Extradition law

Summary

1. *The Purpose of the Study*

The initial drive of the study was to assess whether extradition should be rendered swifter by reducing its traditional grounds for refusal. The reason to consider enhancing extradition in the present historical moment is intuitive. To quote from a prominent textbook (John B. Moore): "In modern times the importance of the subject has vastly increased. The improved facilities of communication which modern invention has afforded (…) have rendered it essential to the order of society that flight should not secure immunity from punishment." The statement is dated from 1891…

Since then, mobility of people has not only continued to increase, but also reached exponential levels. It has also become easier to commit from a distance crimes that produce their effects predominantly in other territories, which led States to expand their extraterritorial jurisdiction. Some offences, notably those that are generally encompassed by protective jurisdiction, even tend to damage exclusively States and communities other than those within which they were committed, meaning that they are usually not punishable in the latter, and, consequently, that the only possibility to avoid impunity may be for the former to obtain the extradition of the offender. Nevertheless, several obstacles to effective cooperation endure. Some of them have their origins in the distant and very diverse world of the 18th century, and others can be traced to even more ancient times. Whether all such grounds for refusal are still necessary is the key issue addressed here.

2. *Fundamental Concepts*

The study commences by laying down its conceptual foundations and establishing its key working definitions. This is performed in **Chapter 1**, where extradition law is *defined and characterised*, as well as *contrasted with substantive criminal law and with criminal procedure*, on the one hand, and *with other forms of international cooperation in criminal matters*, on the other hand. This chapter also ascertains why and to what extent States *need to obtain extradition* and *to extradite*, and concludes that the fundamental force compelling extradition relations between States is their interest in enforcing their *own* penal laws: this interest manifests itself in a direct manner when a State requests extradition to another State (as it thereby expresses its desire to obtain custody of a person), and in a merely reflexive manner when a State grants extradition to another State (as it thereby secures the reciprocity of the latter State in symmetrical cases that may come to occur in the future), but it manifests itself in both instances.

This chapter then elaborates on the concept of *grounds for refusal* or *obstacles* to extradition. Based on the conclusion that States have a self-interest in extraditing, it is submitted that the norms which establish grounds for refusal of extradition can only be conceived of as *embodiments of other interests that conflict with, and supersede (or at least are thought to supersede) States' interest in ensuring the efficacy of their own penal systems*.

In turn, this definition provides the basis for *delineating the scope of the study*. For instance, it entails that limited attention should be paid to the grounds for refusal (such as that according to which extradition is to be rejected if the offence was committed, at least in part, in the territory of the requested State) which concern mainly interstate allocation of jurisdiction: in these cases, the crime caused an injury not only to the requesting State, but to the requested State itself, which, therefore, is also the holder of a direct punitive interest thereupon. This means that both States involved in the extradition proceedings have primary jurisdiction, and *impunity is not a possibility*. The main issue here is to determine which of those two States shall carry out the prosecution or the enforcement. Conversely, enhanced focus is placed on the grounds for refusal (such as the dual criminality rule and the time-bars exception) which *necessarily entail impunity*, in the sense that they preclude even the eventuality of the requested State carrying out a vicarious criminal procedure – that is, a criminal procedure on the behalf of the requesting State – after refusing extradition.

This chapter is also the place where the study initiates a *dialogue between classic extradition and surrender*, its more recent counterpart of which the European Arrest Warrant (EAW) is the most noteworthy concretisation. In this regard, it is underscored that the *main focus of the study is extradition proper – i.e.* the transfer of persons, for penal purposes, between States which are not necessarily linked by ties of political, legal, cultural or historical affinity. Nevertheless, to that end, the study does dedicate significant attention to mechanisms that fall within the concept of mutual recognition – especially to the EAW, but occasionally also to the Nordic Arrest Warrant and the Mercosur Arrest Warrant –, using them as a reference for a possible reform of classic extradition.

