International Annals of Criminology (2023), **61**, 103–130
doi:10.1017/cri.2023.18

ARTICLE

International Cooperation, Criminal Justice and Human Rights: The Missing Link

Rachid Sadouk

Court of Cassation of the Kingdom of Morocco, Rabat, Morocco
Email: rachidsadouk@lawyer.com

(Submitted 4 September 2022; revised 10 October 2022; accepted 20 October 2022)

Abstract
International society has recently witnessed the emergence of two interrelated trends: on the one hand, the significant rise in transnational crimes, which constitute a serious challenge to States' traditional security capabilities, and the noticeable increase in the number of international instruments put in place to bring that challenge to acceptable levels, on the other hand. The great emphasis the international community has put on the principle "*aut dedere aut judicare*" to strengthen the universal legal regime against serious crimes and to deny safe haven to their perpetrators is challenged not only by political, legislative and practical considerations pertaining to the lack of ratification and incorporation of international conventions and the wide disparity between States as to their implementation capacity, but also by the inherent differences between States' differing legal systems. This is an area that, despite its relevance to international cooperation and human rights, has long been ignored by criminal justice comparative studies. Based on actual cases such as the *Ramda* and *El Guerbouzi* cases, this article examines and assesses the impact of the differences between civil law and common law systems on the effectiveness of international cooperation and human rights. It argues that, unless these differences are acknowledged and properly dealt with, perpetrators of serious crime will continue to constitute a serious threat to our peace and security.

Keywords transnational crimes; different legal systems; international conventions; common law; civil law; human rights; international cooperation; *aut dedere aut judicare*

INTRODUCTION

Globalization, it is contended, is an irresistible force that empowers honest citizens as well as criminals (Maillard 2001:77). In fact, with globalization, the international community has witnessed a significant rise in transnational crimes that seriously challenge States' traditional security capabilities. Under such difficult conditions, States have felt compelled to work together in order to provide a global response to this global phenomenon. Former United Nations (UN) Secretary-General Kofi Annan once said, "With enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully and help

citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities" (United Nations Office on Drugs and Crime 2004).

Because international cooperation cannot operate in a vacuum, States have had to implement specific mechanisms to facilitate cooperation among them. In the field of terrorism fighting, for instance, the UN Security Council (UNSC) has voted on many resolutions, many of which are under Chapter VII of the UN Charter, that call on States to afford one another the most significant assistance possible.[1] Furthermore, some international conventions that deal with different aspects of criminality and prescribe some remedies to its expansion have been adopted, such as the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and the UN Convention against Transnational Organized Crime (2000).

Aware of the fact that a serious crime committed anywhere is a crime committed everywhere, and to ensure that criminals will not enjoy safe haven and will be brought before justice wherever they are found, the international community has adopted the principle "*aut dedere aut judicare*" which translates to "extradite or prosecute". This principle constitutes the backbone of international judicial cooperation. The simple presence of a person suspected of terrorism on the territory of a given State has become a mandatory cause for establishing this latter's jurisdiction regardless of the nationality of the said person and of the place of commission of the suspected acts. If the State decides not to extradite that person, it has to bring him without undue delay before its competent authorities for prosecution.

Despite its merits, the principle "*aut dedere aut judicare*" is a limited principle: the successful operation of the two mechanisms that it sets in motion for the sake of good international cooperation against serious crimes, i.e. extradition and mutual legal assistance, requires the fulfillment of several conditions that many countries do not yet meet. These conditions refer to the need to ratify, incorporate and implement universal legal instruments against serious crimes or to what Nelken (2000:6) refers to as the "law in books" and the "law in motion".

This article goes beyond the political, legislative and technical considerations mentioned previously. It aims to examine the other considerations pertaining to the legal and judicial traditions of the States involved in international cooperation. Even though scholars have identified five world legal models, i.e. Islamic, civil law, common law, mixed and socialist (Roberson and Das 2008:3), this article will focus on the foremost known legal traditions of the so-called civil law and common law countries.[2] The legitimate question, then, is: Do the differences inherent to these legal traditions impede an effective international cooperation against serious crime, and to what extent would these differences affect human rights?

To answer this question, the article has reviewed some of the most recent cases of cooperation between countries embracing civil law legal systems, such as France and Morocco, and countries with common law legal systems, such as the United

[1]UNSC Resolution 1373 (2001) (28 September 2001) UN Doc. S/RES/1373 (2001), which was voted on in the aftermath of the 9/11 bombings, for instance, has established a Counter-Terrorism Committee in charge of monitoring the international community's efforts against terrorism.

[2]This choice is justified by the vast majority of countries where they have been adopted and implemented.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

Kingdom (UK). While it took France 10 years to win the extradition of Rachid Ramda, a French citizen arrested in the UK, suspected of having participated in the series of terrorist acts that hit the French capital, Paris, in 1995, Morocco has been struggling for years, with the extradition request it seized British authorities with for the extradition of the named Mohammed El Guerbouzi it suspects of having instigated and funded the Casablanca bombings of 2003. After all that time, one would wonder about the kind of justice delivered to both the victims and the suspects.

The importance of the *Ramda* and *El Guerbouzi* cases stems from the fact that they illustrate one of the significant problems that international cooperation is faced with: the inherent differences between legal systems and their negative impact on the effectiveness of the global fight against severe crimes and on international human rights as well.[3]

Taking into account that States are sovereign and that they conduct international cooperation in compliance with their domestic laws and international obligations, the article argues that unless the differences between civil law and common law systems are acknowledged, understood and comprehensively addressed by domestic legislators, law enforcement officials and judicial authorities as well as by international legislators and technical assistance providers such as the UN Office on Drugs and Crime (UNODC), the principle "*aut dedere aut judicare*" will be denied the universal reach and applicability that it seeks, and international cooperation against serious crimes will continue to lack the strength and efficiency it needs to decrease the threat of serious crimes to acceptable levels.

The choice of this topic finds its *raison d'être* in the following:

(1) This area has not yet been covered by most researchers, either in international cooperation or in criminal justice comparative studies.
(2) This area has been ignored by international organizations in charge of assessing the effectiveness of international cooperation against terrorism, such as the Counter-Terrorism Committee (CTC).[4]
(3) The choice of the subject is also motivated by practical considerations, since with the growth of State borders transparency throughout the world due to globalization, national judicial authorities have found themselves exposed to crimes and legal proceedings to which they were not accustomed, which put a strain on the efforts already made both to thwart crime and to preserve human rights.

The article has been divided into three sections to achieve the desired outcome. The first one is dedicated to the obligation "Extradite or Prosecute", its scope and its limits. The second section identifies the main differences between the civil and common law criminal justice systems. The third section will assess the impact of the

[3]The *Ramda* case was one of the significant reasons that motivated the British Government's decision to amend the 1989 Extradition Act.

[4]See United Nations Security Council, "Letter dated 10 June 2008 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council" (10 June 2008) UN Doc. S/2008/379.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

inherent differences between the two systems under study on the effectiveness of international cooperation against serious crimes. Finally, in conclusion, some solutions for strong and smooth international cooperation will also be proposed.

SCOPE AND LIMITS OF "*AUT DEDERE AUT JUDICARE*"

The principle "*aut dedere aut judicare*" has been embedded in most universal instruments against serious crime. Its binding character arises from the fact that many of these instruments have been adopted under Chapter VII of the UN Charter, such as Resolution 1373 (2001). Particular reference is made here to Article 10 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Article 8(2) of the Convention on the Physical Protection of Nuclear Material (1980), Article 8 of the International Convention for the Suppression of Terrorist Bombings (1997) and Article 9(4) of the Convention for the Suppression of Acts of Nuclear Terrorism (2005). The same principle has been adopted in Article 16(10) of the International Convention against Organized Crime (2000) and Article 11 of the International Convention against Corruption (2005).

It is worth noting that the principle, itself, is not an innovation. We can trace its first appearance as a cardinal standard of international cooperation against serious crime back to the 1970s. Article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), for instance, reads:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State.[5]

In the following sections, we will discuss the principle "*aut dedere aut judicare*", starting with its scope and requirements and ending with its limits.

Scope and Requirements of the Obligation to Extradite or Prosecute

As set in Resolution 1373, the primary purpose of the obligation to extradite or prosecute is to deny terrorists safe haven. The point is that terrorists, wherever they are found, must be brought before justice. States are no longer, as has been the case before, allowed to refuse extradition and prosecution. If they cannot extradite for whatever reason, they are obliged to bring the alleged offenders before their competent authorities for the purpose of prosecution. This, however, is not as easy as it seems to be, for the operation of the principle "Extradite or prosecute" requires the fulfillment of many conditions, some of which have been laid down in Resolution 1373.

