Brexit: Opportunities, Challenges and the Road Ahead

Britain in Europe Policy Report
Brunel University London
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BRITAIN IN EUROPE

Brunel University London

About Britain in Europe

The Britain in Europe think tank brings together academics from a wide range of disciplines, legal practitioners, civil servants, business leaders and NGO members from across the UK and Europe.

Britain in Europe members produce original research and influence public policy, offering a platform for evidence-based evaluations of Britain's interactions with the EU and its institutions, and the role of the UK within Europe more generally.

The think tank was founded in October 2015, and is based at Brunel University London.

FOREWORD

Before the people of Britain voted on 23 June many, myself included, questioned what good could possibly come of excluding our island from the top table in Europe.

How, we asked, could British businesses, many of which have thrived in the single market, continue to compete with their counterparts across the Channel? And how attractive would Britain be to foreign investment while subject to the economic uncertainty predicted of Brexit?

Would our universities, considered to be among the best in the world, fall short of this accolade if isolated from one of the sources of their strength? It wasn't too hard to imagine a future in which our most fruitful collaborations across the continent cease to exist, while staff and students from the EU seek opportunities closer to home.

Perhaps most worryingly, we thought our actions at the polling stations might send a message to our closest neighbours that the UK was no longer open to them - a societal perception alien to anyone born in the past 60 years.

Now that we can be considered post-referendum, yet no closer to being post-Brexit, we can truly address those questions from an academic perspective.

It is no longer good enough to simply bemoan or celebrate the decision the country made, but to use our collective knowledge and experience to predict our future. Most importantly, we must consider the challenges and opportunities on the horizon.

In this policy report, the Britain in Europe think tank has done just that, with a view to adding to a discussion on issues that affect every one of us. The group has assembled the best legal minds from across a spectrum of disciplines, each drawing upon their knowledge and experience to answer the biggest questions arising from Brexit.

Their arguments range from seeing Brexit as a catalyst for constitutional change to considering the likely loss of UK influence in environmental policy, and no stone is left unturned.

I would like to thank the founder of Britain in Europe, Dr Dimitrios Giannoulopoulos, and the many exceptional minds that make up membership of the think tank for contributing to this substantial report. I believe that the arguments within bring much-needed clarity to the subject and will drive discussions to come.

Prof Julia Buckingham
Vice Chancellor, Brunel University London

Brunel University London

Celebrating 50 years

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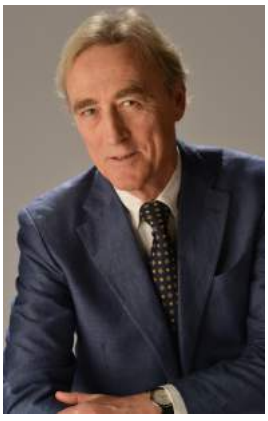

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Scott Crosby is a solicitor and advocate based in Belgium. He is the Human Rights Officer at the European Criminal Bar Association and the Editor of the New Journal of European Criminal Law. Scott practises before the General Court of the European Union, the Court of Justice of the European Union, the European Court of Human Rights and Competition regulators at EU and Member State level and the Belgian Courts (occasionally in cross-border cases and in cases with an EU or ECHR element).

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Dr Dimitrios Giannoulopoulos

Dr Dimitrios Giannoulopoulos is the founder of Britain in Europe. He is a College Associate Dean at Brunel University London, Senior Lecturer in Criminal Law and an Academic Fellow of the Honourable Society of the Inner Temple. He holds a PhD in Comparative Law from the Sorbonne Law School (Paris I) and is a Senior Fellow of the Higher Education Academy. He has published extensively on fair trial rights, the ECHR and comparative criminal procedure, collaborates closely with international human rights NGOs such as Fair Trials International and the Open Society Foundations, and frequently provides consultation - and commentary to the media - in relation to legal and political affairs in the UK, France and Greece.