Very importantly, in Chapter 1 a distinction is drawn which impacts profoundly on the structure of the study (although, admittedly, it is a more notional than precise distinction): a *distinction between 'voluntary' and 'mandatory' grounds for refusal*. The former is comprised of grounds for refusal that are considered necessary by specific States to protect specific interests; the latter, of grounds for refusal that protect values which the international community as a whole considers worthy of being protected. Mandatory grounds for refusal stem largely from *human rights*, and they produce not only (direct) obstructive effects, in that they block extradition even if the specific State to which extradition is requested would not find it necessary to refuse it, but also (indirect) permissive effects, in that they suggest that the grounds for refusal that were set in place in order mainly to protect specific State interests are open to be reformed. Mandatory grounds for refusal thus play both an exclusionary and a habilitating role in the study: they constitute an unyielding set of principles and guarantees below which extradition law cannot under any circumstances fall, and above which it can be called into question.

3. *Research Design*

With the fundamental concepts of the study laid down, **Chapter 2** formulates its research question in the following terms: *which grounds for refusal of extradition voluntarily enacted by States are necessary to preserve the interests which are at stake in extradition law?* It then provides and articulates the sub-questions into which that core question unfolds, together with an explanation of the research methods deployed with a view to answering them.

3.1. *Mandatory Grounds for Refusal – Deductive Analysis*

Since the purpose of addressing mandatory grounds for refusal is not to challenge their existence, but to determine their scope (with a view precisely to exempting them from such a challenge), the method used here is a top-down analysis which consists of deducing from specified sources of law what that scope is.

3.1.1. *Human Rights*

As stated, mandatory grounds for refusal derive largely from human rights. This body of law is analysed in **Chapter 3**. The main unit of analysis here is the ECHR. The option for a regional instrument in a study that strives for wider validity is explained by the fact that the ECHR is, by far, the human rights instrument that has given rise to more generous case law imposing constraints on extradition: if the purpose of this chapter is to identify paramount values that must stay untouched, then what is important is not so much that the object of analysis is representative, but rather that it is *extensive*, since this provides increased assurance that such paramount values are not put at risk in the theoretical exercise performed later in the study. For the same reason, the study moreover makes an intentionally expansive interpretation of that case law, such that several fundamental individual guarantees are brought into the category of human rights or 'para-human rights' grounds for refusal.

3.1.2. *European Union Law*

Another set of mandatory grounds for refusal analysed in the study – in **Chapter 4** – is that which EU law came recently to impose on Member States in their extradition relations with third States. Although these limitations on extradition apply only to the Member States of that specific organisation and are unique in their legal structure, they are illustrative of an approach which may be replicated (and which in fact can already, in a way, be found) among other constellations of States. The main normative references are the EU Treaties, where the primary law of the Union is contained, but attention is also paid to extradition agreements concluded by the EU pursuant to its competence for external action, particularly to that concluded with the USA in 2003. Heavy focus is placed on the case law initiated by the ECJ in 2016 with *Petruhhin*, which devised a 'EU citizenship exception to extradition' and paved the way for the emergence of a 'EU extradition law', as confirmed by the subsequent rulings in *Schotthöfer & Steiner*, *Pisciotti*, and *Raugevicius*.

3.2. *Voluntary Grounds for Refusal – Two-tiered Approach*

Voluntary grounds for refusal are the ones that are brought into question in this study. Early in the study it is posited that States have an interest in maintaining extradition relations so as to ensure the effectiveness of their own criminal laws, and that consequently the existence of grounds for refusal that prevent this interest from being more extensively achieved must be due to other, conflicting interests. With mandatory grounds for refusal already identified in Chapters 3 and 4, the research question then requires two further operations: first, that those conflicting interests are identified; second, that they are weighed against that overarching interest in maintaining extradition rela-

tions. The first operation is carried out in Part III (Chapters 5 and 6), again through deductive analysis; the second in Part IV (Chapters 7 and 8), in this instance through inductive analysis.