We will now examine the principle's scope before discussing its requirements.

[5]See the whole body of the Convention: Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105. Retrieved 21 August 2023 (https://www.unodc.org/unodc/site-search.html?q=Convention+for+the+Suppression+of+Unlawful+Seizure+of+Aircraft).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

Scope of the Obligation: Universal Applicability

The principle has been presented as a cardinal component of the global response to the challenge of terrorism. Two comprehensive solutions have been adopted to ensure the principle of the desired universal reach in both time and space: imposing a mandatory jurisdiction on the States and operating two legal fictions.

Mandatory Jurisdiction. Usually, States are free to establish their jurisdiction over criminal acts based on their criminal justice policies. This, however, is not the case in the field of serious crimes such as terrorism. The binding principle "*aut dedere aut judicare*" requires States to establish their jurisdiction over terrorist crimes based upon the simple presence on their territories of persons suspected of preparing, financing or committing these crimes, regardless of the person's nationality or the location of perpetuation. As long as they do not extradite, States must prosecute.

Legal Fictions. To facilitate a successful operation of the principle "*aut dedere aut judicare*", the universal instruments against terrorism have provided two genius solutions (United Nations Office on Drugs and Crime 2011:23):

- The offences are deemed to have been committed not only in the place in which they occurred but also in the territory or within the jurisdiction of the requesting State. This has been reiterated in almost all international conventions against terrorism. Article 11(4) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), for instance, reads: "If necessary, the offenses outlined in article 3 shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of the State Party requesting extradition."
- The offences are deemed to be included as extraditable offences in any existing bilateral or multilateral extradition treaty. Article 11 of the International Convention for the Suppression of the Financing of Terrorism (1999) stipulates, with this regard, that: "The offenses set forth in article 2, shall be deemed to be included as extraditable offenses in any extradition treaty existing between any of the States Parties before the entry into force of this Convention."

With these two legal fictions, the principle has been ensured the broadest spatial and temporal applicability.

The Requirements of the Obligation to "Extradite or Prosecute"[6]

To satisfy the obligation "Extradite or prosecute", States need to have the appropriate legal instruments to extradite alleged offenders found on their territories or prosecute them whenever they cannot be extradited. That is why Resolution 1373 and subsequent UNSC resolutions strongly have urged States to

[6]The requirements here refer to those conditions needed for the successful operation of the principle, not those obligations deriving from the principle itself, such as the obligation not to invoke the political character of the offence in order to refuse extradition.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

ratify and incorporate the universal conventions and protocols related to serious crime and to implement an effective criminal justice system.

Ratification and Incorporation of the Universal Instruments. Almost 20 international instruments deal with serious crime, 16 of which specifically with terrorism. The usefulness of these conventions is twofold: they constitute, on the one hand, the criminalizing texts that criminalize certain acts and require their punishment based on their gravity. On the other hand, they represent a reliable basis for international cooperation, which spares States the money and time-consuming process of negotiating hundreds of bilateral agreements (United Nations Office on Drugs and Crime 2011:12). The significance of the ratification and incorporation of international conventions, furthermore, results from the fact that it helps fulfill the principle of "double criminality", which constitutes an essential condition for extradition.

Establishment of an Effective Criminal Justice System. More is needed than to ratify and domesticate the international conventions against serious crime. It is also, and more importantly, essential to implement them. This is, however, a challenging task considering the complexity of the offences they are about and the mechanisms they put in place to either counter these crimes or investigate them once they have been committed. A relevant example in this regard would be the use of sophisticated investigative techniques such as controlled deliveries, electronic or other forms of surveillance, and undercover operations, which the International Convention against Organized Crime has brought about.[7]

States must implement an effective and efficient criminal justice system to meet their international obligations. Law enforcement and judicial officials need to be well trained and well equipped to face the challenge of serious crime. They need to know the international and national rules and also have the technical capacity to implement them.

Aware of the negative effect the lack of such technical capacity would have on the global fight against serious crime, many organizations, such as the UNODC, have been mandated by the UN to provide States with assistance in ratifying and implementing the universal legal instruments against terrorism and strengthening the capacity of the national criminal justice systems to apply the provisions of these instruments in compliance with the principles of the rule of law (United Nations Office on Drugs and Crime 2009).

The principle "*aut dedere aut judicare*" has helped strengthen the international fight against serious crime, but its applicability remains limited. This will constitute the subject of the following section.

Limits of the Applicability of the Obligation to Extradite or Prosecute

The principle "*aut dedere aut judicare*" has two limitations. While the first set relates to the small number of States that have ratified the universal instruments against terrorism, especially in critical areas such as nuclear terrorism, the second set is

[7]See Article 20 of the International Convention against Organized Crime (United Nations Office on Drugs and Crime 2004).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

reflected in the apparent disparity between States as to the technical capacity to implement these instruments and to contribute efficiently in the joint effort against these crimes.

Shortcomings in the Ratification and Domestication Processes

A quick review of the actual ratification status of the universal instruments against terrorism shows that, in a very crucial area strongly linked to international peace and security, such as the nuclear area, the rate of ratification is alarmingly small. To date, 50 States have not yet ratified the Convention on the Physical Protection of Nuclear Material (1980); only 54 have ratified the International Convention for the Suppression of Acts of Nuclear Terrorism (2005), and even a lower number (27) has up till now ratified the Amendment to the Convention on the Physical Protection of Nuclear Material (2005).[8]

Considering the severe threat that nuclear materials represent to public health and security, the unimaginable and disastrous consequences of nuclear terrorist acts, and the undoubted desire of terrorist organizations to possess nuclear bombs, one could easily imagine the weakness the legal regime suffers against nuclear terrorism.[9] In such a low rate of ratifications, the principle "extradite or prosecute" remains a minimal principle, unable to produce a solid universal legal framework capable of shielding the international community from the harmful effects of serious crime.

The Technical Capacity Problematic

Serious crimes like terrorism are complex and often very difficult to investigate and prosecute, even for well-developed criminal justice systems. The transnational character of these crimes combined with now proven links between terrorism and transnational organized crime add to that difficulty. The difficulty is even greater for criminal justice systems that lack the technical capacity required for implementing the universal legal regime that has been put in place to facilitate the global fight against these crimes through enhanced international cooperation.

The lack of technical capacity constitutes a problem not only for developing countries that are exposed to the dangers of terrorism but also for developed ones. This latter category of States often demonstrates some reluctance in extraditing alleged terrorists to the first category of States or in accepting alleged terrorists to be prosecuted under their criminal justice systems. This reality explains to a great extent the illegal situations of kidnapping, interdiction and other cases of disguised extraditions.

Another problematic dimension of the technical capacity is related to the problems that technical assistance providers themselves face.[10] The UNODC that has long been active through its terrorism prevention branch in the field of terrorism and international cooperation, and which has been requested by the

[8]For the status of ratification of these conventions, see International Atomic Energy Agency. Retrieved 30 June 2023 (http://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf).

[9]The UNSC expressed its deep concern over terrorists' access to and use of nuclear, chemical, biological and other potentially deadly materials in its Resolution 1456 (2003) (20 January 2003) UN Doc. S/RES/1456 (2003).

[10]The International Atomic Energy Agency also provides technical assistance to its Member States in nuclear security-related issues.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

General Assembly in many of its resolutions to enhance its technical assistance to Member States, in close consultation with the CTC, the Counter Terrorism Executive Directorate (CTED) and the Counter Terrorism Implementation Task Force, for instance, does not have an independent and autonomous budget. Its main funding sources come from voluntary contributions from governments, UN agencies, inter-governmental organizations, international financial institutions and private donors (United Nations Office on Drugs and Crime 2023). Despite the office's excellent performance in fund-raising and technical assistance delivery, the office still needs to compete with other organizations for funding and comply with the donors' conditions. Most donors, in fact, require their funds to be utilized in certain activities or in certain countries. This situation leads to regrettable discrimination among the beneficiaries of the office's services and risks undermining the successful operation of the principle "*aut dedere aut judicare*".

In addition to the previously discussed limits of the obligation to extradite or prosecute, international cooperation against serious crime is hindered by the differences between States regarding their legal traditions. How these legal traditions differ and negatively affect international cooperation will constitute the subject of the following sections.

