner of Police for the Metropolis & Others, *Ex Parte* Pinochet, [1998] UKHL 41, [2000] 1 AC 61 (appeal taken from Q.B. Div'l Ct.); *In re* Pinochet, [1999] UKHL 17, [2000] AC 147.

[33] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. Rep. 422 (July 20).

[34] BASSIOUNI, *supra* note 4, at 19.

There has been an increasing impact of human rights on extradition proceedings both in international and domestic law.[35] Recent multilateral instruments dealing with extradition generally contain a "non-discrimination" clause, which provides that a state may refuse to comply with an extradition request "made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions."[36] Additionally, *jus cogens* now impacts the validity of extradition agreements; for instance, the violation of a peremptory norm, such as those against torture or persecution, would authorize a state not to comply with a treaty under which it would be obliged to extradite an individual.[37] Moreover, some international instruments and several rulings by international bodies consider it a human rights violation to extradite a person to a requesting state where he or she would be subject to torture or inhuman or degrading punishment such as the death penalty.[38] This trend is also at play at the domestic level, where bars to extradition based on human rights grounds can now be found in legislative provisions and court cases in a number of countries.[39]

These developments create new impediments to the transfer of fugitives. However, an opposite trend can be seen in the narrowing of some traditional grounds for refusal. Thus, the scope of official immunity from foreign criminal jurisdiction is slowly being curtailed, with important consequences for extradition.[40] Even more remarkable is the slow "evisceration" of the political offense exception (i.e., non-extradition of political offenders),[41] which was historically part of the "folk law" of Western democracies' political tradition.[42] Once a standard provision in municipal

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[35] John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187 (1998).

[36] U.N. Convention Against Transnational Organized Crime, art. 14, Dec. 12, 2000, 2225 U.N.T.S. 209. *Compare* European Convention on Extradition, art. 3, Dec. 13, 1957, 359 U.N.T.S. 273 *with* U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6(6), Nov. 11, 1990, 1582 U.N.T.S. 95.

[37] *See* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331; 12e Commission de l'Institut de Droit International, *New Problems of Extradition*, 60 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 306 (1983) (stating that, pursuant to Article 53 of the Vienna Convention, "in cases where there is a well-founded fear of the violation of the fundamental rights of an accused in the territory of the requesting State, extradition may be refused, whosoever the individual whose extradition is requested and whatever the nature of the offence of which he is accused."); *See also* ANTONIO CASSESE, INTERNATIONAL LAW 144 (2001); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 98 (2d ed. 2010).

[38] *See in particular* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989), (establishing that extradition of a young German national to the United States to face charges of capital murder violated article 3 of the European Convention on Human Rights guaranteeing the right against inhuman and degrading treatment).

[39] Dugard & Van den Wyngaert, *supra* note 36.

[40] Rosanne van Alebeek, *Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 496 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

[41] For a U.S. perspective on this general trend, see Christopher L. Blakesley, *The Evisceration of the Political Offence Exception to Extradition*, 15 DENV. J. INT'L L. & POL'Y 109 (1986); Abraham D. Sofaer, *The Political Offense Exception and Terrorism*, 15 DENV. J. INT'L L. & POL'Y 125 (1986).

[42] GEOFF GILBERT, RESPONDING TO INTERNATIONAL CRIME 259 (2006).

extradition statutes and treaties, this exception is increasingly restricted to the essential minimum, due to frustration over its inconsistent application to so-called terrorist offenses.[43]

The Assange case illustrates these opposing trends in extradition law well.[44] Julian Assange, a prominent political offender facing an extradition request by the United States at the time of writing, cannot contest his transfer from the United Kingdom on the grounds that his alleged conspiracy to disclose classified documents is a purely political offense. This is because the political offense exception is not included in the U.K. Extradition Act of 2003, even though it implements the United Kingdom–United States extradition treaty which does provide for such an exception.[45] Consequently, much of the argument against his extradition revolves around claims that it would be unjust due to his mental condition and high risk of suicide.[46] Regardless of the case's final outcome, the prevailing uncertainty throughout the proceedings highlights how extradition law allows significant discretion to sovereign states, in contrast to the more predetermined nature of interstate rendition in the United States.

B. Interstate Rendition in the United States

The mechanics of interstate rendition in the United States originate from a set of practices and early compacts which developed during colonial times.[47] The arrangements made for the recovery of fugitives among the English colonies and between these colonies and the Dutch provinces, inspired the Continental Congress to include a provision in the Articles of Confederation and Perpetual Union designed to regulate rendition among the members of the confederacy. Ratified by all thirteen states in 1781, the Articles mandated that any criminal fugitive "shall upon demand . . . be delivered up and removed to the State having jurisdiction of his offence." This clause was carried forward by the founding fathers almost unchanged into the United States Constitution. Nestled between the Full Faith and Credit Clause and the "runaway slave" paragraph in Article IV,[48] it states that a "person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

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[43] SADOFF, *supra* note 3, at 209.

[44] For an overview of the case, see Daniela J. Restrepo, *Modern Day Extradition Practice: A Case Analysis of Julian Assange*, 11 NOTRE DAME J. INT'L & COMP. L. 138 (2021).

[45] Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 4, Mar. 31, 2003, 2490 U.N.T.S. 249.

[46] Clare S. Allely, Sally Kennedy & Ian Warren, *Psychiatric and Legal Issues Surrounding the Extradition of WikiLeaks Founder Julian Assange: The Importance of Considering the Diagnosis of Autism Spectrum Disorder*, 28 PSYCH. PUB. POL'Y L. 630 (2022).

[47] *See* John D. Lindsay, *The Extradition and Rendition of Fugitive Criminals in the American Colonies*, 2 COUNSELLOR 143, 176 (1893).

[48] U.S. CONST. art. VI, *superseded by* U.S. CONST. amend. XIII.

Despite its mandatory language, the Extradition Clause proved challenging to enforce, as demonstrated early on by a dispute over rendition between the governors of Pennsylvania and Virginia.[49] This prompted Congress to pass the Federal Rendition Act in 1793, which specified the necessary types of documentation and designated the governor as the proper recipient of extradition demands. The Act has remained virtually unchanged since then, except for a minor amendment.[50] With the constitutional clause and a few landmark Supreme Court cases, this brief federal statute long stood the sole nationwide framework for the surrender of fugitive criminals. However, the increasing mobility of American society, driven by economic and social realities and the porous nature of state boundaries,[51] soon led to dissatisfaction with the law.[52]

The question of the rendition of non-fugitive suspects (i.e., the surrender of suspects who commit a crime in one state while not physically present at the time of the crime)[53] raised practical difficulties as opportunities to commit offences across state lines increased. Efforts to address the perceived deficiencies in the extradition system led to states developing their own unique rules regarding rendition, resulting in a notable variation in state legislation.[54] The prevailing theory that Congress had not preempted state authority to supplement the federal statute allowed states to legislate on extradition procedures as long as they did not undermine the constitutional and federal duty to surrender. Consequently, the National Conference of Commissioners on Uniform State Law drafted a Uniform Criminal Extradition Act (UCEA) in 1926.[55] Since then, the Act has been adopted by almost all states,[56] filling the gaps in the federal statute and providing for the extradition of persons not present in the demanding state at the time of commission of the crime (article 6).