3.2.1. *Deductive Analysis*

A deductive analysis is carried out in **Chapter 5** and **Chapter 6** with a view to determining the voluntary grounds for refusal which are currently in place, their scope and their rationales. This analysis is similar to that effected with regard to mandatory grounds for refusal, with the particularity that the sample here is more difficult to select, because there are 'voluntary grounds for refusal' in each and every international (bilateral and multilateral) and national legal instrument on extradition. Evidently, it would be impossible to assess all those elements, or even a decent fraction of them. The adopted solution consists of the *composite sample* described subsequently.

a) *United Nations Model Instruments*

Providentially, extradition has been the object of model normative instruments elaborated by the UN with a view to providing States with a useful framework when concluding extradition treaties: the Model Treaty on Extradition (1990, updated in 1997) and the Model Law on Extradition (2006). Developed under the aegis of the UN, these instruments reflect the specificities of different legal traditions, and thus they possess virtually global reach. They condense the state of affairs in this legal area, such that their analysis ensures the *representativeness* of this part of the study.

However, they are not fully-fledged legal instruments: they are not in force as such, nor are they applied by any judicial instance. Therefore, they would be insufficient: they ensure representativeness, but lack tangibility.

b) *National Legislation – Portugal and United Kingdom*

Tangibility is ensured by the assessment of self-sufficient legal instruments that were enacted in view of the interests of specific States and that are applied in concrete cases. A key criterion for determining the sample was that, in combination, the instruments to be assessed would contain all the grounds for refusal found in the UN model instruments. The analysis focuses on national statutes rather than on international treaties, because the former are conceived for regulating extradition between a given State and an unspecified pool of requesting States, such that the grounds for refusal contained therein constitute a 'default parameter': they embody the interests that a given State deems necessary to protect in the abstract (*i.e.* without knowing beforehand the characteristics of the requesting State). The selected States are also parties to the EAW scheme (the main reference of the study with regard to enhanced models of cooperation), as well as to the ECHR (the main reference of the study with regard to human rights).

Based on yet other criteria, the sample that is ultimately reached consists of the legal systems of *Portugal* and of the *UK*. Combined, these two extradition systems not only match in full the catalogue of the UN model instruments, but also they stand in open divergence on all contentious issues (nationality exception, treaty requirement, evidentiary requirements, life imprisonment exception), conferring on this combination the advantage

of allowing for a contrast, already at this point of the study, between opposing views on traditional rules of extradition law. These legal systems moreover stand as representatives of two *different legal traditions*: common law and civil law.

3.2.2. *Inductive Analysis*

After establishing the interests protected by voluntary grounds for refusal, such grounds for refusal are subjected to an essentially inductive exercise through which the research question is finally answered. Put in inductive terms, this question may at this point be worded as follows: in a hypothetical scenario where no grounds for refusal of extradition existed other than those which are imposed by international law, which ones would be *necessary* in order for those interests to be attained?

Chapters 7 and 8 (outlined subsequently) seek to answer this question through an innovative approach to extradition law (described in more detail further below, § 4).

a) *Theoretical Framework*

In **Chapter 7**, the key normative concept of the research question – '*necessary*' – is defined. To that end, a *theoretical framework* is developed drawing on findings and insights arisen in the previous parts of the study. This exercise is not fully self-referential, but rather it also explores elements that only marginally or implicitly arose earlier. Since it sets the parameters within which the research question is ultimately answered, this exercise plays a pivotal role in this study.

b) *Application of the Theoretical Framework*

In **Chapter 8**, the theoretical framework is applied to all voluntary grounds for refusal, so that a clear-cut picture emerges reflecting what extradition law could become if the views defended in that framework were implemented. In the process of applying the framework to the object of analysis, a dialogue is established between the two. Such a process is mainly unidirectional, with the theoretical framework determining the 'new' scope to be assigned to the several voluntary grounds for refusal. However, new insights emerged during the application of the framework which enabled its improvement, such that the theoretical framework ultimately presented in Chapter 7 constitutes a fine-tuned version of an earlier one elaborated before the exercise carried out in Chapter 8.

c) *Sources of Inspiration*

Both the elaboration of the framework and its application to the grounds for refusal are influenced by another dialogue: the interchange established earlier in the study between *classic cooperation* and *mutual recognition* is intensified at this point. Some studies have taken cooperation between federated States as a reference for the possible furthering of cooperation between EU Member States. This study takes cooperation between EU Member States as a reference for cooperation between potentially any States.