CRIMINAL JUSTICE MODELS AND SYSTEMS

By "legal tradition", we refer to either a legal model or a legal system. A model is an abstraction or conceptual object used in the creation of a predictive formula. The model, in this sense, constitutes a set of similar patterns (Roberson and Das 2008). Thus, legal models are the main rules and principles that govern a given criminal justice system or systems, making it/them fall under one specific model but not another.

A system is a set of interacting or interdependent entities forming an integrated whole.[11] It refers to the *modus operandi* of the rules and principles constituting the model. Criminal justice systems, for instance, refer to all those rules, institutions and principles that govern criminal justice in a given place.

Models, systems and traditions are interrelated. Models mould systems. Roberson and Das (2008:3) state: "A nation's criminal justice system is formed and shaped by its legal model of justice, which is formed by customs, religions and culture."[12] A model may encompass more than one system. The interaction between the rules, principles and institutions may create different systems within the same model. The civil law model, for instance, encompasses a wide range of criminal justice systems, such as the French system, the German system, and many others. The same applies to the standard law system. This latter includes as many systems as the number of countries with common law traditions. The models, furthermore, reflect the prevailing legal and judicial culture.[13]

[11]For a definition of "system", see Wikipedia. Retrieved 29 June 2023 (https://en.wikipedia.org/wiki/System#cite_note-merriam-webster-system-1).

[12]See also Feest and Murayama (2000:66).

[13]Despite the obvious difference between models and systems, these two words will be used throughout this article interchangeably.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

A quick review of the main characteristics of each common law and civil law system will help us identify the critical differences between the two systems and understand the relevance of these differences to the cooperation between them.

Comparison Between Civil Law and Common Law Criminal Justice Systems

From the very beginning, it is worth mentioning that comparative studies had put more emphasis on the *modi operandi* of the systems under study than on the impact of their differences on the effectiveness of cooperation between them. Furthermore, different approaches have been used by different researchers in the field of comparative studies. Some have chosen areas that they have examined in different systems (Roberson and Das 2008; Terrill 2003). Others chose to examine two systems of different legal models: the Dutch and the American or the British (Pakes 2008). A third category opted for a more practical approach, preferring to examine how a specific case would be handled in different systems and the differences in policing, prosecuting and sentencing that would make (Feest and Murayama 2000).

For the sake of clarity and simplicity, this article will try to highlight the different developments a case goes through in both civil law and standard law systems – that is, the three stages it crosses till it is settled – beginning with the investigatory stage, through the prosecution stage and ending before the judge/s in the courtroom.

At the Investigatory Stage

Law enforcement in civil law countries is generally composed of two entities: the administrative police and the judicial police. The administrative police depend hierarchically on the minister of interior. The judicial police are subjected to double supervision from the interior and justice ministers. In Morocco, one of the civil law countries, law enforcement fulfills the following characteristics at the investigatory phase of a given case:

- Investigations are conducted by officers of judicial police whose main task, as set clearly in Article 18 of the Moroccan Code of Criminal Procedure of October 2002, is to investigate crimes, collect the evidence and arrest offenders.
- Investigators enjoy limited discretion as they are compelled by law to report all cases as soon as possible to a prosecutor (Article 23 of the Moroccan Code of Criminal Procedure). Outside cases of "flagrant offences", they cannot arrest or detain people without prior permission from the prosecutor (Pakes 2008:251). In sum, investigators work under the close supervision of judges, a system that guarantees early judicial involvement to prevent police abuses and to ensure more fairness and rigor in the treatment of cases, especially concerning evidence gathering. Pakes (2008:54) calls this system a review system whereby the prosecutor ensures a continuous oversight of police action.

As is the case in civil law countries, law enforcement in common law countries carries out investigations. Police officers are, nonetheless, more independent than their peers in civil law countries: they do not depend hierarchically on prosecutors; they are not obliged to report to these latter; if they are not required to fill up

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

extensively detailed files, they are, at least, required to keep a decision log where they record the actions they have taken, the grounds for taking a given action, and their findings.

At the Prosecution Stage

The prosecution is an institution specific to civil law countries, even if some common law countries, such as the United States, had introduced the institution in their legal systems long ago. The institution first appeared in the British legal system through the Crown Prosecution Act of 1985.

The main features of the prosecution service in civil law countries are as follows:

(1) Prosecutors are generally considered members of the judiciary (Pakes 2008:239). While Moroccan prosecutors have been granted the judicial capacity by law, their European peers had to wait for the intervention of the European Court of Human Rights. In its ruling, the Court asserted that the independence and impartiality that characterize the prosecutors' actions make them judicial officials.
(2) The prosecution service is a very significant entity within a country's criminal justice system. Not only does it supervise, direct and advise the police on facts and law, but it also helps provide a balance between private and public interests, i.e. the rights of offenders and victims and public interests.[14]
(3) Like the prosecutor, the examining magistrate is a senior officer of the judicial police. He enjoys all the powers that a prosecutor has concerning police forces. He can issue coercive orders such as domestic and international arrest warrants, order the interception of telecommunications and supervise the execution of international letters of request.
(4) Unlike the prosecutor, the judge's instruction is independent because he is subjected to no hierarchical authority. His main task is to ensure that the rule of law has been upheld at the investigatory phase of the trial. For that purpose, he works closely with the police, the prosecutor, the victims and the defence lawyers. He can interview any person who might assist in finding the truth, cross-examine witnesses and designate experts. He may drop or amend the charges at the end of his investigations and send the case to the competent court. His decisions may be subject to appeal from the dissenting parties, including the prosecutor.

Common law countries have come to know the prosecution institution quite recently compared to civil law countries. To take the example of the UK, the crown prosecution service is a relatively new institution that was introduced in the British criminal justice system for the first time in 1985 (Pakes 2008:52). Since then, British prosecutors have somewhat succeeded in imposing their institution on recalcitrant police organizations fearing for their prominent position within the system.

[14]See with this regard the acts of the pan-European meeting held by the Council of Europe in Messina, Italy, 5–7 June 1996 (Council of Europe 1997).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

However, they still need the means to defend themselves in complex cases before the courts. They rely, for that, on more experienced barristers (Pakes 2008:53).

Prosecutors in common law countries are not judicial officials. They do not wear gowns in the courtroom and sit on the same footing as the defendants and their lawyers. They have, furthermore, no specific powers to supervise police investigations, nor can they issue coercive orders (Terrill 2003:36). The principle of "equality of arms" before justice justifies this matter. In sum, the common law system needs to learn of the "examining magistrate" institution and allows only for limited prerogatives for prosecutors.

At the Trial Stage

A trial court in civil law countries may be composed exclusively of professional magistrates as is the case, for instance, in Morocco or of a mixed panel comprising both professional magistrates and lay assessors chosen by lot in the annual roll.[15] The complexity of serious crimes such as terrorism has convinced France to give up the lay assessors' system, at least for these crimes. French criminal courts are composed of a panel of seven professional judges at the first instance and nine at the appeal phase.[16]

The presiding judge is the ultimate master of the courtroom. According to Article 335 of the Chadian Criminal Procedure Act, the presiding judge is vested with discretionary power, based on which he can, in his honour and conscience, take all valuable measures to uncover the truth. His prerogatives include the control of the order in the courtroom, conducting the trial, and directing the investigation and discussions. He can also, with due respect to the defence rights, refuse all that may unduly prolong the discussions (Article 298 of the Moroccan Code of Criminal Procedure). The presiding judge is, in fact, the central piece in the civil law trial. He is responsible for finding the truth and settling the cases (Feeney and Herrmann 2005:385). For that reason, the civil law system is called an inquisitorial system.

The prosecutor and the defence have no role in conducting the trial. Their mission is to assist the court in finding the truth the way they see it. Each tries to protect, the best he can, the interests he is defending using, for that purpose, the set of available measures, including calling and cross-examining experts and witnesses.

In the common law system, the court is, ideally, composed of a professional presiding magistrate and a jury whose members are drawn from electoral rolls.[17] The judge directs the jury on matters of law and ensures that the principle of "equality of arms" between the parties to the trial is upheld (Thaman 1997:393). Beyond that, he observes religious neutrality, abstaining from intervening in the debates.

The prosecutor and the defence "own" the trial. They conduct the debate before the jury with the facilitation of the judge. They present their own version of the facts,

[15]See, with this regard, Article 330 of the Code of Criminal Procedure of the Republic of Chad (9 June 1967).