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[49] William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63 (1957).

[50] *See* 18 U.S.C. § 3182 (2018).

[51] On the way the culture of mobility and the culture of criminal justice were intertwined in American history, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 192–210, 261–67 (1993).

[52] *See, e.g.*, Wilbur Larremore, *Inadequacy of the Present Federal Statute Regulating Interstate Rendition*, 10 COLUM. L. REV. 208 (1910); Michael G. Heintz, *A Refuge for American Criminals*, 18 J. CRIM. L. & CRIMINOLOGY 331 (1927).

[53] Fred Somkin, *The Strange Career of Fugitivity in the History of Interstate Extradition*, 1984 UTAH L. REV. 511.

[54] NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, AND PROCEEDINGS OF THE 32ND ANNUAL MEETING 365 (1922).

[55] Uniform Criminal Extradition Act, 32 COLUM. L. REV. 1411 (1932). The Act was amended in 1936 by the Uniform Law Commission.

[56] As of 1980, the UCEA was adopted in all jurisdictions except the District of Columbia, Mississippi, and South Carolina. During this period, the Uniform Law Commission drafted an alternative model, the Extradition and Rendition Act, which outlines separate procedures for the retrieval of wanted persons from another state and differentiates between extradition—a traditional executive procedure—and rendition, a court-based procedure. To date, this second model has seen limited adoption, with only North Dakota having enacted it in 2013. *See* UNIFORM L. COMM'N, www.uniformlaws.org (last visited June 1, 2023). *See further* John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, (1983) (on the project of revision); John J. Murphy, *Uniform Criminal Extradition Act: Time for Change?*, *in* THE HANDBOOK ON INTERSTATE CRIME CONTROL 95 (Council of State Government ed., 1978) (on the reasons that caused dissatisfaction with the UCEA). *See also* Lowell Espey, *Extradition: Existing Procedures and Suggested Reforms*, 4 CRIM. JUST. Q. 82 (1976).

The UCEA also details the demand process, arrest, detention, bail, and other related matters, as well as the rights of the accused, including the application for relief by habeas corpus.

The Supreme Court has traditionally characterized the rendition process as a "summary proceeding" through which "the closely associated states" should "promptly aid one another in bringing to trial persons accused of crime."[57] Federal rendition law was thus construed in favor of the prompt removal of fugitives, especially as the Court argued that the law was designed "to eliminate . . . the boundaries of states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land."[58] As early as 1861, in *Kentucky v. Dennison* the Supreme Court determined that federal law created "an absolute right" for the executive authority of a state to demand a fugitive from the executive authority of another state; from this "absolute right" arose a "correlative obligation" to deliver.[59] The Court interpreted this duty as ministerial, rather than discretionary, yet it found no power in the federal government to compel a state officer to perform this duty. The historical context is enlightening: the decision arose from a petition by a slave state (Kentucky) to compel the governor of a free state (Ohio) to deliver a free Black man accused of helping slaves escape to Ohio, at a time when many southern states had proclaimed their secession and the Civil War loomed.[60]

The enforcement mechanism at both state and federal levels was inadequate to prevent the executive from exercising discretion, thus the constitutional duty was effectively only a "moral duty," with gubernatorial discretion becoming the norm.[61] Governors rarely used their power to deny extradition requests, but refusals sometimes occurred for equitable reasons. This changed in 1987 when *Kentucky v. Denison* was declared "fundamentally incompatible with more than a century of constitutional development" by *Puerto Rico v. Branstad*.[62] In this case, the governor of Iowa had denied an extradition request, citing concerns about the suspect not receiving a fair trial in Puerto Rico. The Eighth Circuit Court of Appeals "reluctantly" acknowledged that the federal judiciary did not have the power to compel a state governor to perform his ministerial duty to surrender a fugitive,[63] but the Supreme Court granted certiorari and reversed the judgment, establishing the power of federal courts to enforce the Extradition Clause by writ of mandamus.[64]

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[57] Biddinger v. Commissioner, 245 U.S. 128 (1917).

[58] *Id.*

[59] Kentucky v. Dennison, 65 U.S. 66 (1861).

[60] Stephen R. McAllister, *A* Marbury v. Madison *Moment on the Eve of the Civil War: Chief Justice Roger Taney and the* Kentucky v. Dennison *Case*, 14 GREEN BAG 405 (2011). See also, for a more general perspective, Arthur Bestor, *The American Civil War as a Constitutional Crisis*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 219, 229 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

[61] *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 YALE L.J. 103 (1956). *See also* Rhonda L. Degelau, *Interstate Extradition and Limits on the Governor's Discretion*, 3 HAMLINE J. PUB. L. 51 (1982); JOSEPH F. ZIMMERMAN, HORIZONTAL FEDERALISM: INTERSTATE RELATIONS ch. 6 (2011).

[62] *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

[63] *Puerto Rico v. Branstad*, 787 F.2d 423 (8th Cir. 1986).

[64] Kenyon Bunch & Richard J. Hardy, *Continuity or Change in Interstate Extradition? Assessing* Puerto Rico v. Branstad, 21 PUBLIUS 51 (1991).

The Court concluded that there was "no justification for distinguishing the duty to deliver fugitives from the many other species of constitutional duty enforceable in the federal courts."[65]

Puerto Rico v. Branstad appears to have definitively removed the risk of political interference by the executive authority in interstate rendition proceedings. With a minimal number of grounds for refusal, neither inequitable outcomes nor human rights breaches can justify the use of gubernatorial discretion any longer. There remain only three narrow grounds on which governors can legally refuse to extradite a suspect to another state: when the person was not present in the requesting state at the time of the crime, when he or she is already being prosecuted in the asylum state, or when he or she is not substantially charged with a crime in the demanding state.[66] Such a high degree of automaticity is unmatched in the European Union, where surrender between member states remains subject to various obstacles despite the adoption of the EAW, which eliminates executive discretion and fully judicializes extradition.

C. Surrender Between Member States in the European Union

Following World War II, the facilitation of surrender between European states became a symbol of a renewed desire for European collaboration. The first step was the 1957 Council of Europe Convention on Extradition, which consolidated the existing network of bilateral treaties into a single mechanism.[67] This was further augmented by additional Council of Europe instruments that expanded the scope of transfers and reduced the number of grounds for refusal.[68] However, reservations and non-ratification of protocols by some parties compromised the uniformity originally envisioned by the 1957 Convention. The surge of terrorism in the 1970s prompted new initiatives to streamline and accelerate surrender procedures between European states, rejuvenating interest in regional police cooperation.[69] Throughout the 1990s, new bilateral treaties and conventions were designed to simplify extradition procedures, but these too met with limited success.[70] Meanwhile, the expanding competence of the European Union over criminal matters led to the development of a new cooperative framework. EU member states committed to

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[65] *Branstad*, 483 U.S. 219.