Since classic extradition and the EAW share the same foundation, and since the theoretical framework developed in this study is inspired by elements other than legal instruments on mutual recognition, namely an analysis of the evolution of *private international law* (see again below, § 4), the dialogue between classic extradition and mutual

recognition is also not strictly unidirectional. Rather, the views developed in this study, albeit primarily concerned with classic extradition, might apply to the very instruments of mutual recognition it uses for inspiration, and in this sense this study also constitutes a reflection about the EAW system.

3.2.3. *The Character of this Study*

This study is normative. It employs deductive as well as inductive methods, and it is composite also in its goals. This leads to a final result which features elements of different archetypes of legal research, namely: (i) *doctrinal*, in that it attempts to offer a systematic account of the rules governing a given legal area and to expose their interactions (especially in Part II [Chapters 3 and 4], and Part III [Chapters 5 and 6], where, respectively, mandatory and voluntary grounds for refusal are analysed through deductive methods); (ii) *theoretical*, in that it seeks to obtain a more comprehensive understanding of the conceptual bases underpinning that legal area (especially in Part IV [Chapter 7], where the theoretical framework is developed); and (iii) *reform-oriented*, in that it evaluates the adequacy of existing rules, with a view ultimately to proposing solutions for their improvement (especially in Part IV [Chapter 8], where voluntary grounds for refusal are analysed through inductive methods).

4. *The Core Ideas of this Study*

This study tries to offer a new vision on extradition law, and, thereby, to some extent, on transnational criminal law more broadly. Its most innovative element is arguably the *parallel established between transnational criminal law and private international law*. While the latter area of the law is already often called into consideration in respect of certain aspects of the former, this consideration tends to be scant, superficial and unstructured: it is limited to the concept of *ordre public*, it does not seek to understand the role and the functioning of such a concept within its own natural environment, and it does not explore to their full extent the structural implications of this concept when applied in criminal law. Consequently, it fails to grasp the potential of such an application.

Another central idea of this study which arguably possesses some originality concerns the *duty of non-interference* that governs international law: in the field of extradition, this duty is generally honoured in its negative dimension only, as a prohibition to unilaterally seize individuals located in the territory of other States; this study propounds that such a duty should be acknowledged to also play a positive role, as a duty to grant extradition where this is necessary for another State to assert its sovereignty over acts that injured it. The subsequent paragraphs summarise the conclusions of the study, which are provided in more detail, as well as graphically illustrated, in its **Chapter 9**.

The key *factual conditions underpinning modern extradition law have changed drastically*: distances became easier to travel, human conduct wider in reach; taking refuge abroad less intimidating, and social distress at the escape of criminals often more intense. Today's world is a smaller one, where States and their communities are in many regards closer to each other. However, extradition law continues to conceive them as isolated entities, displaying many of the attributes it was conferred on upon its inception at the turn of the 19th century. Grounds for refusal – the central elements of extradition law – have

not been subjected to a corresponding reform, producing a *substantial lag between the reality and the law*. There currently exists a *mismatch between the scope and the rationale* of numerous grounds for refusal – *i.e.* between the range of situations which receive protection and those which in effect require protection –, the latter being significantly narrower.

Drawing on this diagnosis, this study posits a set of normative propositions intended to bridge the perceived gap. Since those factual developments befell at a pace which was not, and arguably cannot, be fully accompanied by national (social, cultural, political) structures, adjusting to such developments requires assigning *even greater preponderance to territorial jurisdiction* (and hence to the requesting State) than that which it already, justifiably, receives. Indeed, paradoxical as it may seem, at present globalisation calls for 'more' territoriality, because it is still States that bear the responsibility to tackle most criminality, even transnational one. Notwithstanding, this study is grounded on the premise that international cooperation cannot be sustainably enhanced in detriment of *national cultural identities*. Instead, it seeks to overcome the self-centeredness that characterises the paradigm of cooperation forged at the end of the 18th century without succumbing to the view that the globalisation processes that took place subsequently require States to relinquish their legal traditions altogether.