[16]It is worth mentioning that some civil law countries, such as Belgium, Spain and Russia, use the jury system.

[17]Some common law countries, such as the Republic of Ireland, have also removed juries to deal with terrorism.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

the evidence supporting their arguments and cross-examine the witnesses. They comply with compulsory rules of evidence. "The case develops as a competition between the two parties. The search for the truth is structured as a confrontation and a debate. The decision is often the province of 12 laypersons" (Feeney and Herrmann 2005:354). The common law system, for that reason, is described as an adversarial system.

After laying down the main features of the civil and common law systems, we will proceed to identify the main differences between them.

Identifying the Critical Differences Between Inquisitorial and Adversarial Systems

There are foundational differences between civil law and common law legal models. This article intends to retain only those procedural differences that are relevant to the subject under study. These can be summed up, as follows.

Conceptual Differences?

It is striking how the two systems can diverge over internationally well-established principles of justice. Judicial neutrality and impartiality figure among international standards of the right to a fair trial embodied in international human rights instruments. Article 10 of the Universal Declaration of Human Rights of 1948 reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." In the same line, Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) of 1966 states that: "All persons shall be equal before the courts and tribunals. In determining any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law." The same principles have been enunciated in the regional human rights conventions, such as the European Convention on Human Rights (ECHR) of 1950 in Article 6, the American Convention on Human Rights of 1969 in Article 8, and the African Convention on Human and Peoples' Rights of 1978 in Article 7. The two systems seem, however, to have taken different paths in implementing these principles.

While the judges are actively involved in truth finding and in conducting the trials in the civil law system, their peers in the common law system do no more than facilitate the debates leading up to the prosecutor and the defence task of conducting the trial. Both systems still hold that their judges are neutral and impartial.

Monist Versus Dualist Systems

Monist systems are those systems where international agreements take effect from the day of their ratification. Those agreements constitute with the national law one legal body that practitioners and interested people and groups can refer to. Unlike common law countries, most civil law countries observe monist systems (United Nations Office on Drugs and Crime 2011:7). Conversely, dualist systems are those systems where more than the mere ratification of international agreements is needed to give effect to these agreements. For that, a special law needs to be enacted

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

to incorporate them into the national law. The problem with the latter category of systems is that it sometimes takes a long time before the incorporating law is enacted, which seriously hampers international cooperation. It took, for instance, the UK 47 years to incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms it ratified in 1951 in its national law through the Human Rights Act of 1998 (United Nations Office on Drugs and Crime 2011:7).

Official Versus People's Justice

Beyond conducting the trials and endeavouring to uncover the truth with the assistance of the prosecutor and the defence, the judges in the civil law system are also invested with the authority to determine the guilt of an accused and the punishment he deserves. This prerogative has been denied to their counterparts in the common law system. It is, in fact, the jury who decides on guilt, leaving it to the magistrate to determine the sanction (Jackson 1997:411).

These procedural differences stem from the different political developments that both civil and common law countries have gone through. While civil law countries have tended to have strong governments responsible for providing social welfare, including justice, common law countries have opted for more liberal ideas placing specific limits on governmental power (Roberson and Das 2008).

Law Versus Precedent

Among civil law tenets, as stated by Opolot (1980), is that, unlike the common law system, it emphasizes a written code and does not use precedent.[18] According to Roberson and Das (2008) "the common law model prefers precedent as a basis for judgments and moves empirically from case to case. The civil law model tends to move more theoretically by deductive reasoning, basing judgments on abstract principles." It follows that the primary responsibility of civil law courts is to seek the solution to the conflicts included within the laws that the government has enacted. Governments are also responsible for providing written codes for courts and other entities' usage.

Another consequence is that the judgments of the courts have no binding force except in the cases in which they are rendered (principle of the relativity of judgments). Conversely, common law is mainly unwritten and relies on precedents.[19] Common law courts, for instance, use prior court decisions as authority for identical or similar later cases involving a similar question of law.

Written Versus Oral Procedure

The procedure in criminal matters in a civil law country such as Morocco is oral. Article 287 of the Moroccan Code of Criminal Procedure stipulates that the court can only decide based on the evidence presented and discussed before the court at the trial. The court, for instance, must rely on more than the simple exchange of

[18]James Opolot is quoted in Roberson and Das (2008:14).
[19]Opolot quoted in Roberson and Das (2008:15).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

documents and communications between the parties to the trial or even on dossiers that the investigators or the prosecutor have compiled throughout the different stages that the case has gone through. This is the case for most civil law countries.

However, it is not the case for common law countries, which understand "oral procedure" differently. The procedure in common law trials is oral simply because there is no pre-existing dossier at the launching of the trial, as is the case in the civil law system. The *modus operandi* of the trial is similar to a contradictory debate between two parties defending two different theses and using different arguments and "equal arms". The debate is facilitated by a referee and takes place before randomly chosen citizens with no prior knowledge of the issues at stake. Unless otherwise authorized by the court, including the witnesses, all elements of proof are openly examined and cross-examined in the courtroom.

It follows from the previous discussion that while it is perfectly possible in most civil law countries to rely on the written statement of an absent witness at trial, this constitutes a procedural aberration for common law countries.[20]

Presence Versus Absence of Rules of Evidence

A logical consequence of how both the civil and common law systems are structured is the absence of rules of evidence in the former and the way they exist in the latter.

The fact that a single dossier is compiled in very great detail through the different stages the case goes through, and which is open to all parties to the conflict, combined with the judicial supervision over both the investigatory phase and the trial phase in the absence of a non-professional jury, constitutes an elaborate system of checks and balances aimed at protecting both parties' interests and helping uncover the truth.

Things, as seen before, are different in the common law system. The police are independent institutions that enjoy broad powers in their activities. At the trial, the judge has no authority to conduct the debate. He is more of a referee between two competing parties with conflicting interests, and the entity invested with the authority to decide on the guilt of the accused is composed of a non-professional jury. In this regard, rules of evidence represent a system of checks and balances intended to safeguard the interests of the parties and the interests of justice.

EFFECTS OF THE DIFFERENCES BETWEEN LEGAL SYSTEMS AND POSSIBLE REMEDIES

After identifying some of the main significant differences between the civil law and common law systems, we will turn in the present section to assess how these differences have an impact on international cooperation in countering serious crime and to the possible remedies that could be implemented.

[20]The European Court of Human Rights has frequently sanctioned France and Italy for relying on the written statements of absent witnesses to the trial. This attitude, the Court contends, infringes the right to a fair trial as regulated in Article 6 of the European Convention of Human Rights. See with this regard also the ECHR judgment in *Trofimov v. Russia* (App no. 1111/02) ECHR, 4 December 2008. Retrieved 29 June 2023 (https://www.hr-dp.org/contents/437).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

Effects of the Differences Between Legal Systems

The differences between civil and common law legal systems negatively affect the effectiveness of international cooperation and human rights.

On International Cooperation Effectiveness

Among the mechanisms that have been put in place by the UNSC to monitor UN Member States' compliance with the universal legal regime against terrorism and assess the effectiveness of international cooperation in this domain were the CTC and its executive directorate (CTED).[21]

In its report to the UNSC on 10 June 2008, the CTC stated in its assessment of international cooperation mechanisms in Western Europe that:

> States that are members of the group have effective international cooperation measures, and almost all have adequate mutual legal assistance and extradition laws and information exchange procedures in place. The group members have a high ratification rate of the international counter-terrorism instruments, with 28 of the 30 States having ratified 10 or more instruments.[22]

The question to ask here is how can we measure international cooperation "effectiveness" and how accurate/reliable is the CTC's assessment taking into account cases such as the *Rachid Ramda* case?

Statements such as that of the CTC help overlook a critical aspect of international cooperation, which deals with the differences between European legal systems and the adverse effects these differences have on European and international cooperation in general criminal matters. The ratification of universal instruments and the existing information exchange and cooperation mechanisms are beneficial tools. They are, however, not sufficient by themselves to produce the desired outcome: successful international cooperation. Consequently, the effectiveness of international cooperation can and shall not be assessed solely on the presence or absence of such tools. They, at least, have not been that helpful in a case (*Rachid Ramda* case) that gathered two European countries which, beyond the presence of the previously mentioned tools, share the same democratic and human rights values.