[66] Auke Willems, *Extradition on the Two Sides of the Atlantic: The U.S. Model as Blueprint for the European Arrest Warrant?*, 27 CRIM. L.F. 458 (2016).

[67] Today this Convention reaches far beyond the horizon of the European Union: more than fifty countries are parties to this treaty (compared to the twenty-seven EU member states), including geographically remote states such as Israel and South Korea.

[68] *See* European Convention on the Suppression of Terrorism, Jan. 27, 1977, ETS No. 86; European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, ETS No. 98. See further an array resolutions and recommendations adopted within the framework of the Council of Europe to revisit some aspects of the 1957 Convention, available at COUNCIL OF EUROPE, TREATY OFFICE, http://www.coe.int/en/web/conventions/ (last visited June 1, 2023).

[69] MALCOM ANDERSON ET AL., POLICING THE EUROPEAN UNION (1995).

[70] MASSIMO FICHERA, THE IMPLEMENTATION OF THE EUROPEAN ARREST WARRANT IN THE EUROPEAN UNION: LAW, POLICY AND PRACTICE 11–23 (2011).

creating an Area of Freedom, Security and Justice (AFSJ)[71] through mutual recognition of judicial decisions[72] based on mutual trust.[73]

In the wake of the September 11 attacks, the drive to enhance the security focus of the EU agenda presented an opportunity to develop a common policy in criminal matters.[74] Following swift negotiations with the European Commission and the European Parliament,[75] the Council of the European Union—consisting of a representative from each member state—adopted the Framework Decision on the European Arrest Warrant and the surrender procedures between member states on June 13, 2002.[76] This decision, aiming to "abolish[] extradition between Member States and replacing it by a system of surrender between judicial authorities,"[77] was seen as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition."[78] It streamlined the process of arresting and transferring a person "for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" from one member state to another.

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[71] Most treatises and textbooks on EU criminal law include some kind of development on the short yet dense history of the AFSJ. For a rigorous legal genealogy, see STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (3d ed. 2011); VALSAMIS MITSILEGAS, EU CRIMINAL LAW (2d ed. 2022); MARIA FLETCHER, ROBIN LÖÖF & BILL GILMORE, EU CRIMINAL LAW AND JUSTICE (2008); ANDRÉ KLIP, EUROPEAN CRIMINAL LAW: AN INTEGRATIVE APPROACH (4th ed. 2021); SAMULI MIETTINEN, CRIMINAL LAW AND POLICY IN THE EUROPEAN UNION (2013).

[72] Tampere European Council (Oct. 15–16, 1999), Presidency Conclusions, https://www.europarl.europa.eu/summits/tam_en.htm (last visited June 1, 2023). On mutual recognition in the field of criminal law, see in a comparative perspective, JANNEMIEKE OUWERKERK, QUID PRO QUO? A COMPARATIVE LAW PERSPECTIVE ON THE MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS (2011). *Cf.* THE FUTURE OF MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EUROPEAN UNION/L'AVENIR DE LA RECONNAISSANCE MUTUELLE EN MATIERE PENALE DANS L'UNION EUROPEENNE (Gisèle Vernimmen-Van Tiggelen, Laura Surano & Anne Weyembergh eds., 2009).

[73] Mutual trust has been considered an essential concept in the development of the AFSJ by the European Council which acknowledged that "ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future." The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 2010 O.J. (C 115) 5. On this notion, see AUKE WILLEMS, THE PRINCIPLE OF MUTUAL TRUST IN EU CRIMINAL LAW (2021).

[74] On the European Union's reaction to the terrorist attacks of September 11, 2011, see Jan Wouter & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After 11 September*, 41 COMMON MKT. L. REV. 909 (2004).

[75] On the birth of the EAW, see Michael Plachta & Wouter van Ballegooij, *The Framework Decision on the European Arrest Warrant and Surrender Procedures Between Member States of the European Union*, *in* HANDBOOK ON THE EUROPEAN ARREST WARRANT 13, 32–36 (Rob Blekxtoon & Wouter van Ballegooij eds., 2005).

[76] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedure Between Member States, 2002 O.J. (L 190) 1 . For a detailed presentation of the EAW, see, e.g., THE EUROPEAN ARREST WARRANT IN PRACTICE (Nico Keijzer & Elies van Sliedregt eds., 2009).

[77] Council Framework Decision 2002/584/JHA, *supra* note 76, at 1, pmbl., recital 5.

[78] *Id.* at 1, pmbl.,recital 6.

Beyond mere terminology,[79] the Framework Decision established a "system of free movement of judicial decisions," which differs from traditional extradition in several key ways. First, it abandons the element of political authorization—historically a discretionary decision by government officials, linked to foreign policy considerations—and limits the role of executive authority, placing national judges exclusively in charge of the surrender process. Second, it shortens the often-lengthy extradition procedures by setting a ninety-day time limit for the execution of the warrant.[80] Third, it relaxes the substantive requirements for transfer: the principle of double criminality, which requires that extraditable offenses be punishable in both the requesting and the requested states, is not required for thirty-two enumerated offenses.[81] Additionally, the political offense exception has been abolished along with the nationality exception, which previously allowed states to refuse extradition of their own nationals.

Under the Treaty on European Union, effective as of May 1, 1999, and subsequently amended by the Treaties of Nice and the Treaty of Lisbon, Framework decisions were mandated to be "binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods."[82] Accordingly, the Framework Decision establishing the EAW was not directly applicable after its adoption by the Council of the European Union.[83] It required implementation by each EU member state to take legal effect. Member states were obligated to enact the necessary measures to comply with the new instrument by the end of 2003, although not all did so promptly. Eventually, all member states transposed the Framework Decision into their domestic legislation, and the EAW gradually supplanted traditional extradition across the European Union.[84]

The implementation process encountered significant challenges and legal obstacles.[85] To start with, at the EU level, the legal basis of the European instrument was questioned—debating whether the EAW should have been enacted via a convention rather than a Framework Decision—and concerns were raised about a potential breach of the principle of legality, particularly whether the partial abolition of the principle of double criminality undermined the requirement that legislation must clearly define offenses and penalties. The Court of Justice of the European Union

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[79] The Framework Decision replaces the terms "extradition," "extradition request," "requesting states," and "requested state," with "surrender," "arrest warrants," "state of issue," and "state of execution," thus contributing to the evolution of terminology in favor of automatic removal of a person from one state to another.

[80] Council Framework Decision 2002/584/JHA, *supra* note 76, arts. 17, 23.

[81] *Id.* art. 2(2).

[82] Consolidated Version of the Treaty on European Union, art. 34(2), 1997 O.J. (C 340) 164.

[83] On the legal effects of Framework Decisions, see Alicia Hinajeros, *On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?*, 14 EUR. L.J. 620 (2008).

[84] For case studies on the implementation of the Framework Decision across European member states, see CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT (Elspeth Guild ed., 2006); STILL NOT RESOLVED? CONSTITUTIONAL ISSUES OF THE EUROPEAN ARREST WARRANT (Elspeth Guild & Luisa Marin eds., 2009).

