JOANNA JUDGE

MODERNISING NEW ZEALAND'S EXTRADITION LAW: A CRITIQUE OF THE LAW COMMISSION'S PROPOSAL

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2016

Abstract: *Globalisation causes crime to become increasingly transnational, thus compelling states to increase cooperation to suppress crime. New Zealand's outdated extradition laws require reform. The Government agrees with the February 2016 Law Commission Report proposing the need for new legislation to replace the Extradition Act 1999. This paper analyses the relationship between the traditional treaty-based approach to extradition and contemporary domestic extradition legislation, and how these approaches protect requested persons' post-surrender rights. This paper argues the Commission's proposal to replace s 11 of the Act (which states that bilateral extradition treaties override the Act where they are inconsistent) with a narrower provision giving treaties limited scope to "supplement" or add to domestic extradition legislation, places too much focus on domestic efficiencies while overlooking the international significance of extradition. Allowing the Act to override existing treaties will cause New Zealand to breach its international obligation to extradite under those treaties and remove the international plane as a mechanism to protect a requested person's rights. This paper concludes that New Zealand should retain s 11 in its current iteration and renegotiate treaties to reflect international human rights obligations to ensure extradition only occurs where fundamental principles of justice will be upheld.*

Key words: *extradition, bilateral extradition treaty, restriction on surrender, post-surrender rights, Extradition Act 1999.*

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I Introduction

> State decisions regarding extradition involve the intersection of domestic criminal law, complex international treaties, and often overtly political considerations, thus defying neat explanation by legal theorists.[1]

The New Zealand government is engaged in two high-profile extradition cases, each causing litigation spanning four years. In interlocutory proceedings, Kim Dotcom was denied rights to the discovery of evidence presented by the United States for his extradition.[2] Dotcom appealed the decision to extradite him claiming "double criminality" was not satisfied, and that the United States had breached its duty of candour in certifying and providing evidence, and had abused the process.[3] Korean citizen Kyung Yup Kim was granted judicial review of the Justice Minister's decision to allow his extradition on the grounds that the Minister had not explicitly addressed why she was satisfied with Chinese assurances that Kim would receive a fair trial in China.[4] Consequently, China is seeking to negotiate an extradition treaty with New Zealand to increase efficiency in anticipation of the Chinese Government's crackdown on corruption fugitives.[5] High profile cases have prompted legislative reform in Australia and Canada; the New Zealand cases raise the question of whether New Zealand extradition laws are also in need of reform and if so, in what manner.[6]

Extradition law concerns the tension between two rule of law objectives: an obligation to uphold justice by punishing crime and an obligation to protect a requested

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1 William Magnusun "The Domestic Politics of International Extradition" 52 Virginia Journal of International Law 839 at Abstract.

2 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355.

3 *Ortmann v United States of America* [2016] NZHC 522 at [16].

4 *Kim v Minister of Justice* [2016] NZHC 1490 at [259]-[261].

5 Simon Wong and Emily Lloyd Blurr "NZ-China extradition deal 'not impossible' – Key" (20 Arpil 2016) Newshub <www.newshub.co.nz>.

6 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [*NZLC IP37*] at [3.66] and [3.70], citing Joint Standing Committee on Treaties Extradition–A Review of Australia's Law and Policy (Report 40, August 2001) at [2.41].

individual's rights.[7] New Zealand's extradition law must balance these objectives on domestic and international planes in a globalised environment where crime is increasingly transnational. The New Zealand Government agrees with the February 2016 Law Commission Report proposing the need for new legislation to replace the Extradition Act 1999.[8] However, the Government's Response advises "further work is needed to finalise the detail of the proposed new legislation".[9]

This paper analyses the relationship between the traditional treaty-based approach to extradition and contemporary domestic extradition legislation, and how these approaches protect a requested person's rights post-surrender. This paper argues the Commission's proposals place too much focus on domestic efficiencies while overlooking the international significance of extradition, causing New Zealand to breach its international obligation to extradite under bilateral extradition treaties and reducing the mechanisms for the protection of a requested person's rights. It is not argued that New Zealand should only extradite where a bilateral treaty exists – that approach would be too inflexible. Instead, New Zealand should retain the provision in the Extradition Act 1999 which gives paramountcy to bilateral treaties and renegotiate treaties to reflect international human rights obligations.

Part II outlines the foundations of New Zealand's extradition law and summarises the Law Commission's proposal to adopt new legislation. Part III analyses the values and limits of a treaty-based approach and the Commission's proposal to replace s 11 of the Extradition Act 1999 (which states that bilateral extradition treaties override the Act where they are inconsistent) with a narrower provision giving treaties limited scope to "supplement" or add to domestic extradition legislation. Part IV explores the rise of human rights in extradition law and the consequent obligation on requested states to

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7 Clive Nicholls, Clare Montgomery and Julian B. Knowles *Nicholls, Montgomery and Knowles on The Law of Extradition and Mutual Assistance* (3rd ed, Oxford University Press, Oxford, 2013) at [1.02].

8 Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) [*NZLC R137*].

9 *Government Response to Law Commission Report on Modernising New Zealand's Extradition and Mutual Assistance Laws* (presented to the House of Representatives, August 2016).

inquire into a requesting state's justice system. This includes analysis of the Commission's proposal to extend restrictions on surrender to expressly obligate New Zealand courts to inquire into a requesting state's justice system. Part V concludes that the proposed departure from a treaty-based approach cannot be justified. Bilateral treaties bind New Zealand to extradite and secure accountability on the international plane for the breach of a requested individual's rights. Bilateral treaties should be renegotiated to ensure New Zealand upholds international extradition and human rights obligations.