Prof Andrew George

Prof Andrew George is Deputy Vice Chancellor (Education and International) and Professor of Immunology at Brunel University London. He has published widely in the field of immunology and the development of molecular therapies to treat disease. He contributes to research ethics and governance, and is Chair of the National Research Ethics Advisors' Panel. He got a BA from Cambridge, followed by a PhD from Southampton. After holding a Beit Memorial Fellowship he went on to work at the National Institutes of Health in the USA before returning to the Royal Postgraduate Medical School (Hammersmith Hospital), which became part of Imperial College London. He has been awarded a DSc from Imperial. At Brunel he is responsible for the education and international strategies of the University.

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Dr Christian Heitsch is lecturer in law at Brunel University London, and has previously worked in private practice and higher education in Germany and the U.S. As part-time advisor with a German law firm, he recently prepared a submission to an international supervisory body – the Aarhus Convention Compliance Committee –, alleging that German environmental law is incompatible with the Aarhus Convention about public participation and access to justice in environmental matters. He teaches Public, European Union and Environmental Law, and his research focusses on Human Rights and Environmental Law.

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Sir Geoffrey Nice QC has practiced as a barrister since 1971 and is renowned for leading the prosecution of Slobodan Milošević, former President of Serbia. Much of his work since has been connected to cases before the permanent International Criminal Court or pro bono for victims groups whose cases cannot get to any international court.

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Jonathan Rushworth is a retired solicitor, whose legal career was at a major City of London law firm. He was a partner in the firm with a broad ranging company and finance practice. He was on a number of professional committees and wrote and lectured extensively on legal topics. In addition to pursuing charity and history interests since retiring from legal practice, he has worked with Dr Michael Schluter and others on the analysis and practical approach to put relationships and the interests of others at the heart of society rather than a focus on the rights and interests of the individual with a narrow materialistic approach.

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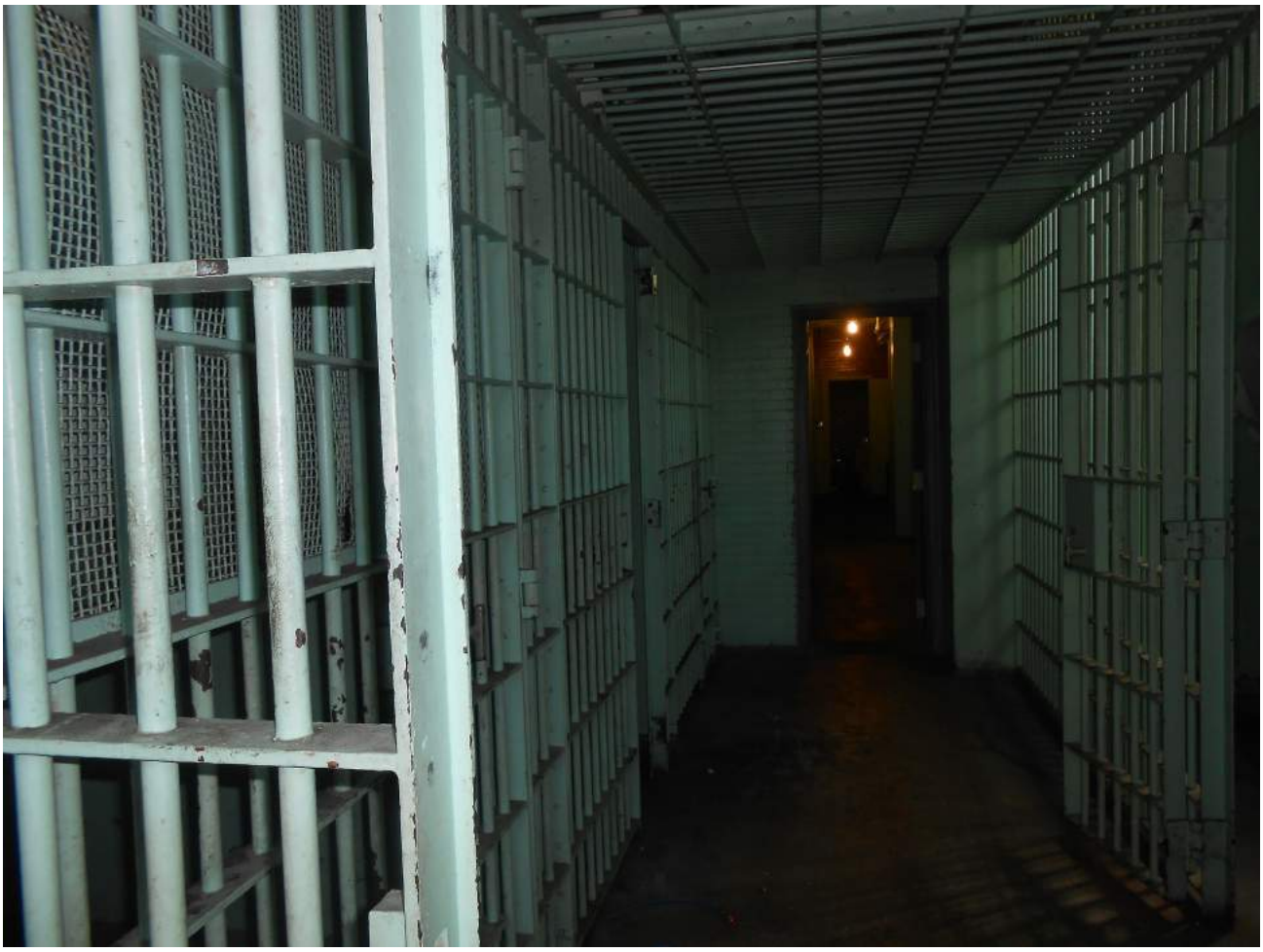
Sir Geoffrey Nice QC - "Post Brexit lawyers will be operating in a new environment where the supremacy of international human rights norms can not be so easily taken for granted and if – in our country or elsewhere – it becomes acceptable to slip back from today's liberal norms – for economic, ethnic, cultural, demographic reasons – then lawyers may have to confront our state more directly than has been their responsibility to date."