[85] *See* Julia Sievers, *Too Different to Trust? First Experience with the Application of the European Arrest Warrant*, *in* SECURITY VERSUS JUSTICE? POLICE AND JUDICIAL COOPERATION IN THE EUROPEAN UNION, *supra* note 84, at 109.

ultimately upheld the validity of the Framework Decision,[86] but the road to implementation remained fraught as the constitutionality of implementing statutes was contested in the supreme courts of several member states.[87] This led, in some instances, to the annulment of implementing statutes and the adoption of new legislation,[88] or to the amendment of national constitutions.[89] Despite these hurdles, the transposition process continued, albeit with variations in the domestic incorporation of the EAW among member states.[90]

Since then, the interpretation of the Framework Decision has led to an increasing number of requests for preliminary rulings to the Court of Justice of the European Union (CJEU), rising from twelve in 2014 to over fifty by mid-2020.[91] Initial decisions called for stringent application of the mutual recognition principle, allowing only limited exceptions to the obligation to surrender.[92] However, the CJEU has since reoriented its case law, acknowledging that the executing judicial authorities can refrain from giving effect to the EAW if there is "a real risk . . . of the fundamental right of a fair trial being breached."[93] This shift reflects the Court's efforts to address concerns from judicial and political circles about the implications of mutual recognition for fundamental rights.[94]

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[86] Case C-303/05, Advocaten voor de Wereld VZW, 2007 E.C.R 1-3633.

[87] For a comprehensive list of these constitutional challenges, see Pavel Zeman, *The European Arrest Warrant: Practical Problems and Constitutional Challenges*, *in* STILL NOT RESOLVED? CONSTITUTIONAL ISSUES OF THE EUROPEAN ARREST, *supra* note 84, at 107, 107–111.

[88] The case of Germany is the most emblematic: *see* Florian Geyer, *A Second Chance for the EAW in Germany: The "System of Surrender" After the Constitutional Court's Judgment of July 2005*, *in* STILL NOT RESOLVED? CONSTITUTIONAL ISSUES OF THE EUROPEAN ARREST, *supra* note 84, at 195.

[89] France and Poland offer two examples in which constitutional reform was undertaken to transpose the Framework Decision in the domestic legal order. See, respectively, Roger Errera, *The Implementation of the EAW in France: Constitutional Issue and Scope of Judicial Review*, *in* STILL NOT RESOLVED? CONSTITUTIONAL ISSUES OF THE EUROPEAN ARREST, *supra* note 84, at 157; Jaroslaw Zagrodnik, *The EAW in the Light of the Amendment to the Constitution of the Republic of Poland*, *in* STILL NOT RESOLVED? CONSTITUTIONAL ISSUES OF THE EUROPEAN ARREST, *supra* note 84, at 247.

[90] For an insightful comparative analysis of the implementing legislation in the United Kingdom and Italy, see FICHERA, *supra* note 70, at 135–68. *See also* Renaud Colson, *Domesticating the European Arrest Warrant: European Criminal Law Between Fragmentation and Acculturation*, *in* EU CRIMINAL LAW AND THE CHALLENGES OF LEGAL DIVERSITY: LEGAL CULTURES IN THE AREA OF FREEDOM, SECURITY AND JUSTICE 199 (Renaud Colson & Stewart Field eds., 2016).

[91] *See further* Helmut Satzger, *Mutual Recognition in Times of Crisis—Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant*, 8 EUR. CRIM. L. REV. 317 (2018). For regular comprehensive updates on this case law, see EUR. L.F.: PREVENTION • INVESTIGATION • PROSECUTION, https://eucrim.eu (last visited June 1, 2023).

[92] *See in particular* Case C-396/1, Curte de Apel Constanţa v. Ciprian Vasile Radu, ECLI:EU:C:2013:39 (Jan. 29, 2013); Case C-399/11, Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107 (Feb. 26, 2013).

[93] *See in particular* Case C-216/18, High Court (Ireland) v. LM, ECLI:EU:C:2018:586, ¶ 61 (July 25, 2018).

[94] *See, e.g.*, Theodore Konstadinides, *The Europeanisation of Extradition: How Many Light Years Away to Mutual Confidence*, *in* CRIME WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE 192, 216–21 (Christina Eckes & Theodore Konstadinides eds., 2011).

Although procedural safeguards for persons arrested under an EAW have been reinforced by several European directives,[95] skepticism towards the European extradition scheme persists in some national rulings. The case of Carles Puigdemont, the former President of the Catalan Regional Government, who fled Spain after organizing an illegal referendum on Catalonia's independence, illustrates how lingering mistrust can impede judicial cooperation in Europe, particularly in politically charged cases.[96] Despite two EAWs issued against Puidgemont by Spanish judges for charges including rebellion, sedition, and misuse of public funds, judicial authorities in Belgium and Germany refused compliance based on both formal and substantive grounds, ultimately leading to the withdrawal of the warrants. This case shows that despite the abolition of the political offense exception in the EAW Framework Decision, the extradition of political offenders in Europe remains politically sensitive.

Despite occasional setbacks, the EAW is hailed as a success by the European Union. Official reports acknowledge persistent issues in the national transposition of the Framework Decision and in executing the EAW.[97] Nevertheless, the European Union praises the operational success of this new "efficient mechanism [designed] to ensure that open borders are not exploited by those seeking to evade justice."[98] From nearly 7,000 in 2005 to more than 20,000 in 2019, the number of warrants has steadily increased. Moreover, in 2020, 70% of arrests following initiated

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[95] Since the coming into force of the European Arrest Warrant Framework Decision, six EU directives protecting the rights of transferred persons have been adopted: Directive 2010/64/EU of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings 2010 O.J. (L 280) 1; Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings, 2012 O.J. (L 142) 1; Directive 2013/48/EU of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed Upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities While Deprived of Liberty, 2013 O.J. (L 294) 1; Directive 2016/343 of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings, 2016 O.J. (L 65) 1; Directive 2016/800 of 11 May 2016 on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings, 2016 O.J. (L 132) 1; Directive 2016/1919 of 26 October 2016 on Legal Aid for Suspects and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings, 2016 O.J. (L 297) 1.

[96] The case has received critical attention, either lamenting the limited progress of mutual trust between European criminal justice systems, or calling for a restriction of cooperation in political cases. *See, e.g.*, Luis Arroyo Zapatero, *Rebellion and Treason: The Family Demons of Europe and the European Arrest Warrant*, 8 EUR. CRIM. L. REV. 137 (2018); Sibel Top, *Prosecuting Political Dissent: Discussing the Relevance of the Political Offence Exception in EU Extradition Law in Light of the Catalan Independence Crisis*, 12 NEW J. EUR. CRIM. L. 107 (2021); Julia König, Paulina Meichelbeck & Miriam Puchta, *The Curious Case of Carles Puigdemont: The European Arrest Warrant as an Inadequate Means with Regard to Political Offenses*, 22 GER. L.J. 256 (2021).