Beyond the presence or absence of the tools that the CTC has referred to in its report to the UNSC, the effectiveness of international cooperation can be best assessed through the presence or absence of facilitating or impeding conditions, such as the differences between legal systems.

On the Efficiency of the International Fight Against Serious Crime

Like driving in the UK for Moroccans, international cooperation between legal systems is often difficult. One primary source of the difficulty is the need for more sufficient knowledge of the *modus operandi* of each system. The Interpol office in Morocco's capital city of Rabat, for instance, had issued a warrant for the arrest of

[21]See UNSC Resolution 1373 (2001) (above note 1).

[22]United Nations Security Council (above note 4) para 137.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

Mohamed El Guerbouzi in 2003 for his alleged role in several criminal offences, such as collecting funds for financing terrorists, preparing terrorist attacks and assisting in forging passports (BBC 2005). After six years, the case was not yet settled, and the suspect was still free. The difference between the evidence requirements in both legal systems accounts for the delay affecting the extradition request that Moroccan authorities have seized their British counterparts with.

The difference between legal systems makes international cooperation an excessively time-consuming process that undermines national and international efforts to bring down the threat of terrorism. Not only does it hinder the Moroccan authorities' efforts to dismantle the Moroccan Islamic Combat Group, known by its French acronym GICM, with which Moroccans claim El Guerbouzi is associated, but it also goes against the international community's will for swift cooperation in response to the challenges of serious crime (Tefft 2005). For instance, the preamble of UNSC Resolution 1373 reads: "*Calling* on States to work together urgently to prevent and suppress terrorist acts".[23] It inflicts serious damage to practitioners' faith in the worthiness of international cooperation. In his comments on the *Ramda* case, Georges Holleaux (2002:62) deplored the lack of solidarity by British authorities with a democracy afflicted by terrorist acts.

On International Human Rights

The abuses that had been committed here and there in the name of fighting terrorism compelled the international community to intervene in order to remind States that the relationship between the notions of security and liberty are not necessarily a conflicting one (United Nations Office on Drugs and Crime 2008:5). One, indeed, needs not to be sacrificed for the other. Instead, as UNSC Resolution 1456 puts it: "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[24] Recent cases before international, regional, and national courts give, conversely, evidence that UN Member States still need to fully uphold this obligation.

States tend to breach their international obligation to uphold the rule of law in fighting terrorism purposefully or as a direct consequence of their legal systems. However, sometimes, the breach happens as an unintended consequence of the operation of two different legal systems, such as civil law and common law. Among the rights impacted upon, one could refer easily to the right to an adversarial debate, the right to having one's case heard before an independent and impartial court within a reasonable time, and the right to specialty.

We will now examine each one of these rights.

The Right to an Adversarial Debate. This right constitutes an essential element of the right to due process. It has been embodied in most international and regional human rights conventions, such as the ICCPR (Article 14(e)) and the ECHR (Article 6(d)). The wording of both articles allows for both civil law and common

[23]See UNSC Resolution 1373 (2001) (above note 1), preamble.
[24]See UNSC Resolution 1456 (2003) (above note 9).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

law practices about conducting the trials. However, the only and yet major problem that arises is related to witnesses' attendance and examination. Some civil law countries, indeed, authorize their courts to rely in their judgments on the written testimonies of absent witnesses. This practice needs to meet the common law requirements as to the adversarial character of the trial.

The difference between legal systems in this regard affects the right to an adversarial trial and constitutes a serious obstacle in the face of effective international cooperation against serious crimes. In the absence of actual witnesses outside the co-offenders whose statements have been taken in their quality as suspects, the Moroccan extradition request is still unable to find its way to the British courtroom.

The Right to be Tried Without Undue Delay. Article 14(3) of the ICCPR, the foundational human rights document in the criminal justice field, provides that: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . [and to] be tried without undue delay."

The ECHR extended this right to civil proceedings. Article 6 of the Convention, for instance, stipulates that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time . . . " The concept of "reasonable time" raises many questions. For the sake of simplicity, we will deal only with those relating to the criteria required to assess time reasonably.

There seem to be no guidelines on when a trial breaches the obligation of "reasonable time", either in international conventions or in regional ones. Doctrine and jurisprudence, however, retain the following criteria:

- The circumstances of the case. The "reasonable time" is not an absolute concept but a relative one that is determined on a case-by-case basis.
- The level of cases' complexity. There are a number of facts that show to which extent a case is complex in terms of the law as well as in terms of the determination of facts, i.e. the number of parties involved, the number of the charges filed against the accused and his co-offenders, the link with other cases, investigations undertook across-borders. Moreover,
- The attitude of the accused and his lawyer, i.e. recourse to unfounded or unmeritorious appeals.
- The way the authorities handled the case, from the launching of the investigations to the judicial decision.
- The relevance of the conflict to the parties. Every conflict affects the parties to it both financially and psychologically. They may also be deprived of their liberty and suffer financial losses if they are kept in detention (Sadouk 2013:122–35).

Considering the said criteria, the *Rachid Ramda* case clearly infringes on the right to due process, equating to justice denial. In its ruling on Ramda's judicial review application filed against the Secretary of State's order of 6 April 2005 granting his extradition, the Queen's Bench Division (Divisional Court) recognized and regretted the abnormality of the situation stating that: "the context in which it

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

had to be considered [Ramda's application for an adjournment] was the substantial and regrettable passage of time since the first requests by the French government."[25] Indeed, the complexity of the case stemming mainly from the differences between the French civil law system and the British common law system, combined with the poor way that the authorities have handled the case, account for the flagrant breach of one of the elementary rights that the accused enjoys under international human rights law. The failure to acknowledge such differences was responsible for the excessive delays the case suffered twice: the first time, when the Divisional Court quashed the Secretary of State's initial decision to extradite on 27 June 2002 for failing to provide some information concerning the operation of the French criminal justice system that the Court considered relevant;[26] and the second time when it took the Secretary of State and the claimant (Ramda) more than one year for the former and two years for the latter, beginning in July 2002, to obtain independent expert advice on French criminal law and procedure.[27]

The right to be tried without undue delay gains more significance when it affects human freedom. Ramda has been under extradition detention for almost 10 years, which is hard to justify under international human rights standards calling for trial within a reasonable time or release (Article 9(3) of the ICCPR). Georges Holleaux (2002:64) has vehemently criticized this situation:

> The absence of judicial solidarity shown between democratic States, notwithstanding their contractual commitments and notwithstanding, on a case-by-case basis, the abolition of the death penalty, is unjustifiable. Especially since it leads, in the very country of habeas corpus, to deprive of liberty, without trial, for more than six years, a person accused of crimes.

The Right to Specialty. The right or rule of specialty is a guarantee to protect the person whose extradition is sought from arbitrary detention or prosecution. According to Article 723 of the Moroccan Code of Criminal Procedure, extradition can only be granted under the condition that the person claimed shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, or otherwise restricted in his personal freedom, for any offence committed prior to his surrender other than that for which his extradition is requested.[28]

If the same provisions are applied in most legal systems, evidence shows that, at least at the practical level, this is different in some legal systems. In the USA, for instance, some States ignore this guarantee, as illustrated by the *Government of the USA v. Kaufman* case (1988), where two brothers, the Frankses, had been extradited from Mexico to Louisiana for drug-importation conspiracy-related charges.

[25]*Ramda v. Secretary of State for the Home Department* [2005] EWHC 2526 (Admin) Queen's Bench Division (Divisional Court) Keene LJ and Poole J, 17 November 2005, para. 6. Authoritative text may also be found at [2005] All ER (D) 223 (Nov).

[26]Ibid., para. 3.

[27]Ibid., para. 4.