MULTI-LEVEL COOPERATION IN CRIMINAL JUSTICE POST-BREXIT: THE CASE OF THE EUROPEAN ARREST WARRANT AND EXTRADITION

Gerard Conway

Introduction

The UK has been quite a reluctant participant in the criminal justice competence of the EU, since the EU developed competence in this sphere from the Treaty of Maastricht onwards in 1992. Today, following the Treaty of Lisbon, which came into effect in late 2009, the EU has the potential for considerable involvement in criminal procedure and the criminal justice systems of Member States. It has competence in both procedural (Article 82 TFEU) and substantive (Article 83 TFEU) criminal law (in – rather loosely – defined areas), along with the presence in Article 86 TFEU of the legal basis for a European Public Prosecutor (EPP). The EPP, which is currently the subject of a legislative proposal from the European

Commission,[1] is of huge potential significance, representing the direct involvement of the EU in the criminal enforcement and procedure of the Member States. The UK has opted out of much of the legal instruments adopted by the EU in criminal matters,[2] the possibility of opt-out having been provided for under the Treaty of Lisbon (in an interesting example of a reversal of integration).

The UK might legally operate something similar to the surrender scheme entailed in the European Arrest Warrant (EAW) when it is outside the EU. This could be achieved quite easily in terms of the legal form it would take, the UK would just need to sign an extradition treaty with the EU (as the US has done).[3] The EAW has now become a familiar part within the UK of mutual legal assistance relations with EU Member States, although at a political level, a similar arrangement post-Brexit might have to be made part of the overall agreement the UK makes with the EU as it leaves (rather than being something that can be considered on a standalone basis). This contribution focuses on the possibility of retaining elements of the current EAW arrangement post-Brexit. Such a post-Brexit extradition treaty between the EU and the UK could entail provisions similar to the EAW, although there would be details to work out like the status of ECJ caselaw on the EAW in UK courts post-Brexit. Alternatively, the UK could just revert to the European Convention on Extradition of 1957,[4] adopted under the auspices of the Council of Europe, which it operates with European countries not in the EU, and apply this again in its relations with EU Member States. The UK already had a special backing of warrants procedure with Ireland, so flexible extradition arrangements have always been possible in public international law (the EAW was sometimes slower than the warrant procedure the UK previously had with Ireland, although the EAW is quicker than the Council of Europe convention procedure).