[97] *See, e.g.*, *Report from the Commission to the European Parliament and the Council on the Implementation Since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, COM (2011) 175 final (Apr. 11, 2011); *Report from the Commission to the European Parliament and the Council on the Implementation Since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, COM (2020) 270 final (July 2, 2020).

[98] *Report from the Commission to the European Parliament and the Council on the Implementation Since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, *supra* note 97, at 3.

surrender proceedings resulted in effective extradition,[99] demonstrating the EAW's role as a leader in the broader trend towards simplifying extradition processes, as evidenced by comparative analysis.[100]

II. INTERPRETING THE CULTURAL CONTINGENCIES OF EXTRADITION (*TERTIA COMPARATIONIS*)

Despite their shared function of transferring suspects or convicts across state borders, international extradition, European surrender, and American interstate rendition exhibit significant divergences. A contextual comparison of these variations reveals that these three extradition mechanisms span a continuum that exhibits structural, procedural, and cultural tensions. Notably, the European arrest warrant serves as an intermediate technique compared to the other two. The differences in the way surrender schemes are designed, implemented, and justified are clearly evidenced in their legal sources, the processes they establish, and the cultural contexts they expose.

A. Sources

The transfer of suspects or convicts across borders, which is the core function of the three surrender techniques, necessitates an interaction between diverse laws and a close intertwining of norms from multiple sources, as it involve three distinct legal frameworks: the jurisdiction of the requiring state, the jurisdiction of the requested state, and the law coordinating these jurisdictions.[101] For example, international extradition usually involves the application of international treaties along with the domestic legislation of two sovereign states. In the United States, the duty of interstate rendition is enshrined in a constitutional clause, supplemented by federal legislation and implemented through states' legislation. Meanwhile, the EAW system is based on a European Union Framework Decision and the domestic statutes of each member state. A common feature of these techniques is that they all rely on a variety of rules originating from different sovereign states.

In international law, extradition schemes typically stem from a formal agreement, either multilateral or bilateral, which alone can impose a binding obligation to extradite.[102] The implementation process varies across jurisdictions depending on how treaties are incorporated—automatically or on an ad hoc basis—and whether the treaty is deemed self-executing. Irrespective of these details and the standing of international rules within the jurisdictions involved in the extradition process, domestic norms cannot be invoked in international law as a defense for non-

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[99] Commission Staff Working Document: Statistics on the Practical Operation of the European Arrest Warrant—2020, SWD (2022) 417 final (Dec. 8, 2022).

[100] Neil Boister, *Global Simplification of Extradition: Interviews with Selected Extradition Experts in New Zealand, Canada, the US and EU*, 29 CRIM. L.F. 327 (2018).

[101] SADOFF, *supra* note 3, at 135–36.

[102] As mentioned earlier, extradition can occur under an ad hoc arrangement in the absence of a permanent extradition relationship between two states. In such instances, absent a clear expression of consent to be bound, no international obligation to extradite exists for the requested state, even if domestic legislation grants state officials the authority to extradite. *See* sources cited *supra* note 22.

compliance with a valid treaty.[103] Similarly, EU law obligates member states to "take the necessary measures to comply with the provisions of [the] Framework Decision,"[104] which establishes a unified surrender procedure. Likewise, deficiencies in state law cannot justify non-compliance with the Rendition Clause of the U.S. Constitution since the Federal Rendition Act constitutes part of the supreme law of the land.

While the overarching authority, whether international, federal, or European, mandates states to fulfill extradition duties in a similar way, there are significant differences between each scheme. The goal of judicial cooperation promoted by top-down legal instruments often encounters resistance during implementation.[105] This tension is resolved differently depending on the degree of control states maintain over their domestic laws[106] and the types of compliance mechanisms in place to enforce the surrender scheme. Thus, international extradition, European surrender, and American interstate rendition differ greatly in the constraints they impose on domestic jurisdictions to implement the transfer of fugitives.

In international extradition, these constraints are minimal since it is domestic constitutional law, not international law, that prevails.[107] Only domestic law can provide the legal basis for fulfilling international extradition obligations. The refusal of a sovereign state to comply with an extradition treaty, whether by not enacting appropriate domestic legislation or by refusing extradition without legal grounds for denial, rarely triggers international enforcement actions.[108] In contrast, the U.S. Federal Rendition Act provides a sufficient legal basis for interstate rendition in the absence of implementing state legislation. Since the 1987 *Puerto Rico v. Branstad* ruling, federal courts have had the authority to compel state governors to perform their extradition duties.[109] The European scheme occupies a middle ground: while the Framework Decision on the EAW has no direct effect and cannot serve as a legal basis for surrender, it requires member states to take necessary measures for compliance. National authorities must interpret national law in accordance with this instrument,[110] and the European Commission monitors the implementation

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[103] CASSESE, *supra* note 37, at 166–68.

[104] Council Framework Decision 2002/584/JHA, *supra* note 76, art. 34.

[105] CRYER ET AL., *supra* note 37, at 87–88.

[106] *See generally* Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 213, 218–30 (Kalypso Nicolaidis & Robert Howse eds., 2001).

[107] PUENTE EGIDO, *supra* note 19, at 131–32.

[108] However, it should be considered that a state's refusal to extradite, whether or not there is a formal obligation, could still trigger its international responsibility and lead to reciprocal countermeasures or even to economic sanctions. A notable example is the Lockerbie case: *see* Michael Plachta, *The Lockerbie Case: The Role of the Security Council in Enforcing the Principle* Aut Dedere Aut Judicare, 12 EUR. J. INT'L L. 125 (2001). However, under normal circumstances, most cases where extradition is denied end in a stalemate. *Id.* at 128.

[109] *See* NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, *supra* note 54.

[110] Case C-105/03, Criminal Proceedings Against Maria Pupino, 2005 E.C.R I-5285.

of EU legislation closely.[111] Member states failing to meet their obligations in criminal cooperation can now face enhanced infringement proceedings.[112] However, no such proceedings have yet been initiated for incorrect transposition of the EAW Framework Decision, and EU institutions lack the means to coerce a member state to execute a valid EAW.

In light of these varied arrangements, it comes as no surprise that international extradition, interstate rendition, and European surrender exhibit different degrees of legal homogeneity. These three schemes range from strong procedural heterogeneity to quasi-uniformity. In international law, extradition treaties focus mainly on enforcing the transfer obligation and typically omit details on the domestic processes of arrest and removal, allowing significant diversity in how duties to extradite are implemented internally.[113] Similarly, U.S. federal legislation on interstate rendition provides very little guidance on the surrender process, leaving states to apply and augment the constitutional clause and the Federal Rendition Act. Unlike international extradition, however, the process of interstate rendition has become uniform across nearly all the United States. The discretion granted by the federal government to states to regulate various aspects of extradition—such as requisition application; arrest and detention; preliminary trial; application for the writ of habeas corpus—has prompted the Commissioners on Uniform State Laws to draft a model act covering the surrender procedure in detail. Unlike many uniform laws,[114] the Uniform Criminal Extradition Act has been adopted by almost all states, providing a nearly unified legal framework throughout the United States, even though there was no federal obligation for such legal uniformity.