Undeniable difficulties with this argument are acknowledged: for example, the lack of enforcement mechanisms on the international plane, the difficulties of inquiring into anticipated treatment of an extraditee in the requesting state, and practical and political obstacles associated with renegotiating bilateral extradition treaties. Comparative analysis is limited to Commonwealth jurisdictions, to reflect their influence on New Zealand's extradition law. In contrast to the Commission's focus on domestic process, this paper adopts an international law lens. Further research integrating the two would be valuable.

II Background to New Zealand's Extradition Law

A Definition

Extradition is the formal legal surrender by one state (the requested) to another state (the requesting) of a person who has been accused or convicted of a criminal offence in the jurisdiction of the requesting state, in order to be tried or punished.[10] A preliminary hearing in the requested state determines whether the requested individual is eligible for surrender. The premise of extradition is that perpetrators of crime should not be able to escape justice by fleeing one country for another, thus compelling international cooperation between states in punishing crime.[11]

New Zealand's current extradition arrangements consist of:

- The Extradition Act 1999, which covers extradition to all countries;

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10 Nicholls, Montgomery and Knowles, above n 7, at [1.01]; NZLC IP37, above n 6, at [2.1].

11 Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom's Extradition Arrangements* (Home Office, 30 September 2011) at [2.1]–[2.3].

- Membership in the London Scheme for Extradition within the Commonwealth 1966 (London Scheme);
- 41 inherited bilateral treaties entered into by the United Kingdom on New Zealand's behalf prior to 1947;
- Four bilateral treaties negotiated by New Zealand; and
- At least 25 multilateral treaties that contain extradition provisions.[12]

Extradition from New Zealand is only possible if the request relates to an extraditable person and an extradition offence, and comes from an extradition country.[13] New Zealand can extradite a requested individual to Commonwealth states under the London Scheme or to any state with which New Zealand has negotiated a bilateral extradition treaty or ad hoc extradition agreement.[14] The surrender of a requested individual will not be granted if the court or Minister deems any of the mandatory or discretionary restrictions on surrender to be satisfied.[15]

B The Influence of History and Collective Extradition Instruments

Although extradition is an essential international mechanism for suppressing crime, states are not obliged to cooperate with extradition requests under general or customary international law. Instead, "extradition treaties not only supply the broad principles and the detailed rules of extradition but also dictate the very existence of the obligation to surrender fugitive criminals".[16] The legal source of extradition evolved from a traditional conception as the desire for reciprocity through acts of international comity: "the favour accorded by one state to another".[17]

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12 See Appendix C of NZLC IP37, above n 6.

13 Extradition Act 1999, ss 3, 4, and 6 respectively.

14 Section 2.

15 Sections 7, 8 and 30.

16 Ivan Shearer *Extradition in International Law* (The University Press, Manchester, 1971) at 27; Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim*'s *International Law* (9th ed, Longman, London, 1992) at 950 [*Oppenheim*]; Nicholls, Montgomery and Knowles, above n 7, at [1.04]; and *Norris v Government of the United States of America (No 2)* [2010] 2 AC 487 at [5].

17 E Aughterson *Extradition: Australian Law and Procedure* (Law Book Co, Sydney, 1995) at 2; Ivan Shearer "Extradition and Human Rights" (1994) 68 Australian Law Journal 451 at 451; and Nicholls, Montgomery and Knowles, above n 7, at [1.06]-[1.07].

Technological advancements in transport and communication in the eighteenth and nineteenth centuries aided the internationalisation of crime. The United Kingdom's extradition treaties with foreign states became more prevalent, spurring the creation of the Extradition Act 1870 (Imp) which provided statutory process for giving effect to bilateral extradition treaties, and created a procedural framework for extradition.[18] Based on existing treaties, the Act required the existence of a bilateral treaty for any future extradition.[19] Britain's 1870 Act and bilateral treaties were inherited by New Zealand and the primacy of bilateral treaties is echoed in New Zealand's Extradition Act 1999. Section 11 states that bilateral extradition treaties override the Act to the extent of any inconsistency between the two (barring some exceptions such as mandatory restrictions on surrender).

Concurrently, extradition within the British Empire was enabled under the Fugitive Offenders Act 1881 (Imp) on non-treaty bases. Twentieth century decolonisation necessitated a new regime to allow extradition between sovereign Commonwealth countries. In 1966, Commonwealth countries agreed to enact domestic legislation in accordance with the London Scheme as a formal recognition of the doctrine of comity.[20] The Scheme aimed to achieve uniform laws reflecting existing imperial treaties and allowed the surrender of fugitives between Commonwealth countries without treaty.[21] Because the British Empire owed common allegiance and shared legal concepts and cultural values, there was no need for treaties to ensure reciprocity and remedy discrepancies between national systems.[22]

United Nations bodies working to promote international cooperation to suppress crime identified the need to provide model instruments that enabled Member States to

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18 Nicholls, Montgomery and Knowles, above n 7, at [1.12]-[1.13].

19 *Oppenheim*, above n 16, at 955.

20 M Cherif Bassiouni *International Criminal Law: Volume II Multilateral and Bilateral Enforcement Mechanisms* (3rd ed, Martinus Nijhoff Publishers, Leiden, 2008) [*International Criminal Law*] at 414.

21 Nicholls, Montgomery and Knowles, above n 7, at [1.18]-[1.19]; and Cherif Bassiouni *International Criminal Law*, above n 20, at 414.