The Council of Europe Convention on Extradition 1957

The Extradition Convention 1957 of the Council of Europe is the first major example of a comprehensive attempt to regulate extradition multilaterally. International law has for long recognised the possibility for States to hand over fugitives to another jurisdiction.[5] Extradition has mostly operated at a bilateral level. Multilaterally, extradition rules have tended to be a small part of multilateral treaties on some other substantive matter. The European Convention on Extradition 1957 and the EAW are both important developments in extradition law understood as a part of international law. However, international law imposes relatively few limitations on the power of States to agree extradition rules amongst themselves. Rather, international customary and treaty law recognises certain standard practices, e.g. that States may refuse to extradite a person for political offences. One requirement that international extradition practice tends to impose is double criminality: to be extraditable, the offence must have existed in the criminal law of both the requesting and the requested State (reflecting the principle of legality - *nullem crimen sine lege* - or non-retroactivity) (there may be scope for debate, notwithstanding EU practice to the contrary, as to whether non-retroactivity is a general principle of international law and thus in principle not something from which States can agree to derogate).

The purpose and advantage of the Council of Europe Convention on Extradition of 1957 was to provide a standard framework in Europe for extradition between signatory States. It largely reflects existing extradition practices, including, for example, double criminality (Article 2(1), i.e. the offence must have existed in the criminal law of both States), the rule of speciality (Article 14, i.e. the extradition request is

only granted regarding a specified offence and another offence may not be prosecuted), the discretion of States to exclude offences from being extraditable (Article 2(3)), the exclusion of political offences (Article 3), double jeopardy or *ne bis in idem* (Article 9), and transmission through diplomatic (rather than judicial) channels (Article 12). The main innovation was its removal of the traditional requirement that the requesting State demonstrate a *prima facie* case (which is itself lower than States sometimes require, e.g. the US requires that probable cause be demonstrated). The UK removed the prima facie case requirement in s. 9 of the Extradition Act 1989 (this was later replaced by the Extradition Act 2003).

The European Arrest Warrant (EAW)

The EAW[6] was adopted in the aftermath of the attacks on the United States in New York on September 9/11. It represents quite a radical innovation compared to pre-existing extradition practice, whether that operated bilaterally between countries or multilaterally.

Among its main features are:

- The arrest warrant applies to all offences punishable by a custodial sentence of over a year or when a person has been sentenced to a custodial or detention order exceeding four months (Article 2(1))

- There is no requirement to demonstrate a threshold of likelihood of the guilt of the accused (whether a *prima facie* case or probable cause)

- The double criminality requirement is removed for a wide-ranging list of 32 offences, one of the more problematic aspects of the EAW since it appears to undermine the principle of legality or non-retroactivity (Article 2(2))

- The decision on extradition or surrender (the EAW uses the latter term) is exclusively for courts, rather than the executive (Recital 8 and Article 1(1))

A key issue to address in adopting the Framework Decision on an EAW was the difference between common law and civil law legal traditions in criminal procedure. Perhaps of most significance here is the requirement that Ireland and the UK imposed in their implementing legislation that a decision on charging must have been made before the request for surrender, in order to prevent investigative detention (in Ireland in the European Arrest Warrant Act 2004, s. 11(3) and in the UK in s. 12A of the Extradition Act as amended) (generally prohibited in common law tradition, but accepted in civil law tradition). Whether these latter provisions would survive ultimately review by the Court of Justice of the EU is uncertain, but the Court has not been as activist or creative (although there are examples of activism in this area too) in criminal justice matters to date as it has in other areas of its caselaw.