This contrasts sharply with the European scenario, which again occupies a middle ground between the international and the American contexts. The Framework Decision on the EAW mandates substantial harmonization by requiring a standardized form and specifying general principles, such as the scope of the EAW, grounds for non-execution, procedures in abstentia, and content and form of the EAW. It also details technical aspects, including methods for transmitting an EAW, as well as time limits and procedures for deciding to execute it. Despite these requirements, the implementation of the EAW scheme has been quite fragmented. The incomplete transposition of the Framework Decision across various member states has led to considerable

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[111] Several evaluations of the EAW were launched by the European Commission to monitor the proper implementation of the scheme by EU member states. *See, e.g.*, *Report from the Commission to the European Parliament and the Council on the Implementation Since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States* , *supra* note 97. More generally on compliance with EU law, see Edoardo Chiti, *The Governance of Compliance*, *in* COMPLIANCE AND THE ENFORCEMENT OF EU LAW 31 (Marise Cremona ed., 2012).

[112] Vassilis Hatzopoulos, *Casual but Smart: The Court's New Clothes in the Area of Freedom, Security and Justice After the Lisbon Treaty*, *in* THE INSTITUTIONAL DIMENSION OF THE EUROPEAN UNION'S AREA OF FREEDOM, SECURITY AND JUSTICE 145, 158 (Jörg Monar ed., 2010).

[113] *See Final Report: The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), supra* note 31, at 6–7.

[114] *See* Kim Quaile Hill & Patricia A. Hurley, *Uniform State Law Adoptions in the American States: An Explanatory Analysis*, 18 PUBLIUS 117 (1988); *see also* J. ZIMMERMAN, *supra* note 61, at 183–87.

variation in how it is implemented nationally, leading to discrepancies in the surrender process from one country to another.[115]

B. Procedures

International extradition, European surrender, and American interstate rendition rely on a series of procedural steps that adhere to a common functional logic. Checklists, standard forms, and flowcharts provided in manuals and commentaries on these diverse legal techniques show obvious resemblances, highlighting their similarities. The transfer of a person from one jurisdiction to another always involves several steps, including the requesting state issuing a written demand accompanied by predefined supporting documents and requisite information to the requested state. The requested state must then decide on the request, communicate this decision, and, if positive, proceed to surrender the person. Although these steps are common to all extraditions, they vary as different surrender schemes do not offer the same degree of cohesion and display great diversity in implementation details.

The scope of extraditable offenses also varies. In international law, extraditable offenses depend on the provisions of the governing treaties. These offenses are sometimes specified by name ("enumerative method"),[116] particularly in sectoral conventions targeting specific harmful conducts such as drug trafficking or terrorism. More commonly, current extradition treaties define extraditable offenses by reference to variable standards of severity. For instance, the London Scheme for Extradition Within the Commonwealth stipulates that "an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty."[117] In addition, offenses are deemed extraditable only if they meet the double criminality requirement and constitute a crime according to the laws of both the requesting and the requested states. No such rules apply in American interstate rendition, where renditable offenses include "every offence, from the highest to the lowest in the grade of offences," encompassing both misdemeanors as well as treason and felony,[118] and without requiring the offense to be a crime in the asylum state.[119] The EAW Framework Decision provides a middle ground by removing the double criminality requirement for a broad range of crime categories while setting a minimum penalty requirement in the requesting state.[120]

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[115] *See* Colson, *supra* note 90.

[116] SHEARER, *supra* note 4, at 133.

[117] London Scheme for Extradition Within the Commonwealth, art. 2 (Nov. 2002), www.oas.org/juridico/english/mesicic3_jam_london.pdf (as amended). *Compare* Inter-American Convention on Extradition, art. 3, Feb. 25 1981, 1752 U.N.T.S. 190, *with* European Convention on Extradition, art. 2, Dec. 13, 1957, 359 U.N.T.S. 273 (requiring a detention period of at least one year for an offense to be extraditable).

[118] Kentucky v. Dennison, 65 U.S. 66 (1861).

[119] Johnston v. Riley, 13 Ga. 97 (1853), *quoted in* Frank Kopelman, *Extradition and Rendition: History, Law, Recommendations*, 14 B.U. L. REV. 633 (1934).

[120] Council Framework Decision 2002/584/JHA, *supra* note 76, art. 2(2).

As the array of extraditable offenses varies, so too do the obstacles to the transfer of the fugitives. From this perspective, one could contrast the lengthy and partly discretionary procedure of international extradition with the summary proceedings of U.S. interstate rendition, and the EAW halfway between. Compared to international extradition, the European instrument reduces several traditional transfer requirements and eliminates barriers to surrender mentioned in the United Nations Model Treaty on Extradition,[121] commonly included in contemporary treaties. Thus, the Framework Decision abolishes the nationality exception, which allows states to refuse to extradite their own citizens provided they submit the case to a national competent authority. The European legislator also eliminated the political offense exception, which precluded extradition for politically motivated crimes, and the persecution clause, which bars surrender of persons threatened by the requesting state for reasons of religion, nationality, ethnic origin, political opinion, sex, or status. In this respect, the EAW diverges from traditional international extradition and is, in theory, closer to the U.S. model.

However, the EAW still falls short of the near automaticity of American interstate rendition. The European surrender scheme retains the specialty rule, according to which "a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence . . . other than that for which he or she was surrendered" (article 27.2). In contrast, U.S. rendition does not provide a right to exemption from additional prosecution by the demanding state.[122] Moreover, the Framework Decision sets out several grounds for non-execution of the EAW—some mandatory, some optional—including reasons such as amnesty in the executing state, the *ne bis in idem* principle, age of criminal responsibility, and *locus delicti* exceptions, none of which are admissible in the United States. The CJEU has also recognized a "European public order" proviso, which permits the non-execution of an EAW to uphold the legal force of fundamental rights.[123] Additionally, many European states have implemented further restrictions related to national security, political offenses, or human rights that exceed the terms of the Framework Decision.[124] These additional safeguards, though contrary to EU law, provide numerous practical opportunities to block extradition. Consequently, the European surrender scheme is significantly less stringent than its American counterpart, where a politically motivated request provides no exemption from rendition, even if rendition poses a risk of torture or abuse.[125]

The respective roles of the executive and judiciary in the surrender process further set the EAW apart from international extradition and align it more closely with interstate rendition. A major innovation of the European scheme is the complete judicialization of the surrender process,

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[121] G.A. Res. 45/116, *supra* note 24, arts. 3–4.

[122] Lascelles v. Georgia, 148 U.S. 537 (1893).

[123] *See further* Satzger, *supra* note 91.

[124] Colson, *supra* note 90.