22 Ivan Shearer "Extradition Without Treaty" (1975) 49 Australian Law Journal 116 at 188.

make more efficient and effective legal frameworks.[23] The key extradition instruments are the Model Treaty on Extradition (1990) and the Model Law on Extradition (2004). The fundamental principle of the Model Law is streamlining national legislation to support (not replace) the implementation of existing treaties or arrangements, and provide a self-standing framework for countries that extradite in the absence of a treaty.[24] Section 2(2) illustrates the traditional approach to extradition – paramountcy of treaties:[25]

> 2. *Extradition pursuant to a treaty shall be governed by extradition treaties or agreements in force* … Notwithstanding the foregoing, the procedures applicable to extradition and transit proceedings taking place in [country adopting the law], as set forth in sections 16-40 of the present law, shall apply to all requests for extradition *unless otherwise provided for in the applicable treaty or agreement in force*.

Despite efforts to create global uniformity, however, divergent or under-developed domestic laws have caused inconsistencies with treaties.[26] Globalisation has shifted the rationale for extradition from the desire for interstate reciprocity to the desire of states to be considered "good international citizens" of law enforcement.[27] States increasingly depart from the treaty-based approach to extradition by implementing domestic extradition legislation which gives effect to ad hoc agreements, streamlines procedures and expands restrictions on surrender. Additionally, multilateral treaties now contain extradition provisions, requiring extradition irrespective of bilateral treaties.[28] These changes illustrate the transforming nature of legal extradition obligations. However, New Zealand's existing obligations under bilateral extradition treaties must be respected. The addition of inconsistent provisions in domestic legislation, such as extended restrictions

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23 *United Nations Office on Drugs and Crime Model Law on Extradition* (2004) at 5-6.

24 At 6-7 (emphasis added).

25 Also see the *United Nations Office on Drugs and Crime Manual on Mutual Legal Assistance and Extradition* (2012) at [44].

26 *United Nations of on Drugs and Crime Report of the Informal Expert Working Group on Effective Extradition Casework Practice* (2004) at [11]; Cherif Bassiouni *International Criminal Law*, above n 20, at 415-6 and 423; and *Oppenheim*, above n 16, at 1249.

27 NZLC IP37, above n 6, at [2.2].

28 Nicholls, Montgomery and Knowles, above n 7, at [1.04]; and *Oppenheim*, above n 16, at 953.

on surrender, are only legitimate if treaties are renegotiated (or withdrawn from) to reflect amendments and thus avoid breaching international law.

C The Law Commission's View: Need for Reform

The Law Commission believes New Zealand's extradition law is complex and fails to appreciate the increasingly globalised and interdependent international environment.[29] The Commission proposes a new Extradition Bill because "the interests of both law enforcement and justice require that extradition processes are as efficient as possible, taking account of the need to protect the rights of the persons sought."[30] The Commission's proposals fit into four main categories: an integrated scheme; reducing complexity in dealing with requests; reducing delay; and the protection of rights.[31] The second and fourth categories are the focus of this paper.

The Commission argues the advantages of New Zealand's current treaty paramountcy approach are outweighed by complex inefficiencies caused by treaties, and that New Zealand's domestic extradition legislation must correspond with ratified international human rights obligations. Several of the Commission's proposals may conflict with bilateral treaty obligations, including:

- the time limit for and the standard of evidence required in a request after provisional arrest or arrest;
- admissibility and authentication of evidence requirements; and
- extended restrictions on surrender.[32]

Because this paper focuses on an extraditee's post-surrender rights, analysis is confined to treaty breaches caused by extending statutory restrictions on surrender.

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29 NZLC R137, above n 8, at iv.

30 At iv.

31 At [2]-[13].

32 At [3.10]-[3.20].

III Analysis of the Treaty-Based Approach

A The Binding Force of Bilateral Extradition Treaties

Providing for the paramountcy of treaties in domestic extradition legislation ensures domestic courts are not forced into breaching their state's international obligation to extradite under bilateral treaties. Customary international law dictates that treaties legally bind state parties once in force.[33] A party must abstain from acts that frustrate the object and purpose of the treaty and will be held responsible in international law if they do not.[34] New Zealand's bilateral extradition treaties come into force in accordance with ratification provisions found therein.[35] After ratification by the Executive – which has authority to bind the state on the international plane – New Zealand is bound by the treaty at international law. Domestic extradition legislation causes the treaty to become binding domestically, meaning domestic judges are bound to give effect to it on the national plane. However: [36]

> a national law which is in conflict with an international law must in most states nevertheless be applied as law by national courts, which are not competent themselves to adapt the national law so as to meet the requirements of international law.

In contrast, "a party may not invoke the provisions of its internal law as a justification for a failure to perform a treaty".[37] Therefore, New Zealand courts breach international law when they are required to apply domestic statutory apply provisions which conflict with obligations to extradite under bilateral extradition treaties.[38]

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33 *Oppenheim*, above n 16, at 1206; and Vienna Convention on the Law of Treaties 1969 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*], art 26.

34 *Oppenheim*, above n 16, at 82-84; VCLT, above n 33, art 26; and *Draft Articles on the Law of Treaties with commentaries* [1966] vol 2 YILC 187 at 211.

35 For example, Treaty on Extradition between New Zealand and the United States of America 791 UNTS 253 (opened for signature 12 January 1990, entered into force 8 December 1970), art XIX.

36 *Oppenheim*, above n 16, at 84.

37 VCLT, above n 33, art 27; and *Oppenheim*, above n 16, at 82-82 and 1249.

38 *Oppenheim*, above n 16, at 83.