[28]The same provisions have been applied by the European Convention on Extradition dated 13 December 1957, in Article 14, with a difference in the rule of exception. Unlike the Moroccan 30 days, the European Union Convention allows for a 45-day delay before the extradited can be prosecuted for acts committed prior to those for which extradition had been granted.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

The extradition was granted under Louisiana indictment and arrest warrants. After trial, the brothers have been surrendered for similar charges to Texas, where they have been tried and convicted. Despite the explicit terms of the extradition agreement – "A person extradited shall not be detained, tried, or punished in the territory of the requesting party for an offense other than that for which extradition was granted" – the Court rejected the appeal on the basis that "the trial of the extraditees for a separate but similar offense would not be an act of bad faith against the requested country such as would constitute a violation of the rule of specialty" (Jones and Doobay 2006:34). The court, furthermore, had taken the same position in subsequent cases.[29]

The investigations conducted after the Casablanca bombings of 2003 have shown that a certain Abderrahmane Elkatrani, a National Moroccan, had played a significant role in the establishment and funding of the so-called group of Moroccan Islamic Fighters (GMIF). Elkatrani had been located in southern Ireland, and Moroccan authorities seized their peers in Dublin with an extradition request. After several written exchanges that focused mainly on the Moroccan legal framework pertaining specifically to the safeguards that Morocco puts in place to guarantee the right to due process, I was entrusted by the Moroccan minister of justice with the task of holding a meeting with Irish authorities in order to convince them with the merits of the Moroccan request. Even though all Irish authorities' concerns were dealt with rightfully, an enormous obstacle hampered Moroccan efforts and prevented Irish authorities from granting extradition. The obstacle arose from Ireland's Law of Extradition imposing a 45-day rule of specialty, whereas the Moroccan Penal Procedure provides only 30 days. They were offered diplomatic guarantees, but the law of Ireland did not allow such a possibility.

The cases previously discussed demonstrate that the differences between criminal justice systems can hamper the effective operation of the principle "Extradite or prosecute" and consequently seriously affect human rights. We turn now to the proposed remedies to the evils affecting international cooperation.

Proposed Solutions

The solutions to the shortcomings of international cooperation, as far as the consequences of the differences between legal and criminal justice systems, can be grouped into two categories: the first category concerns the changes that need to be brought to the legal systems themselves and the second category is more related to the changes that practices within the systems need to undergo. We will examine both categories in the following.

Systemic Changes

The effectiveness of international cooperation in countering serious crime is the responsibility of all. The UNSC has undoubtedly established a committee that supervises the strength and cohesion of the universal response to serious crime challenges. However, it is also up to the States to endeavour to complement the universal framework by enacting adequate and comprehensive laws on the one hand

[29]See *United States of America v. Lebaron or United States v. Andonian* (Jones and Doobay 2006:35).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

and working together on a bilateral, regional or even international level on the other hand.

At the National Level. Even though Rachid Ramda abandoned his challenge of the Secretary of State's order of 6 April 2005 on the ground that the delay since the main events had happened was so great as to prevent a fair trial from taking place, the Court still felt the need to comment on it. The Court stated in this regard that: "its presence originally as a ground of challenge illustrates the amount of time which these extradition proceedings have taken. It must be emphasised that this has happened under the procedures set out in the 1989 Act, widely recognised as cumbersome and time-consuming."[30] The testimony of the Court constitutes, indeed, strong evidence that international cooperation generally, and the principle "*aut dedere aut judicare*" more specifically, can be seriously hampered by domestic laws. Consequently, the 1989 Extradition Act has been replaced by the new Extradition Act of 2003, which provides better-designed mechanisms to speed up extradition procedures.

In *United States v. Cotroni*, the Supreme Court of Canada said: "Investigations, criminal prosecutions as well as punishment of the crime for the protection of citizens and maintaining peace and public order constitute an important goal of every organized society. It is unrealistic that pursuing this objective will be confined within national boundaries" (United Nations Office of the High Commissioner for Human Rights 2003:69). The legislator, thus, needs, at the time of enacting new laws, not to restrict himself to local realities. However, he needs to foresee the requirements of the interaction of domestic laws with foreign laws, especially with the increasing transparency of national borders due to globalization. The same effort habitually made to harmonize newly enacted laws with pre-existing ones needs to be made to harmonize the newly enacted laws with foreign laws and prevent stalemate in international cooperation. This does not mean that the legislative authority has to check every State's laws for comparison. It only means that the legislator must consider specific features of the leading international legal models to facilitate the smooth operation of international cooperation against serious crime. This can only be achieved through sensitizing the legislators and educating them on the differences between legal systems and the impact of these differences on international cooperation and human rights.

At the Regional Level. Before even UNSC Resolution 1373 had been voted in 2001, the difficulties encountered by States in handling international cooperation compelled them to negotiate bilateral and regional arrangements and agreements to overcome those obstacles, mainly due to the inherent differences between their legal systems. Two examples from Europe and Africa are presented to show how regional cooperation can yield better results in tackling the problem: the European arrest warrant and the Rabat Convention on Mutual Legal Assistance and Extradition against Terrorism.

The European arrest warrant is a procedure put in place according to the Framework Decision adopted by the Council of the European Union on 13 June 2002. This procedure has been meant to replace the complex and time-consuming formal extradition procedure between European States with a simplified system of surrender based on the following foundational principles:

[30] *Ramda v. Secretary of State* (above note 25), para. 6.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

- The principle of mutual recognition, described by the European Council as the "cornerstone" of judicial cooperation, is based on a high level of confidence between Member States as to the fairness of the procedures and decisions taken in the issuing States.[31] It constitutes, furthermore, a serious guarantee for Member States to extradite their nationals.
- The judicial authority-to-judicial authority principle strengthened the judicial character of the procedure by restricting the involvement of the executive authority to practical and administrative assistance (Lecrubier 2002:67).
- The removal of the double criminality requirement principle. Double criminality, which has long constituted a serious obstacle to international cooperation, is no longer required for a list of offences, including serious crimes such as terrorism, corruption and money laundering (Article 2 of the framework decision).

Despite the European arrest warrant's relevance and success in reducing the delay in handling European judicial cooperation, it is not widely accepted within the European community. The German Supreme Court, for instance, has recently ruled on the unconstitutionality of the procedure because it conflicts with the German Constitution's provision prohibiting the extradition of German nationals. Furthermore, the framework decision establishing the European arrest warrant lacks universal reach because it is based on subjective criteria specific to European countries and cannot constitute a reliable solution to the problem.

We will now turn to the Rabat Convention on Mutual Legal Assistance and Extradition against Terrorism. With the assistance of the UNODC and the Organisation Internationale de la Francophonie, the ministers of justice of 29 French-speaking African States met in Rabat city, capital of Morocco, on May 2008 and signed a Convention on Mutual Assistance and Extradition against Terrorism.[32] Amongst the problems facing judicial cooperation between these countries was that their legal systems provided for capital punishment, such as the Moroccan and Algerian ones. In contrast, others had already abolished that penalty, such as the Senegalese.

A solution inspired by the Moroccan experience was proposed during the negotiations. Morocco, indeed, gave up the death penalty for the sake of facilitating judicial cooperation with its international partners. Article 11 of the Convention on Extradition signed on 30 May 1997 between The Kingdom of Morocco and the Kingdom of Spain stipulates that: "If the acts for which extradition is sought are punishable by death under the law of the requesting State, this penalty shall be substituted by the one provided for the same acts in the law of the requested State."[33] This solution did, however, not meet the general acceptance of the negotiating

[31]See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). Retrieved 30 June 2023 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584).

[32]The Convention was signed at the Fifth Conference of the Ministers of Justice of Francophone African countries for the implementation of the universal instruments against terrorism held in Rabat, Morocco, 12–16 May 2008.

[33]المادة 11: "إذا كانت الأفعال المطلوب من أجلها التسليم معاقب عليها بالإعدام بموجب قانون الدولة الطالبة، فإن هذه العقوبة تستبدل بتلك المنصوص عليها لنفس الأفعال في قانون الدولة المطلوب إليها التسليم." See the body of the Convention: https://www.justice.gov.ma.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

parties. They, in contrast, preferred a middle solution, leaving it up to the interested States to decide on the suitable penalty to impose. Consequently, the disposition that met the general agreement stated that: "If the penalty provided in the law of the requesting State for the offenses for which extradition is sought is not provided in the legislation of the requested State Party, this penalty is substituted, by agreement between the two States Parties, by the penalty provided for the same offenses under the law of the requested State Party (article 37)."

At the International Level. One of the consequences of globalization is that it decreased States' traditional powers to benefit both national and international non-State actors. The sovereignty of States is no longer as absolute as it used to be. States can, for example, no longer do whatever they want within their borders. They increasingly need to report to international organizations such as the UN and its specialized agencies on many issues, such as human rights and terrorism fighting.