[125] JulieAnn Karkosak, *Fleeing Injustice: Examining the Interstate Extradition Clause as Applied to Political Refugee*, 68 U. CIN. L. REV 123, 148 (1999).

from the issuance to the execution of the warrant.[126] Under this framework, the role of executive authorities is limited to providing "practical and administrative assistance,"[127] with the procedure entirely managed by the judiciaries of the member states, which are the sole bodies competent to issue and execute an EAW. This stands in stark contrast to international treaties, where extradition conventions often do not specify how national institutions should handle requests, leaving it to municipal law which frequently grants the executive the power to refuse surrender even if national courts find extradition admissible.[128] The significant political influence in the extradition process, permitted by this balance of power, is minimized in the European scheme, as it is in U.S. rendition, where governors of asylum states have no discretionary power to refuse rendition. However, unlike in the United States, the European reform has not entirely rooted out the political dimension of surrender. Although the judicialization of the extradition process precludes any interference from the executive branch, it cannot prevent the politicization of rulings under the guise of legal technicalities in contentious cases such as that of Puigdemont. Compared to the fully depoliticized rendition in the United States, the subtle persistence of politics within the EAW system reveals the deep connection between the technical aspects of extradition mechanisms and their cultural context.

C. Cultures

It is a common observation that broad national cultural conceptions fundamentally influence legal systems.[129] Acknowledging the tight link between culture and rule does not detract from the high degree of autonomy of juridical techniques. Culture, with its open texture covering an indeterminate range of phenomena, including traditions, intellectual formations, and "structures of feeling,"[130] complicates the ascription of precise institutional effects to each of its elements. However, the impact of cultural imagination on specific legal techniques is undeniable. Just as criminal proceedings or sentencing practices are often analyzed within their cultural contexts,[131] so too are extradition schemes reflections of the core ideological beliefs of the legal systems to which they belong. These beliefs evolve over time, shaping the development of extradition techniques.

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[126] Otto Lagodny, *"Extradition" Without a Granting Procedure: The Concept of "Surrender," in* HANDBOOK ON THE EUROPEAN ARREST WARRANT, *supra* note 75, at 39.

[127] Council Framework Decision 2002/584/JHA, *supra* note 76, pmbl., recital 9 & art. 7.

[128] SHEARER, *supra* note 4, at 197–200.

[129] *See* MIRJAN R. DAMASKA, FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

[130] This definition of culture as "structures of feeling" was first developed by the Welsh social theorist Raymond Williams, and extended and elaborated throughout his work: RAYMOND WILLIAMS, MARXISM AND LITERATURE esp. ch. 9 (1977).

[131] *See* David Nelken, *Making Sense of Punitiveness*, *in* COMPARATIVE CRIMINAL JUSTICE AND GLOBALIZATION, *supra* note 14, at 11; Chrisje Brants, *Comparing Criminal Process as Part of Legal Culture*, *in* COMPARATIVE CRIMINAL JUSTICE AND GLOBALIZATION, *supra* note 14, at 49. For a concrete example, see Massimo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

Invoking cultural factors to explain the evolution of and variations in international extradition, American state rendition and European surrender raise the thorny issue of comparability between legal cultures. These cultures develop in distinct settings and exhibit varying levels of complexity.[132] While American legal culture, within a sovereign state framework, shows a wide array of distinguishable features,[133] international and EU legal cultures appear much less defined, sometimes leading to questions about the existence of a specific culture shaping these legal orders beyond national boundaries. Nevertheless, the technical aspects of the three extradition schemes under review undeniably reflect ideological values and enduring mentalities, which manifest differently in the realm of international relations, in the American polity, and in the European Union.

The cultural context of international law may be less homogeneous and more difficult to define than domestic law,[134] but this variability is a notable characteristic reflected in extradition treaties. The decentralized and fragmented nature of international law explains the patchwork of existing treaties and the diversity of these instruments. The lack of a central authority, the horizontal structure of the international community,[135] the interplay of diplomatic logic and legal technique,[136] and the often high level of distrust characterizing relationships between sovereign states are important features that shape the culture of international law. These elements contribute to the frequent reluctance of states to enter into extradition treaties,[137] the persistent role of executive powers in the extradition process, and the numerous obstacles to the extradition of fugitives between countries. Finally, the fast-changing, mutable nature of international legal culture, which acquired a stronger cosmopolitical dimension over the last decades, drawing on a

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[132] On the very notion of legal culture, see David Nelken, *Legal Culture*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 12, at 480. *See also* Sally Engle Merry, *What Is Legal Culture? An Anthropological Perspective*, *in* USING LEGAL CULTURE 52 (David Nelken ed., 2012).

[133] *Compare* J. Willard Hurst, *The Law in United States History*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER, *supra* note 52, at 3, *with* Lawrence M. Friedman, *Notes Towards a History of American Justice*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER, *supra* note 52, at 13. *See also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

[134] Knut Einar Skodvin, *Defying the Odds: Legal Culture and International Law*, in RENDEZVOUS OF EUROPEAN LEGAL CULTURES 111 (Jørn Øyrehagen Sunde & Knut Einar Skodvin eds., 2010). *See also* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, esp. 563–67, 575–80 (discussing the claim that international law is a culture); Anthea Roberts, Paul B. Stephan, Pierre-Hughes Verdier & Mila Versteeg, *Conceptualizing Comparative International Law*, in COMPARATIVE INTERNATIONAL LAW 3 (Anthea Roberts, Paul B. Stephan, Pierre-Hughes Verdier & Mila Versteeg eds., 2018) (describing comparative international law as a way forward to better apprehend the heterogeneity of international law and its culture).

[135] CASSESE, *supra* note 37, at 5. More generally on the "anarchical" structure of the international system, see HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (2002).

[136] Gerry Simpson, *International Law in Diplomatic History*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 25 (James Crawford & Martti Koskenniemi eds., 2012).

[137] See, e.g., the stalemate regarding the signature of the extradition treaty between Australia and China: Damien Cave, *Australian Vote on Extradition Treaty with China Is Canceled*, N.Y. TIMES (Mar. 28, 2017), www.nytimes.com/2017/03/28/world/australia/malcolm-turnbull-china-extradition-treaty.html. *See generally* Noah E. Lipkowitz, *Why Countries Diverge over Extradition Treaties with China: The Executive Power to Extradite in Common and Civil Law Countries*, 59 VA. J. INT'L L. 440 (2019).

negotiable methodology,[138] is also reflected in the renewal of extradition techniques, from the design of a model treaty on extradition to the proliferation of multilateral extradition treaties and the issuance of best practice recommendations.[139]

The impact of cultural context on extradition techniques is especially evident in the case of interstate rendition in the United States, where the combination of constitutional provisions, federal statutes, and state laws epitomize the U.S. federal model. The U.S. rendition technique reflects core principles of the American law— illustrating a "harmony-without-unity" model where a loose national legal framework allows states to adapt and coordinate their domestic legislations. This coordination often leads to convergence through imitation or uniform model laws.[140] In a country where the locus of sovereignty remains a constitutional question,[141] the technique of rendition has evolved through changes in federal law and interstate cooperation. The Supreme Court has interpreted the Rendition Clause as a testament to states' mutual respect and their commitment to the Union,[142] alongside a baseline harmonization of criminal procedures under the U.S. Constitution, which protects the rights of the accused across all states. The twists and turns of American legal history appear to explain much of the development of interstate rendition, particularly its near automaticity and almost wholly non-discretionary nature.