1 Accountability on the International Plane and the Desire for Reciprocity

Generally, states do not consent to enforcement mechanisms on the international plane if they breach the obligation to extradite as bilateral extradition treaties, the London Scheme and United Nations Models do not contain enforcement provisions. Instead, a state's accountability for the consequences of a treaty breach rest on foreign relations ramifications.[39] These ramifications, particularly for extradition, create significant incentives for compliance with treaty obligations because traditional rationales for a treaty-based approach are reciprocity and comity between states: when one state cooperates with another, it does so understanding that it will receive similar cooperation in return.[40] The binding nature of bilateral extradition treaties at international law creates the incentive for states to act consistently to maintain bilateral relationships and secure the ability to try fugitives found in another state, or otherwise risk adverse foreign relations ramifications. Furthermore, third party states will find it unappealing to enter future negotiations with a state that breaches treaty obligations. [41] Thus, states effectively self-enforce bilateral extradition treaties.

However, reciprocity has limits: "[i]t is the inevitable consequence of reciprocity that the more one seeks to restrict the other party, the more one limits oneself. In the end, both have compromised their principles".[42] Reciprocity should be interpreted as being bound to return fugitives according to a state's domestic law, complying with baseline treaty standards.[43] It is common sense that a state would want to rid itself of unwanted criminals and avoid assisting impunity in lieu of "'keeping the score' even with other countries", especially considering the increasing mobility of criminals.[44] Indeed, most states now allow ad hoc extradition agreements in the absence of treaties.

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39 James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 33; and Magnusum, above n 1, at 894.

40 Baker, Perry and Doobay, above n 11, at [3.25]; and Janice Brabyn "New Zealand Extradition Law" (Master of Laws Dissertation, Victoria University of Wellington, 1985) at 384.

41 Magnusum, above n 1, at 894.

42 Brabyn, above n 40, at 385.

43 At 385.

44 Ivan Shearer *Extradition in International Law*, above n 16, at 31-34, citing *Report of the Royal commission on Extradition* C.2039 (1878), 6 *British Digest of International Law* (1965) at 805.

Ultimately, treaties add a desirable layer of accountability: the international plane. The breach of domestic extradition legislation limits a requesting state's accountability to the national plane where domestic ramifications are unlikely because the executive and judiciary are complicit in granting extradition. Treaties have the ability to hold foreign state parties accountable on the international plane whereas national law is inapplicable against other states.[45] For example, international legal obligations are important for extradition-specific rights protections such as the rule of speciality and restrictions on re-extradition to a third country, which bind both parties to a treaty. If these protections only existed in a requested state's domestic legislation, they would have no effect on the requesting state as they do not exist in international law elsewhere.

B The Ability to Tailor-make Extradition

> It has been said that extradition is "an act of confidence in the system of justice of the requesting state".[46]

States who require bilateral treaties to invoke the application of domestic extradition legislation can ensure extradition will only occur with states who maintain a sufficient standard of justice by only concluding treaties with such states. Moreover, treaties enable extradition relations to be tailor-made based on a state's ability to uphold justice:[47]

> There can be no objection to states agreeing enhanced enforcement of public law by treaty. In such a case, the agreement is reached on a bilateral and reciprocal basis and constitutes a voluntary assumption of additional obligations not otherwise necessarily imposed on either state.

Where foreign states demonstrate sceptical human rights records, New Zealand can justify refusing surrender by providing for broader restrictions on surrender in treaties with these states, better ensuring that the requesting state will not have the opportunity to

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45 *Oppenheim*, above n 16, at 84.

46 John Quigley "The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law" (1990) 15 North Carolina Journal on International Law 401 at 430; and Brabyn, above n 40, at 385.

47 Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014) at [11.19]; and Brabyn, above n 40, at 385.

infringe on an extraditee's rights. For example, in *Kwok-Fung* the New Zealand Court of Appeal held that because the Hong Kong bilateral extradition treaty provided wider grounds for refusing surrender than the Act, the requested person was entitled to the benefit of those wider grounds.[48] In *Bujak* a discretionary restriction on surrender under the Act became a mandatory restriction under the treaty, thus providing greater protection.[49]

It is often argued treaties allow the state to undertake the fundamental role of protecting its own nationals by denying the extradition of nationals to states whose standards of justice are unsatisfactory.[50] However, it is a "highly cynical diplomatic exercise" to conclude an extradition treaty exempting nationals from surrender to protect them from unacceptable standards of justice, but placing non-nationals in jeopardy by allowing their surrender.[51] Instead, a treaty should not be concluded with such states, or otherwise provide for restrictions on surrender for all individuals.

Although treaties allow one state to review another's legal system, this rationale is less convincing following the development and recognition of international human rights norms. Inquiry into the requesting state's judicial system, whether a treaty relationship exists or not, has become necessary to avoid assisting in a breach of international human rights law.[52] Indeed, "existence of an extradition treaty does not guarantee that previously satisfactory standards of justice will not later fall as a result of internal political changes".[53] This is particularly poignant for New Zealand as 41 of our 45 bilateral treaties were concluded by Britain in the late nineteenth and early twentieth centuries,

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48 *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] NZCA 174, [2001] 3 NZLR 463, affirmed in *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604 at [43]; and *Kim v Minister of Justice*, above n 4, at [108].

49 *Bujak v Republic of Poland*, above n 48, at [30]-[31].

50 Shearer "Extradition Without Treaty", above n 22, at 119.

51 Shearer *Extradition in International Law*, above n 16, at 120-1; and M. Cherif Bassiouni *International Extradition and World Public Order* (A. W. Sijthoff International Publishing Company, The Netherlands, 1974) at 440-441.