By relying on a markedly *formalistic* approach to international cooperation, grounds for refusal of extradition currently protect States' *essential* and *unessential* values alike. By equating them, extradition law weakens the former at the expense of the latter, making them converge onto an intermediate, homogeneous, degree of importance. This is clearly illustrated, for instance, by dual criminality and the time-bars exception, based on which requested States project their own substantive criminal laws, as a whole, upon requesting States, hindering cooperation even in cases where there are only tenuous disparities in perspective as to the criminal relevance of the acts. This does not mirror the sense of justice of the requested State, and is hardly understandable in the eyes of the requesting State. In order for extradition law to be brought into congruence with its spirit, this study proposes to extricate from the scope of grounds for refusal the hypotheses that affect merely secondary values of the requested State, narrowing the scope of such grounds for refusal down to the limits given by its essential values – its *ethos*. This approach is particularly visible in the suggested reform of the concept of extraditable acts, from a principle of dual criminality into a principle of *qualitative relevance* according to which States can extradite for acts that they do not criminalise, so long as criminalisation would be consistent with their essential criminal justice values.

Thus, rather than pinpointing that certain grounds for refusal should be removed and others maintained, this study conceives of a transversal *optimisation* of grounds for refusal. As noted above, the manner in which such an optimisation is envisaged is largely inspired in the functioning of *private international law*. Traditionally, the applicability of a private norm was determined by reference to its *content*. In the event of a conflict, the norm that would apply was the one carrying the effects that were deemed preferable according to given substantive criteria (*e.g.* the one that was more favourable to the person concerned). In the 19th century, Savigny reasoned that such an approach was both partial as well as unclear, and he developed an alternative theory which relied on a straightforward separation between the content of a norm and its *sphere of application*. Applicability would no longer be deduced from the content of the norm, but from the legal relation-

ship at issue, such that, in the event of a conflict, the norm that would apply would, in line of principle, be the one in force in the legal system to which the situation was more strongly linked. Private international law thus became *neutral*.

Aware of the pointed differences that exist between private law and criminal law, between private international law and transnational criminal law, this study posits that, at present, the question as to whether extradition should be granted – a question which, from such a neutral perspective, should in principle be answered in the affirmative (because, and insofar as, the legal system of the *requesting* State is the one to which the crime is more closely connected) – is dependent on norms (grounds for refusal) which are infused with substantive considerations springing from the legal system of the *requested* State (to whose legal system the acts are not in any way connected). That is, under current extradition law the requested State 'internalises' acts with which it has no connection. To assign unambiguous primacy to the requesting State is to confer extradition law the neutrality it is currently lacking.

Nevertheless, considering the repressive nature of extradition, the primacy that from that jurisdictional standpoint is owed to the requesting State does not translate into an absolute entitlement on its part to obtain extradition. By granting extradition, a State not only assists in the possible application of an extreme legal consequence to a person (a penalty), but also it immediately subjects this person to a repressive measure (a period of deprivation of liberty coupled with a coercive transfer to another jurisdiction). This inevitably confers some relevance on its own notions of justice. As already defended by many authors, such notions can be reflected about based on a concept which also has its roots in private international law: *ordre public*. This concept comes into play subsequently to the neutral determination of the applicable law: as stated, a foreign law should in principle apply if the respective legal system is the one that has the strongest link to the acts; however, such an application will be limited or excluded if, though *only if* it is likely to carry effects that would be *unbearable* to such legal system. *Ordre public* is, therefore, a 'shock-absorbing device' which allows to avoid the abnormal effects that could result from a purely neutral determination of the applicable law. By definition, it is also an *exclusive* concept, in that it encompasses but a select cluster of values and purports to avoid but a particular type of results: it does not block the application of foreign norms whenever these may carry results which are *different* from the ones that would result from an application of national norms, but only results which are *intolerable* to the social consciousness of the community at issue. As far as criminal justice is concerned, the select set of values which form the 'ethos' of a community is to be found in its *supra-ordinary law*, notably in its Constitution. Constitutional and para-constitutional law constitute the source of the criteria which enable the distinction between the essential and the unessential values of a State, and, consequently, the optimisation of grounds for refusal of extradition.