The experience of the international community's struggle with terrorism demonstrates that an international, sometimes forceful, action needs to be taken to overcome both States' reluctance and inter-legal system differences for good international cooperation against serious crime. After massive efforts culminating in establishing 16 universal instruments that provided a coherent legal framework, the international community is now working on drafting an integrated and comprehensive international convention that will incorporate all components of the existing universal legal framework against terrorism. A similar international convention on extradition and mutual legal assistance would minimize the relevance of the different legal systems' differences and strengthen international cooperation by the same token. According to Jean Maillard (2001:81):

> judicial cooperation should no longer be designed merely for its own purposes, as a specific field concerning only judges and police officers on the one hand, and people whose freedoms are threatened on the other. It should simply be one particular function of an international system in which cross-border relations are governed by appropriate common legal norms, whatever the nationality or locality of the natural persons or legal entities concerned.

Such an international convention is possible and desirable if we need to ensure a universal reach and a successful operation to the principle "*aut dedere aut judicare*". However, two conditions need to be fulfilled to prepare the terrain for the establishment and successful operation of the new Convention. First, we need to break down the sovereignty barriers embedded in most international conventions, which seriously hamper international cooperation against serious crime. Whether in the field of extradition or mutual legal assistance, the striking observation is that all international conventions insist upon the primacy of the law of the requested State. Article 13 of the Convention on the Physical Protection of Nuclear Material (1979) states, "The law of the State requested shall apply in all cases." One would easily predict the outcome of the cooperation between two States with inherently different legal systems. The solution to this matter of fact would undoubtedly be the establishment of an international convention that replaces the prevailing State

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

sovereignty-oriented system of international cooperation with a system of international uniform rules that would govern international cooperation and yield the same results regardless of the orientation of the legal systems of the States involved.

The second condition has more to do with States' technical capacity and ability to implement the proposed international uniform rules efficiently. One must admit that to be efficient, the technical assistance programmes provided to developing countries must be enhanced in quality and intensified in quantity to bring these countries up to international standards of justice and the rule of law.

Changes in Practices

As is the case for the legislator, lawyers, judges, prosecutors and defence lawyers need to be sensitized on the differences between different legal systems and their potential impact on the effectiveness of international cooperation against serious crime. The actions to be taken in this regard must primarily tackle the problem of ethnocentrism. Some consider it a serious bar to learning from others (Roberson and Das 2008:3).

The rising caseload due to the noticeable increase in criminal activity combined with the ever-growing complexity of cases pushes lawyers to focus more on their own systems. In addition, misunderstandings of how the other legal systems work lead lawyers, unconsciously yet sometimes purposefully, towards developing a tendency of solid ethnocentrism that regards one's legal system as superior to the other's (Roberson and Das 2008:2). This will inflict a serious prejudice on international cooperation.

There is a bouquet of actions that can be taken to remedy the problem of ethnocentrism. One action would be to break down the inter-legal system barriers of ignorance through targeted programmes dedicated to would-be lawyers in law schools and judicial schools, such as the Moroccan Institut National des Etudes Judiciaires and to practising lawyers in the form of seminars or training sessions. Another action would be undertaken through exchange programmes between countries with different legal traditions or the exchange of liaison magistrates.

CONCLUSION

This article has tried to examine an area that, despite its significance to international cooperation and human rights, has surprisingly been ignored by comparative studies of criminal justice systems: the impact of the inherent differences between world legal systems on the effectiveness of international cooperation against serious crime and on human rights. For that purpose, it has introduced the internationally prevailing civil law and common law legal systems, has identified the most relevant differences between them, and has, based on ongoing cases as well as on settled ones such as the *Ramda* case, evaluated the far-reaching negative consequences of these differences on both the effectiveness of international cooperation and international human rights.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

The solutions the article proposes to enhance international cooperation against serious crime include various actions that must be taken at both the system and practice levels. National laws must be framed at the system level to remove possible obstacles to international cooperation. This requires raising awareness among the legislature on the necessity of considering the need for international cooperation when enacting new laws. However, establishing an international convention that sets uniform rules governing international cooperation, including the necessary guarantees for international human rights, would be a better option. After all, the differences between legal systems did not impede the creation and operation of international tribunals such as the International Criminal Court. The UK and European Union extradition acts concluded, respectively, on 31 March 2003 and 25 June 2003 with the United States are a clear example that where the political will is there, the apparent differences between legal systems do not stand in the face of international cooperation (Jones and Doobay 2006:20–3).

Practically, judges, prosecutors and defence lawyers must be sensitized to the differences between legal systems and their potential consequences on international cooperation.

To conclude, the differences between legal systems are for international cooperation what a ring is for the whole chain. Unless these differences are adequately acknowledged and resolved, the principle "*aut dedere aut judicare*" will continue to lack the effectiveness needed to counter serious crime.

Acknowledgements. I thank my mother, who has never been to school, and my father, sisters and brothers for their continuous support. I also pay a special tribute to the UNODC and the Centre for International Studies and Diplomacy for their precious help. My warm thanks go also to my colleagues at the Court of Cassation of the Kingdom of Morocco for their insightful critique and to the Editor of the *Annals* for the careful editing of the article's text.

References

BBC. 2005. "Bosnian Police Investigate Claims London Bombing Suspect Lived in Brcko." 13 July 2005, retrieved 12 June 2023 (http://www.slobodan-milosevic.org/news/nn071305.htm).

Council of Europe. 1997. *The Role of the Public Prosecution Office in a Democratic Society*. Strasbourg: Council of Europe Publishing.

Feeney, Floyd and Joachim Herrmann. 2005. *One Case – Two Systems: A Comparative View of American and German Criminal Justice*. Ardsley, NY: Transnational Publishers.

Feest, Johannes and Masayuki Murayama. 2000. "Protecting the Innocent: A Case from Spain, Virtually Compared to Germany and Japan." Pp. 49–67 in *Contrasting Criminal Justice Getting From Here to There*, edited by David Nelken. Aldershot: Dartmouth Publishing Company.

Holleaux, Georges. 2002. "Le cas de Monsieur Rachid Ramda, ou la chronique d'une extradition annoncée." P. 62 in Associazione SOS Attentats, *Livre Noir: Terrorisme et responsabilité pénale internationale – Recueil des contributions préparatoires au Colloque, 5 février 2002*. Paris: S.O.S. Attentats.

Jackson, J. 1997. "Judges and Juries in the Criminal Trial Process." P. 411 in *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence*, The Hague, the Netherlands, 1–5 December 1995, edited by J. F. Nijboer and J. M. Reijntjes. Lelystad: Koninklijke Vermande.

Jones, Alun and Anand Doobay. 2006. "Extradition Arrangements with the USA." P. 34 in *Cross-border Crime: Defence Rights in a New Era of International Judicial Co-operation*, edited by Marisa Leaf. London: Justice.

Lecrubier, D. 2002. "Mandat d'arrêt européen." P. 67 in Associazione SOS Attentats, *Livre Noir: Terrorisme et responsabilité pénale internationale – Recueil des contributions préparatoires au Colloque, 5 février 2002*. Paris: S.O.S. Attentats.

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

Maillard, Jean. 2001. "Legal Co-Operation Concerning Activities in Offshore Countries: Proposals for Solutions." P. 77 in *International Co-operation in the Fight Against Corruption and Offshore Financial Centres: Obstacles and Solutions: Programme of Action Against Corruption: 4th European Conference of Services Specialised in the Fight Against Corruption, Limassol (Cyprus), 20–22 October 1999*. Strasbourg: Council of Europe Publishing.

Nelken, David. 2000. *Contrasting Criminal Justice Getting from Here to There*. Aldershot: Dartmouth Publishing Company.

Opolot, James S. E. 1980. *An Analysis of World Legal Traditions*. Jonesborough, TN: Pilgrimage Press.

Pakes, Francis. 2008. *Comparative Criminal Justice*. Cullompton: Willan Publishing.

Roberson, Cliff and Dilip K. Das. 2008. *An Introduction to Comparative Legal Models of Criminal Justice*. Boca Raton, FL: CRC Press.

Sadouk, R. 2013. *Strategy for Developing Justice in Morocco*. Casablanca: Dar Annachr.

Tefft, Bruce. 2005. "Probe of London Attacks Targets a Network of Radicals in Europe." 11 July 2005, retrieved 12 June 2023 (http://www.mail-archive.com/osint@yahoogroups.com/msg12305.html).

Terrill, Richard J. 2003. *World Criminal Justice Systems A Survey*, 5th ed. Cincinnati, OH: Anderson Publishing.

Thaman, S. C. 1997. "The Jury as Catalyst for the Reform of Criminal Evidentiary Procedure in Continental Europe: The Cases of Russia and Spain." P. 393 in *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence*, The Hague, the Netherlands, December 1–5, 1995, edited by J. F. Nijboer and J. M. Reijntjes. Lelystad: Koninklijke Vermande.