The 'backing of warrants' procedure between the UK and Ireland

Ireland and the UK adopted a special, expedited form of extradition in response to the political and legal problems posed by the Northern Ireland conflict. In Ireland, this was implemented through an amendment

to the Extradition Act 1965, with a new Part III. In the UK, the new procedure was implemented by the Backing of Warrants (Republic of Ireland) Act 1965. The procedure is generally considered to have worked very well, especially for non-political offences (traditionally political offences are a ground for refusing extradition). The backing of warrants procedure involved mutual recognition of the validity of arrest warrants issued in the other jurisdiction so long as the arrest warrant was endorsed in the appropriate way by a magistrate. Where a suspect consented to extradition, the person could be transferred to the requesting jurisdiction within a day, and even where the suspect did not consent, extradition could be achieved in around 15 days. By comparison, the respective maximum periods under the EAW are 10 days (with consent) and 60 days (without consent) (Article 17).

The ability to agree this procedure reflected the similarity and mutual familiarity of the legal systems of Ireland and the UK. In the implementation by Ireland and the UK of the EAW, in its initial period, considerable delays could be caused in the requested Member States in efforts to ensure that a surrender to an unfamiliar legal system would not be compromised. As mutual familiarity between systems developed, concerns of this nature tended to drop away somewhat.

Concluding comment

A comparison of the EAW with 'traditional' extradition law is an instructive example of the multi-level character of legal cooperation and how flexibility and innovation can exist outside of an EU framework, while at the same time being open to learning about what positive elements exist within EU practice. While the EAW procedure undoubtedly has some advantages, chiefly in the standardisation of procedure and the relative expedition in the overall process relative to normal extradition (some consider the reduction of the role of the executive a desirable feature of the EAW also), an even more flexible procedure had previously been agreed by Ireland and the UK. This practice by Ireland and the UK (which has been superseded by the EAW) reflects the normal faculty of States under international law to mutually agree their sovereign preferences. Thus, the UK and the EU are free to adopt much of the context of the EAW post-Brexit, if they both agree. The partial removal of the double criminality requirement in the EAW is normatively questionable because it is in tension with the non-retroactivity principle, and thus the UK might seek to avoid this element of the EAW in any post-Brexit extradition treaty with the EU. Judicial enforcement and the role of the Court of Justice of the EU post-Brexit might be thought a problem, but in this context would not be any different to what normally happens in extradition internationally: each jurisdiction would be bound by its own court decisions on the matter and efforts to reconcile problematic caselaw could proceed by legislative and treaty amendment (the UK would follow the rulings of its Supreme Court and the EU would follow the rulings of the Court of Justice).

As a final comment, an alternative scenario is that the UK would enter into extradition agreements on a bilateral basis with individual EU Member States. Under the area of the EU Treaties in which criminal justice falls – the Area of Freedom, Security and Justice – the EU Member states retain their power to enter into external relations agreements (a power they have lost regarding internal market matters). Given that multilateral cooperation has been well developed in Europe (most European countries have signed the European Convention on Extradition of 1957[7]), however, this bilateral approach should not be necessary.

Notes

1. Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office /* COM/2013/0534 final - 2013/0255 (APP).

2. Protocol 36 of the Treaty of Lisbon allowed the UK to opt out, by 31st May 2014, of approximately 130 police and criminal justice adopted by the EU. The UK decided to opt in to 35 of these measures, including the European Arrest Warrant.

3. Agreement on Extradition between the European Union and the United States of America, entered into force 1st February 2010, OJ L 181, 19.07.2003, p. 27.

4. ETS 024.

5. The practice of extradition has existed from antiquity, although the term itself only came into use in the late 18th century: see C. Blakesley, 4(1) *Boston College International and Comparative Law Review* 39-60 (1981).

6. OJ L 190, 18.07.2002, p. 1.

7. See < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=ztDhMhcR > (a total of 50 States have ratified it, including some outside of Europe).

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