On the other hand, the fact that in the field of extradition the *duty of non-interference* operates exclusively in its classic negative dimension causes an imbalance between the requested and the requesting States whereby the former has preponderance over the latter. The subjects involved in extradition proceedings therefore form a *triangle* in which the requested State has higher standing than the requesting State. Their relation is not horizontal, but diagonal instead.

5. *The Model Defended in this Study*

The model defended with a view to rectifying that imbalance consists of the following propositions: (i) the requesting State shall be assisted in tackling its domestic criminality, in the name of the principles of territoriality and of non-interference (in its positive dimension); (ii) the requested State shall provide such an assistance, in the name of those same principles, and with the additional incentive of securing reciprocity; (iii) the foregoing propositions shall, but shall only be departed from where this is required by international law or where the requested State would otherwise sacrifice other fundamental individual guarantees or core values of its legal system; (iv) individuals targeted by extradition requests shall be acknowledged to face adverse conditions, but (v) this shall not prevent the recognition that they currently benefit from a wide array of guarantees which do not protect relevant individual rights, but which instead are merely incidental to the protection of ethnocentric interests of the requested State.

This study relies as much as possible on an *objective* diagnosis of the state of affairs in international cooperation, and the reform defended here is a direct result of that approach. It does not pursue externally defined criminal policy goals, even though it does show consistent with a widely supported view according to which cooperation should be enhanced, and even though this was this view that triggered this research. Evidence of this objectivity is that the study defends the preservation and even the expansion of certain grounds for refusal – which runs counter to such an agenda. This is namely the case of quantitative relevance thresholds, *ne bis in idem*, absence of valid jurisdiction by the requesting State, rehabilitation exception, existence of jurisdiction by the requested State, evidentiary requirements, and the specialty rule. The study moreover proposes the enactment of a ground for refusal which does not currently exist, namely the severe disproportionality between the acts and the penalty applicable in the requesting State.

As for those grounds for refusal that protect secondary interests of the requested State, and that thereby open unwarranted spaces for impunity – such as dual criminality, time-bars and other cases of extinction of criminal liability other than *ne bis in idem*, the political and the military offence exceptions, and the nationality exception – virtually all are subjected to an unequivocal optimisation effort. This is why, in a final balance, the model defended here probably entails *wider room for cooperation* than that which presently exists. As noted, refusal of extradition will now be limited: on the one hand, and insofar as voluntary grounds for refusal are concerned, to core values of the requested State and relevant individual guarantees; and, on the other, to grounds for refusal rooted in superseding rules of international law, notably human rights, which are inviolable.

But the increase in cooperation envisaged in this study is fundamentally *qualitative*, in that it embodies a more solidary approach to interstate relations in the field of criminal justice. By stripping extradition law of the elements which express merely superfluous values of the requested State, grounds for refusal not only become narrower in their scope, but also the requested State and the requesting State will now bear equal standing vis-à-vis each other. The *perfectly horizontal* position in which they are now placed is the result of the increased preponderance assigned to the principle of territoriality that governs criminal law and of the positive dimension assigned to the duty of non-interference that governs international law. The requested State would now only refuse to assist the

requesting State in exceptional cases. In all other cases, it would recognise the necessities and respect the differences of the requesting State. The model envisaged here is based on a principle, not of mutual trust, but of mutual *understanding*; not of mutual recognition, but of mutual *respect*.