Although much newer, the EAW is deeply rooted in the ideological context of the European Union, just as American interstate rendition is a product of American culture. The EAW encapsulates the evolving objectives of the European Union in crime control, embodying an integrationist agenda based on explicit values and implicit beliefs.[143] Initially framed as a response to a perceived security deficit arising from the abolition of internal borders,[144] the development gained momentum with the advent of "citizenship of the Union," positioning the European Union as a guarantor of security and freedom for member state nationals.[145] Whatever the reality of the security deficit and the degree of mutual trust between member states, one cannot but observe that these ideas underpin a vision of the European Union and provide the building blocks of a political myth about the European Union's past and future.[146] This myth is given material expression in the

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[138] *See generally* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW (Antonio Cassese ed., 2012).

[139] *See, e.g.*, UNODC, *supra* note 28; UNODC, *supra* note 29.

[140] James R. Maxeiner, *United States Federalism: Harmony Without Unity*, *in* FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS 491 (Daniel Halberstam & Mathias Reimann eds., 2014).

[141] Jeff Goldsworthy, *The Debate About Sovereignty in the United States: A Historical and Comparative Perspective*, *in* SOVEREIGNTY IN TRANSITION 423 (Neil Walker ed., 2003).

[142] Michigan v. Doran, 439 U.S. 282 (1978).

[143] For a genealogy of the ideological dimension of this project, see FRANCESCA FERRARO, LIBERTÀ E SICUREZZA NELL'UNIONE EUROPEA (2012).

[144] On the spill-over theory, see FLETCHER, LÖÖF & BIL GILMORE, *supra* note 71, at 22–31.

[145] Stephen Coutts, *Citizenship of the European Union*, *in* EU SECURITY AND JUSTICE: LAW AFTER LISBON AND STOCKHOLM 92 (Diego Acosta Arcarazo & Cian C. Murphy eds., 2014).

[146] On the mythical dimension of the European integration project, see Vincent Della Sala, *Myth and the Postnational Polity*, *in* NATIONAL MYTHS: CONSTRUCTED PASTS, CONTESTED PRESENTS 157 (Gérard Bouchard ed., 2013).

EAW, marking a critical, incremental step in the Union's rationale that extends market-based mechanisms of integration (e.g., mutual recognition and free movement provision) to national judicial decisions. Conversely, Brexit has redefined how extradition functions between the United Kingdom and the EU member states, with a new Trade and Cooperation Agreement[147] opening the door to increased scrutiny of extradition requests.[148]

CONCLUSION

A comparison of extradition schemes in context does more than inventory the similarities and differences between three operational legal regimes. It offers an illustration of how a comparative case study can reconcile seemingly opposed comparative law premises, such as the functional "*praesumptio similitidunis*" and the primacy of culture. While the first approach stresses that legal systems "answer the needs of legal business in the same or in a very similar ways,"[149] the second highlights the uniqueness of legal practices, arguing that cultural differences override technical similarities.[150] Often viewed as irreconcilable, these approaches to comparison are not so much antithetical as they are complementary in understanding the diversity of laws and their development.

The comparison of the three surrender schemes confirms the basic tenets of functionalism,[151] namely that social needs shape legal techniques, but it also underscores how the cultural context impacts the very definition of these social needs. In this respect, cultural diversity provides a functional explanation for the differences between extradition regimes, as each is shaped by its environment. The role of extradition—the transfer of fugitives across borders—varies depending on whether the states involved are bound by close legal ties and strong mutual trust, based on political alliances and a common cultural background, or have little previous contact and share little in terms of penal ideology. Crime control cooperation is simpler in the first scenario and more complicated in the second. Accordingly, extradition schemes may offer lesser or greater fluidity in transfer by setting up or removing legal hurdles at each stage of the process, depending on the broader context in which they operate. This is confirmed by close comparative analysis. While the American scheme facilitates near-automatic rendition between states united by a federal compact, international extradition takes place between often-distrustful sovereign entities and remains challenging. The European scheme, which streamlines surrender and limits states'

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[147] Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, 2020 O.J. (L 149) 10.

[148] Edward Grange, Ben Keith & Sophia Kerridge, *Extradition Under the EU–UK Trade and Cooperation Agreement*, 12 NEW J. EUR. CRIM. L. 213 (2021).

[149] Konrad Zweigert & Hein Kötz, AN INTRODUCTION TO COMPARATIVE LAW 40 (Tony Weir trans., 3d. ed. 1998).

[150] *See, e.g.*, Pierre Legrand, *The Same and the Different*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240 (Pierre Legrand & Roderick Munday eds., 2003).

[151] Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 16, at 345. *See also* Michele Graziadei, *The Functionalist Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, *supra* note 16, at 100.

discretion while maintaining procedural safeguards, occupies a middle ground between these two models. In this respect, the EAW exemplifies the unique nature of European integration, a sui generis experiment which sits somewhat awkwardly between international cooperation and constitutional federalism.[152]

The comparison of extradition schemes highlights how legal techniques are shaped by legal culture and adapt to their environment but also hints at a reciprocal process: how the adoption of a legal instrument can significantly influence, and even develop, its broader environment, contributing to the creation of a legal culture. While this may not be apparent in U.S. rendition, which is just one of many tools of interstate cooperation, it may be argued that American uniform law and Supreme Court rulings on interstate rendition have helped shape American federalism. This is also evident in international extradition, where the proliferation of multilateral instruments in recent decades has densified international criminal law and eroded traditional aspects of international politics in crime control, fostering more robust cross-border policing relationships.[153] The impact of the development of a specific surrender regime on legal ideology is even more pronounced in Europe, where the EAW is the flagship of EU criminal policy. This new surrender scheme was justified by new EU powers but also contributed to the development of its constitutional identity as an entity promoting security and justice across the continent.[154] In this context, the EAW exemplifies how the adaptation of an existing legal technique in a new setting can foster its unique development[155]: not only does the European surrender scheme enhance EU criminal law, but it also supplies symbolic materials and operative norms to strengthen a nascent EU legal culture.[156]

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[152] Bruno De Witte, *The European Union as an International Legal Experiment*, *in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM 19 (Gráinne de Búrca & Joseph H.H. Weiler eds., 2012).

[153] *See further* ANDREA & NADELMANN, *supra* note 6, at 245*ff*. *See also* Boister, *supra* note 100.

[154] *See further* ALUN H. GIBBS, CONSTITUTIONAL LIFE AND EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE (2011).

[155] *See* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) (offering a sophisticated account of the way legal transplant contribute to the development of the law).

[156] On the influence of EU criminal law on this nascent legal culture, see Jenia Iontcheva Turner, *The Expressive Dimension of EU Criminal Law*, 60 AM. J. COMP. L. 555 (2012); Renaud Colson & Thomas Elholm, *The Symbolic Purpose of Criminal Law*, *in* EU CRIMINAL LAW AND THE CHALLENGES OF LEGAL DIVERSITY: LEGAL CULTURES IN THE AREA OF FREEDOM, SECURITY AND JUSTICE, *supra* note 90, at 48.