52 See Part IV, Section 2 of this paper.

53 Shearer "Extradition Without Treaty", above n 22, at 119 (emphasis added).

leaving plenty of scope for treaty partners to lower standards or lag behind international norms.

To summarise, the benefits of the binding nature of international obligations and the ability to extend restrictions on surrender in bilateral treaties outweigh changes caused by globalisation and the rise of international human rights law. These benefits continue to compel New Zealand to retain treaties as a significant and paramount aspect of New Zealand's extradition law.

C The Current Status of Bilateral Treaties in New Zealand's Extradition Law

Kwok-Fung, the leading case on the interpretation of s 11, notes that its use of language gives "very strong direction": the Act is "overridden" by inconsistent treaty provisions.[54] The Court emphasises that treaty paramountcy is important because treaties create binding obligations at international law:[55]

> [16] The process which s 11 of the New Zealand Act requires can perhaps be better thought of as *reconstruction of the Act*, to the extent it is inconsistent with the treaty, to make it consistent. *The strength of the direction recognises the basic principles of international law that treaties must be complied with and that a state cannot invoke its internal law to justify its failure to perform a treaty* … [T]he Act also recognises those principles in its objective stated in s 12: the Act, among other things, is an Act: To enable New Zealand to carry out its obligations under extradition treaties.

The Court uses discretionary restrictions on surrender to illustrate the powers of s 11. If treaties did not recognise these then New Zealand could not rely on statutory discretionary restrictions to refuse surrender as that would be inconsistent with the treaty obligation to surrender a requested person:[56]

> [17] … In such a situation s 11(1) would require s 8 not to be applied or in effect require it to be read out of the Act. By contrast, if, as in the present case, the

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54 *Yuen Kwok-Fung*, above n 48, at [15]; and Extradition Act 1999, s 11(2).

55 *Yuen Kwok-Fung*, above n 48 (emphasis added).

56 *Yuen Kwok-Fung*, above n 48.

> discretionary grounds in the treaty are broader than those in the Act, they are read into the Act which is then construed appropriately.

The Court of Appeal later affirmed treaty paramountcy, holding that the usually high threshold for restrictions on surrender based on humanitarian concerns is "subject to the terms of the relevant extradition treaty, which might allow for a less rigorous standard or for more expansive grounds".[57]

Parliament was concerned with overextending the ability of international obligations to amend domestic legislation and consequently extended restrictions on surrender in the Extradition Act 1999 that a treaty could not override.[58] As explained by Keith J, the paramountcy of the Act in this case is justified because the extended restrictions which treaties cannot override create a bottom line for future treaties,[59] whereas, treaties which came into force before the 1999 Act (44 out of 45) are only subject to narrower restrictions on surrender in the 1965 Act.[60] Therefore, the extended restrictions in the 1999 Act which treaties cannot override do not breach an obligation to extradite under pre-1999 treaties because they do not apply to those treaties.

The current law allows New Zealand to act consistently with its international obligations. However, the Law Commission's proposal, which recommends that treaties cannot limit or override statutory restrictions on surrender and removes the pre-1999 treaty distinction, does not.[61] Specifically, the Commission's proposed extended restrictions on surrender which treaties cannot override but are generally not included in pre-1947 treaties (41 out our 45) and therefore conflict with the obligation to extradite under those treaties, include restrictions where the extraditee may face discrimination,

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57 *Bujak v Minister of Justice* [2009] NZCA 570 at [43]. Affirmed in *Kim v Minister of Justice*, above n 4, at [108].

58 See speech by Hon Tony Ryall introducing the Select Committee Report on the Bill to the House (16 March 1999) 575 NZPD 15367.

59 *Bujak v Minister of Justice*, above n 57, at [43].

60 Extradition Act 1999, ss 11 and 105.

61 NZLC R137, above n 8, at [5.18].

cruel, inhumane or degrading treatment or punishment, and unjust or oppressive treatment.[62]

International human rights law complicates the issue. The Commission argues existing bilateral treaties should be "overlaid" with international human rights obligations and the corresponding proposed restrictions on surrender:[63]

> To the extent that our proposed grounds for refusal may seem to be inconsistent with pre-existing bilateral treaties, we think that those grounds in those bilateral treaties would have been inconsistent with international norms.

However, rules of treaty interpretation bring these arguments into question. In *Kwok-Fung*, Keith J stated the protection against torture in the Extradition Act 1999 justifiably overrides bilateral extradition treaties because the protection against torture is in "a very widely accepted multilateral treaty".[64] More explicitly, the prohibition on torture is jus cogens so cannot be overridden by a treaty.[65] However, later in *Zaoui v Attorney-General (No2)*, Keith J stated the rules governing the amendment of one treaty by a later treaty are "designed for treaties that create bilateral rights and obligations" and "concern the application of successive treaties relating to the same subject-matter".[66] That is, treaty rules do not intend to give multilateral treaties, which create erga omnes obligations and concern different or specific subjects, the ability to amend bilateral extradition treaties. Keith J's reasoning applies to non-jus cogens obligations contained in multilateral treaties protecting human rights, such as fair trial rights in the ICCPR, which therefore lack the ability to amend bilateral extradition treaties.[67] Indeed, states have the ability to contract out of customary international law obligations via treaty.[68] Therefore, New Zealand's obligation to surrender fugitives under bilateral extradition treaties can trump other international law obligations that are not jus cogens. It may be the case that obligations to

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62 As admitted by the Commission at [5.24] of NZLC R137, above n 8.