United Nations Office of the High Commissioner for Human Rights. 2003. *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism*. New York: United Nations and OHCHR Publications.

United Nations Office on Drugs and Crime. 2004. *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*. Retrieved 15 June 2023 (https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf).

United Nations Office on Drugs and Crime. 2008. *Legislative Guide to the Universal Legal Regime Against Terrorism*. New York: United Nations. Retrieved 13 June 2023 (https://www.unodc.org/documents/terrorism/Publications/Legislative_Guide_Universal_Legal_Regime/English.pdf).

United Nations Office on Drugs and Crime. 2009. *Delivering Counter-Terrorism Assistance: Terrorism Prevention Branch*. New York: United Nations.

United Nations Office on Drugs and Crime. 2011. *Manual for International Cooperation in Criminal Matters Related to Terrorism*. New York: Terrorism Prevention Branch.

United Nations Office on Drugs and Crime. 2023. "Partnerships and Funding." Retrieved 29 June 2023 (https://www.unodc.org/unodc/en/donors/index.html).

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

TRANSLATED ABSTRACTS

Abstracto

La sociedad internacional ha asistido recientemente al surgimiento de dos tendencias interrelacionadas: por un lado, el aumento significativo de los delitos transnacionales, que constituíen un serio desafío a las capacidades tradicionales de seguridad de los Estados, y el aumento notorio en el número de instrumentos internacionales establecidos para llevar ese desafío a niveles aceptables, por otra parte. El gran énfasis que la comunidad internacional ha puesto en el principio "*aut dedere aut judicare*" para fortalecer el régimen legal universal contra los delitos graves y negar refugio seguro a sus perpetradores es desafiado no solo por consideraciones políticas, legislativas y prácticas relacionadas con la falta de ratificación e incorporación de convenciones internacionales y de la gran disparidad entre los Estados en cuanto a su capacidad de implementación, sino también por las diferencias inherentes entre los diferentes sistemas legales de los Estados. Esta es un área que, a pesar de su relevancia para la cooperación internacional y los derechos humanos, ha sido ignorada durante mucho tiempo por los estudios comparativos de justicia penal. Basado en casos reales como los casos de Ramda y El Guerbouzi, este artículo examina y evalúa el impacto de las diferencias entre los sistemas de derecho civil y derecho consuetudinario en la eficacia de la cooperación internacional y los derechos humanos. Argumenta que, a menos que estas diferencias se reconozcan y se aborden adecuadamente, los autores de delitos graves seguirán constituyendo una grave amenaza para nuestra paz y seguridad.

Palabras clave delitos transnacionales; distintos sistemas jurídicos; convenciones internacionales; disparidad entre Estados; common law; civil law; cooperación internacional; *aut dedere aut judicare*

Abstrait

La société internationale a récemment assisté à l'émergence de deux tendances interdépendantes : d'une part, l'augmentation significative des crimes transnationaux, qui constituaient un sérieux défi pour les capacités traditionnelles de sécurité des États, et l'augmentation notable du nombre d'instruments internationaux mis en place pour amener ce défi à des niveaux acceptables, d'autre part. L'accent mis par la communauté internationale sur le principe « *aut dedere aut judicare* » pour renforcer le régime juridique universel contre les crimes graves et refuser l'asile à leurs auteurs est remis en question non seulement par des considérations politiques, législatives et pratiques relatives à l'absence de ratification et d'incorporation des conventions internationales et la grande disparité entre les États quant à leur capacité de mise en œuvre, mais aussi par les différences inhérentes entre les différents systèmes juridiques des États. Il s'agit d'un domaine qui, malgré sa pertinence pour la coopération internationale et les droits de l'homme, a longtemps été ignoré par les études comparatives de justice pénale. Basé sur des cas réels tels que les affaires Ramda et El Guerbouzi, cet article examine et évalue l'impact des différences entre les systèmes de droit civil et de common law sur l'efficacité de la coopération internationale et les droits de l'homme. Il soutient que, à moins que ces différences ne soient reconnues et correctement traitées, les auteurs de crimes graves continueront de constituer une menace sérieuse pour notre paix et notre sécurité.

Mots-clés crimes transnationaux; systèmes juridiques differents; conventions internationales; disparite entre États; common law; droit civil; cooperation internationale; *aut dedere aut judicare*

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

抽象的
近期, 国际社会出现了两个相互关联的趋势：一方面, 跨国犯罪显着上升, 对国家传统安全能力构成严重挑战；另一方面, 国际文书数量显着增加 另一方面, 使挑战达到可接受的水平。
国际社会高度重视“aut dedere aut judicare”原则以加强打击严重犯罪的普遍法律制度并拒绝为犯罪者提供安全避难所, 这不仅受到政治、立法和实际考虑的挑战国际公约的批准和纳入以及各国之间在执行能力方面的巨大差异, 以及各国不同法律制度之间的内在差异。 这是一个领域, 尽管它与国际合作和人权相关, 但长期以来一直被刑事司法比较研究所忽视。
本文基于拉姆达案和埃尔古尔布齐案等实际案例, 考察和评估大陆法系与英美法系之间的差异对国际合作有效性和人权的影响。 它认为, 除非承认并妥善处理这些差异, 否则严重犯罪者将继续对我们的和平与安全构成严重威胁

关键词 跨国犯罪；不同的法律制度；国际公约；国家之间的差异；普通法；民法；国际合作；aut dedere aut judicare

خلاصة
شهد المجتمع الدولي مؤخرا ظهور اتجاهين مترابطين: من ناحية ، الارتفاع الكبير في الجرائم عبر الوطنية ، والتي شكلت تحديا خطيرا للقدرات الأمنية التقليدية للدول ، والزيادة الملحوظة في عدد الصكوك الدولية الموضوعة لرفع هذا التحدي إلى مستويات مقبولة ، من ناحية ثانية.
إن التركيز الكبير الذي أولاه المجتمع الدولي على مبدأ "التسليم أو المحاكمة" يعزز النظام القانوني العالمي ضد الجرائم الجسيمة وحرمان مرتكبيها من الملاذ الآمن لا يعارض فقط مع الاعتبارات السياسية والتشريعية والعملية المتعلقة بهذا النقص. التصديق على الاتفاقيات الدولية وإدماجها والتفاوت الواسع بين الدول فيما يتعلق بقدرتها على التنفيذ ، ولكن أيضا من خلال الاختلافات المتأصلة بين الأنظمة القانونية المختلفة للدول. هذا مجال ، على الرغم من علاقته بالتعاون الدولي وحقوق الإنسان ، تم تجاهله منذ فترة طويلة من قبل الدراسات المقارنة للعدالة الجنائية.
استنادا إلى قضايا فعلية مثل قضية الرمدة والكربوزي ، تبحث هذه المقالة وتقيم تأثير الاختلافات بين أنظمة القانون المدني والقانون العام على فعالية التعاون الدولي وحقوق الإنسان. وتقول إنه ما لم يتم الاعتراف بهذه الاختلافات والتعامل معها بشكل صحيح ، فإن مرتكبي الجرائم الخطيرة سيظلون يشكلون تهديدا خطيرا لسلامنا وأمننا.

الكلمات المفتاحية الجرائم عبر الوطنية; الأنظمة القانونية المختلفة; الاتفاقيات الدولية; التفاوت بين الدول; القانون; العام; القانون المدني; التعاون الدولي; التسليم أو المحاكمة; قضية رمدة وا

https://doi.org/10.1017/cri.2023.18 Published online by Cambridge University Press

Rachid Sadouk is an advocate general at the Court of Cassation of Morocco with more than 28 years' experience in the field of justice, development and international cooperation. He holds a PhD in Law from Casablanca University titled "Strategy for Developing Justice in Morocco" and a Master's degree in International Security, International Law and Diplomacy from London University, School of Oriental and African Studies (SOAS) in 2009. He has actively participated in UNODC training workshops and legal drafting activities in more than 20 sub-Sahara African countries providing significant advice on international judicial cooperation and contributing to the enhancement of the skills of more than 600 law enforcement practitioners.

Cite this article: Sadouk, R. 2023. International Cooperation, Criminal Justice and Human Rights: The Missing Link. *International Annals of Criminology* **61**, 103–130. https://doi.org/10.1017/cri.2023.18