

BOFAXE

Another Reason to Maintain Friendly Relations

On Julian Assange, Edward Snowden, and the Practice of Extraditing Wanted Individuals

— Julian Assange could soon face extradition to the United States. For years, this case has drawn public attention to the law and practice of extradition.

This post briefly illustrates the legal framework for extraditions, before moving on to two examples where similar extradition requests are treated entirely different: Julian Assange and Edward Snowden. Both individuals face extradition requests from the United States, primarily for charges related to espionage. Crucially, the requested states are different (UK and Russia respectively), and their varying diplomatic relations with the US play a key role in the success of these two requests. This post, therefore, aims at unravelling not only the legal but also the diplomatic and political dynamics at play in cases involving extradition requests.

Legal Framework for Extraditions

Whenever one state seeks the arrest of a wanted individual located within another state, it depends entirely on the assistance of the latter's law enforcement authorities. It is always easy for a requested state to deny or merely ignore the request, as the requesting state has no legal means to enter the other states' territory with its own law enforcement agents.

To govern the requirements and the proceedings of an ordinary extradition, many states have concluded bilateral or multilateral extradition treaties. On the European level, the European Convention on Extradition of 1957 has been ratified by all members of the Council of Europe as well as by Israel, the Russian Federation, South Africa and South Korea. However, if the requested state and the requesting state do not share an extradition treaty, the legal framework is the domestic law of the requested state. This underscores the significance of understanding the details of this domestic law. Even if a requested state's domestic law permits extradition without a treaty, the requesting state may find it challenging to enforce extradition through legal means alone.

Ban on Extradition

Furthermore, the citizenship of the wanted individual often plays a crucial role for the success of an extradition request, as many states do not extradite their own citizens to foreign states or set at least strict requirements to do so. For example, the Russian Federation enshrines a constitutional ban on the extradition of its citizens under Article 61 para. 1 of its constitution. Similar prohibitions are echoed in national legislation such as Article 692-2 of the French Code de procédure pénale.

Apart from citizenship, the principle of non-refoulement often leads requested states to refuse extraditing a wanted individual as part of the principle of non-refoulement if there is a serious risk of the individual being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. For most European states the obligation of Article 3 of the European Convention on Human Rights (ECHR) poses a significant obstacle to deporting or extraditing an individual under such circumstances, as they would eventually participate in the ill-treatment even if it occurs in another state (see, for example, *Ilias and Ahmed v. Hungary*, para. 126 with further references). In terms of the death penalty, the European Court of Human Rights' landmark decision in *Soering v. UK* in July 1989 established that a wanted individual may not be extradited from a High Contracting Party to the US if they face the death penalty there, as this would constitute a violation of Article 3 ECHR (see paras. 82-91). Consequently, in such cases, the US authorities must provide assurances that the individual will not be sentenced to death or, if sentenced, that the execution will not be carried out. Numerous extradition treaties have addressed this aspect, such as Article 13 of the Agreement on extradition between the EU and the US or Article 7 of the Extradition Treaty between the UK and the US.

Moreover, the nature of the offense itself may constitute a barrier to extradition. Article 4 para. 1 of the Extradition Treaty between the UK and the US provides that an "extradition shall not be granted if the offense for which extradition is requested is a political offense". In order to avoid any conflict about the classification of the offense, the requested state is usually entitled to determine if the request is politically motivated or not (see, for instance, Article 4 para. 3 of the aforementioned treaty).

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The Case of Julian Assange

The planned extradition of Australian citizen Julian Assange is, in many senses, different from what is usually known as an “ordinary” extradition case. Despite being an Australian national who performed actions outside US soil, he was indicted in the US for violating the Espionage Act by publishing classified military and diplomatic documents on his online platform Wikileaks.

With this platform, Assange revealed highly controversial actions of US soldiers during the Iraq war in 2003, potentially amounting to war crimes. To avoid arrest, he fled to the Ecuadorian embassy in London in June 2012, where he was granted so-called diplomatic asylum, a highly disputed legal institute that only exists in Latin America on a treaty basis. In April 2019 – after almost seven years – the ambassador allowed the British police to enter the premises to arrest Assange. He is since jailed in London’s high security prison Belmarsh where he awaits his extradition.

As the US requested the UK to extradite Assange, his case is governed by the above-mentioned Extradition Treaty between the UK and the US. Assange’s defence lawyers tried to use Article 4 of this treaty, arguing the request was politically motivated. The Westminster Magistrates’ Court rejected this line of argumentation, however, explaining that the relevant treaty does not confer a right to a wanted individual as it has not been incorporated into domestic UK law (see page 19).

The Case of Edward Snowden

Former NSA analyst and (current) US citizen Edward Snowden is another person wanted by US authorities for leaking classified NSA information. Snowden has been living in Russia for more than ten years. He managed to board the plane from Hong Kong – which has an extradition treaty with the US – to Russia – which has no extradition treaty with the US. Hong Kong authorities said they were unable to arrest Snowden upon immigration control because his middle name had been written incorrectly in the relevant documents (“James” instead of “Joseph”).

After landing in Moscow, Snowden famously spent more than a month in the transit area of Sheremetyevo airport before being granted preliminary asylum in Russia. Although the US had requested his extradition while he was still in the transit area, the Russian government denied his arrest and extradition because of the absence of an extradition treaty with the US. While the relevant provision in the Russian legislation, Article 462 para. 1 of the Russian Criminal Procedural Code, stipulates that an extradition may be performed even without an agreement, this is subject to further criteria and provides for significant discretion.

In September 2022, it became public that Snowden and his wife received Russian citizenship, thus making extradition even more unlikely as Russian authorities can easily rely on the above-mentioned Article 61 of the Russian constitution to legally deny any further extradition request.

Conclusion

The better the diplomatic relations between two states, the more likely an extradition request will be executed smoothly. Good diplomatic relations normally lead to the creation of (bilateral) extradition treaties. Even in the absence of such a treaty, a requested state may make use of its domestic extradition law in a cooperative way to help the requesting state rather than to make it difficult. If the relations are amicable, as seen between the US and the UK, extradition requests tend to face minimal scrutiny.

Conversely, strained diplomatic relations between states lacking an extradition treaty can lead to extradition issues being politicized. The applicable domestic law of the requested state could be invoked to deny an extradition request, leaving the requesting state unable to seek remedies. Above all, this signifies that either way, given good or bad diplomatic relations, extradition issues are often solved politically if the case itself is politically sensitive.