63 NZLC R137, above n 8, at [5.24]; and NZLC IP37, above n 6, at [8.17].

64 Above n 48, at [18].

65 VCLT, above n 33, art 53.

66 [2005] NZSC 38, [2006] 1 NZLR 289 at [50] referring to VCLT, above n 33, art 30.

67 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [*ICCPR*].

68 Crawford, above n 39, at 30-34.

extradite under existing bilateral treaties are inconsistent with international human rights obligations, and that treaty interpretation rules positively presume that a general rule of customary international law should be read into a treaty in which there is no relevant rule.[69] However, the specific nature of the obligation to extradite under bilateral extradition treaties can trump general international human rights law obligations (*lex specialis*).[70]

D The Law Commission's Recommendation: Repealing Treaty Paramountcy

One of the Commission's main objectives for the review was to appropriately align domestic extradition legislation and bilateral extradition treaties. The Commission proposes to provide all countries with a procedure for requesting extradition, regardless of their treaty relationship with New Zealand, admitting there will be differences between the terms of treaties and the Act.[71] Section 11 would be replaced with a provision that specifically identifies the requirements, procedures and protections in the new Act that may be *supplemented* (added to), rather than *overridden*, by the terms of a treaty. The central justifications for this significant change are based on the efficiency of the extradition process:

- Treaties have the potential to create countless different extradition processes, causing confusion, litigation, and delay in New Zealand courts and conflict with the procedure in the Act based on New Zealand's domestic procedures.
- Treaties can quickly become outdated if they are not amended to reflect changes in criminal offences and state practices of treaty partners, leading to litigation around whether the offence in question falls within the ambit of the treaty list of extraditable offences.[72]
- New Zealand is a small and geographically isolated country – it is unlikely that negotiating an extradition treaty with New Zealand is high on the political agenda of many foreign countries.

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69 VCLT, above n 33, art 31(3)(c).

70 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* [2001] vol 2, pt 2 YILC, at art 55.

71 NZLC R137, above n 8, at [3.4].

72 Also, see the preamble of *United Nations Office on Drugs and Crime Model Treaty on Extradition* GA Res 45/116, A/RES/45/116 (1990).

- Treaties do not expressly recognise current human rights obligations.[73]

The argument that states will not negotiate new treaties with New Zealand is unproven. The absence of a treaty is the absence of the obligation to extradite (unless an ad hoc agreement is negotiated) and criminals often escape to so-called "safe havens". Therefore, a fugitive has greater chance of impunity in treaty-less states, thus causing states to be conscious of the need for negotiating treaties. As a case in point: China is currently pushing for treaty negotiations with New Zealand in light of difficulties in extraditing Kyung Yup Kim. All other reasons cause significant concern for New Zealand's extradition law. However, the Commission's emphasis on efficiency obscures the international nature of extradition and overlooks New Zealand's binding bilateral treaty obligations.

The Commission seeks to redeem this position by relying on "the guiding principle that an international treaty must be interpreted in context and in light of its object and purpose".[74] The Commission argues that because the object of bilateral extradition treaties is to facilitate extradition between state parties by creating a duty to extradite in certain circumstances, only a violation of a provision that is essential to the accomplishment of this object will amount to a breach of New Zealand's international obligations.[75] In other words, domestic legislation can override parts of treaties as long as the object of facilitating extradition is not frustrated. This argument has flaws. First, it neglects to recognise one of the treaty obligations being breached as a result of the Commission's proposals (to extend restrictions on surrender) is the most essential treaty obligation – the obligation to extradite. Second, the binding force of a treaty protects non-essential as well as essential provisions.[76]

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73 NZLC IP37, above n 6, at [3.74]; and NZLC R137, above n 8, at [3.6].

74 NZLC IP37, above n 6, at [3.20]; and VCLT, above n 33 art 31(1).

75 NZLC IP37, above n 6, at [3.21] and [3.24], citing VCLT, above n 33, art 60(3). Supported by Thomas Rose "A Delicate Balance: Extradition, Sovereignty and Individual Rights in the United States and Canada" (2002) 27(1) The Yale Journal of International Law 193 at 193.

76 *Oppenheim*, above n 16, at 1300-1301; *Draft Articles on the Law of Treaties with commentaries*, above n 34, at 253; and VCLT, above n 33, art 60(3).

Moreover, the Commission recognises that the purpose of bilateral extradition treaties is to facilitate extradition *in certain circumstances*. "Certain circumstances" must include circumstances set out in a treaty: "Bilateral treaties can be tailored between States and provide a high degree of certitude regarding the obligations and expectations in the extradition process".[77] This approach is in line with the most important method of interpreting treaties: "[a] treaty shall be interpreted in good faith *in accordance with the ordinary meaning to be given to the terms of the treaty* in their context and in light of its object and purpose".[78] The primacy of the text should be the basis for interpretation.[79]

1 Approaches to Treaties in the Commonwealth

The Commission proposes New Zealand adopt a similar approach to Canada's Extradition Act 1999. Canada replaced the treaty paramountcy provision in their 1877 Act (the equivalent of New Zealand's s 11) with provisions allowing treaties to override, supplement or provide an alternative for only expressly identified provisions in their 1999 Act.[80] The Canadian approach is the middle ground between the British and Australian approaches.

The United Kingdom's Extradition Act 2003 departs from its previous treaty-reliant approach. Treaties are not required for extradition and cannot override the statutory extradition process.[81] This approach is explicable because of the United Kingdom's close relationship with Commonwealth states under the London Scheme where treaties are not required and with Europe under the European Arrest Warrant and the European Convention on Extradition where the Convention overrides a treaty between the parties.[82] Additionally, the United Kingdom renegotiated the vast majority of its old imperial treaties.

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77 *Manual on Mutual Assistance and Extradition*, above n 25, at [44]. See, for example, Treaty on Extradition between New Zealand and the United States of America, above n 35, art 1.

78 VCLT, above n 33, art 31(1) (emphasis added).

79 *Draft Articles on the Law of Treaties with commentary*, above n 34, at 218.

80 NZLC IP37, above n 6, at [3.72].

81 Nicholls, Montgomery and Knowles, above n 7, at [1.33]-[1.45].

82 European Convention on Extradition 359 UNTS 273 (opened for signature 13 December 1957, entered into force 18 April 1960), art 28.

In contrast, the Australian approach in the 1988 Act is treaty-reliant; one-off extradition requests are not granted.[83] The "no evidence" rule became the default position for new treaties, facilitating the negotiation of bilateral treaties as the lack of requirements made it favourable for foreign states whose extradition requests would be more readily granted. Subsequently, Australia concluded 58 new bilateral extradition treaties. Accountability and consequences on the international plane are better ensured where a state breaches the rights of a requested person, however, the seemingly necessary compromise of granting extradition without evidence can only be regarded as a significant breach of a requested person's freedom.

It is unlikely that New Zealand will follow either of these extremes. New Zealand's only close, non-treaty relationship is under the London Scheme and the argument for retaining legislative uniformity under the Scheme is futile. By adopting a treaty-reliant no-evidence approach like Australia, New Zealand would depart from its rights-conscious reputation. However, the ideal middle ground is unclear, illustrated by the significant differences between the Canadian approach and the Commission's proposals:

- Canada entered into 42 new bilateral treaties between 1985 and 1998 which are therefore relatively contemporaneous with their 1999 Act;
- Restrictions on surrender in treaties prevail over most of the restrictions in the Canadian Act (excluding s 44 restrictions which apply to every country at the Minister's discretion[84]). *This includes a situation where the ground will be deemed not to apply if it is included in the Act but is not in a treaty* because drafters of treaties are presumed to have considered all possible restrictions and included the necessary. [85]
- The Justice Minister is responsible for considering all restrictions on surrender, increasing the likelihood of politically charged discretion; and

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83 Extradition Act 1988 (Cth), s 11.

84 Unjust or oppressive treatment, discrimination, or the death penalty.

85 Extradition Act SC 1999 c 18, s 45(1). Confirmed in *Nemeth v Canada (Justice)* 2010 SCC 56 [2010] 3 SCR.

- Requested persons are protected by the Canadian Charter of Rights and Freedoms, including the right to fundamental justice under s 7. [86]

Most of New Zealand's treaties were negotiated a century ago. If New Zealand passed a new Act significantly restricting the ability of treaties to override the Act, a greater number of discrepancies between the Act and treaties are likely to occur, thus increasing the likelihood of breaching international obligations. Additionally, the Commission's proposals import extended restrictions on surrender into all treaties regardless of the content of the treaties and when they came into force. However, the Commission does propose a new restriction on surrender expressly requiring the inquiry into the "likelihood of a flagrant denial of a fair trial in the requesting county" which resembles the Canadian s 7 inquiry. Additionally, the Commission recommends the court should be responsible for deciding most restrictions on surrender thus reducing the exercise of politically charged Ministerial discretion.[87] Indeed, the UN Human Rights Committee criticised the Canadian Minister for not exercising discretion and consequently violating ICCPR obligations.[88] Canada partially remedied this inaction by recognising that international norms had changed and therefore the Minister must gain assurances form a requesting state that the death penalty will not be applied where the extraditee faces capital punishment.[89]

The Canadian approach illustrates the dangers of repealing a treaty paramountcy provision and the necessary precautions that accompany it, such as renegotiating imperial treaties and extending rights protections.

To summarise, statutory restrictions on surrender should not override the international obligation to extradite under bilateral extradition treaties; therefore, New Zealand should

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86 Gary Botting *Canadian Extradition Law Practice* (5th ed, LexisNexis, Ontario, 2015) at 314, 318 and 327, citing: *Doyle Fowler v Canada* [2013] QJ No. 5929, 2013 QCCA 1001 (Que. CA) at [43]-[45]; *Nemeth v Canada (Justice),* above n 85, at [71]; and *Canada (Justice) v Fiscbacher* 2009 SCC 46, [2009] 3 SCR 170 at [39] citing *United States of America v Bonamie* [2001] AJ No. 1334, 90 CRR (2d) 269 (Alta. CA). Consistent with *Suresh v Canada (Minister Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCR 3.

87 NZLC R137, above n 8, at [5.12].

88 Gary Botting, above n 86, at 303 and 305.

89 *United States v Burns* 2001 SCC 7, [2001] 1 RCS 283.

maintain the current iteration of s 11. As the Commission recognises, however, there is a pressing need to modernise restrictions on surrender applying to existing treaties to correspond with international human rights obligations.[90]

IV The Effect of the Rise of Human Rights Law on Bilateral Extradition Treaties

Although extradition is state-centric and heavily influenced by foreign relations, the protection of a requested person's rights has increased with the rise of international human rights law.[91] The UN General Assembly Resolution promulgating the Model Treaty on Extradition in 1990 expressed:[92]

> the need to respect human dignity … recalling the rights conferred upon every person involved in criminal proceedings, as embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

States considering extradition requests should act consistently with their international human rights obligations.[93] Correspondingly, extradition-specific laws have created greater obligations on states to consider the rights of a requested person.[94] International norms have loosened the rule of non-inquiry, thus obligating requested states to inquire into the justice system of a requesting state before surrendering a requested individual. Bilateral extradition treaties ensure accountability on the international plane for a breach of this obligation by providing for restrictions on surrender that necessitate inquiry into the requesting state's system.

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90 NZLC IP37, above n 6, at [8.5].

91 See Thomas Rose, above n 75, at 193; and Cherif Bassiouni *International Extradition and World Public Order*, above n 51, at 562.

92 Model Treaty on Extradition, above n 72, at Preamble.

93 *Oppenheim*, above n 16, at 960.

94 Cherif Bassiouni *International Extradition and World Public Order*, above n 51, at 505. 95 Crawford, above n 39, at 642.

A Focus on an Extraditee's Post-Extradition Rights

1 The Limits of International Human Rights Law

Crawford states that "[i]t is now generally accepted that the fundamental principles of human rights form part of customary international law" and thus bind all states when extraditing an individual.[95] However, the content of fundamental principles is disputed.[96] Rights generally accepted as customary international law include those prohibiting genocide, slavery, murder, torture, prolonged arbitrary detention, racial discrimination and "a consistent pattern of gross violations of internationally recognized human rights".[97] Some of these rights, such as freedom from torture, have jus cogens status so can never be abrogated.[98] However, this "common core" is "partial and imperfect and it hides altogether the many differences in the articulation of the various rights in the various treaties", sometimes resulting in ambiguous obligations for extraditing states.[99]

Generally, the right to a fair trial as a whole is not considered to be customary international law. Fair trial rights aim to ensure proper administration of justice and are some of the most extensive human rights; all international human rights instruments enshrine them, including the ICCPR, which has 167 state parties.[100] However, a breach of the ICCPR lacks consequences. The interstate complaints procedure, which allows any state party (whether part of extradition or not) to complain of non-compliance (but only if both states have recognized the Committee's competence to receive complaints), has never been used.[101] Additionally, there are only 114 state parties to the ICCPR's first optional protocol which allows individuals to complain to the Human Rights Committee.[102] These deficiencies illustrate the limits associated with a requested

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95 Crawford, above n 39, at 642.

96 At 642.

97 At 642.

98 VCLT, above n 33, art 53.

99 Crawford, above n 39, at 643.

100 ICCPR, above n 67, arts 14 and 16; Crawford, above n 39, at 638; and Curtis Doebbler *Introduction to International Human Rights Law* (CD Publishing, 2006) at 107-108.

101 Crawford, above n 39, at 638.

102 At 638. Also see *Kim v Minister of Justice*, above n 4, at [87]-[88] in relation to China.

individual relying on international human rights law to ensure they are extradited appropriately.

Bilateral extradition treaties do not seem to place comprehensive obligations on requesting states, and individuals are unlikely to be able to claim for breaches of bilateral extradition treaties because the provisions protecting their rights are framed as state party obligations (not as an individual's rights).[103] However, they do impose obligations on the requested state who decides whether to extradite or not. Obligations to uphold an extraditee's post-extradition rights are usually outlined in treaties as restrictions on surrender and ensure an individual is only surrendered to a state who would not breach the rights protected by these restrictions. Moreover, bilateral treaties contain extradition-specific protections absent from international human rights laws, such as speciality and re-extradition. Consequently, bilateral extradition treaties are important because they enable a requested state to be held responsible at international law for the breach of a duty to protect a requested person's rights where international human rights law may not.

2 Relaxing the Rule of Non-Inquiry

Until recently, the rule of non-inquiry prevented the courts of a requested state from investigating the fairness of the requesting state's justice system and the procedures or treatment awaiting a surrendered fugitive.[104] The rule concerns institutional competence and the separation of powers and reasons that the executive branch of a state, not the judiciary, is the more appropriate avenue for inquiry.[105] Consequently, a requested state endangers an extraditee's rights where a politically influenced executive neglects to assess the possibility that an extraditee will face injustice upon extradition. The rule is legitimate in respect of accepting different criminal trial procedures of a foreign state,

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103 *Oppenheim*, above n 16, at 961: speciality and re-extradition are framed in a way that place obligations on the requesting state and give the requested state a right to complain if they are breached.

104 Matthew Murchison "Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry" (2007) 43 Stanford Journal of International Law 295.

105 McLachlan, above n 47, at [11.15]-[11.16].

however, the availability of access to fundamental standards of justice cannot be ignored.[106]

Globally, extradition laws have developed towards allowing treaty-absent extradition, meaning the suitable inquiry into a requesting state's justice system at the treaty negotiating stage does not always occur. Therefore, inquiry at the extradition stage is essential. Moreover, conceptions of national sovereignty are becoming "outdated".[107] Alongside these developments and the rise of human rights law post-World War II, the rule of non-inquiry has relaxed: [108]

> Just as states came to recognize that individuals possessed rights separate and distinct from the countries in which they found themselves, courts also came to recognize that extradition involved interests beyond those of countries alone. Thus, … traditional ideas about comity and sovereignty gave way to a renewed interest in fairness … The rule of non-inquiry, born out of concern for courtesy and friendship between governments, has given way to a new concern for the rights of individuals.

Yet, including the obligation in a bilateral extradition treaty remains highly desirable as it secures accountability on the international plane. This is despite the undesirable effects caused by the existence of a bilateral treaty. For example, the treaty rationale of reciprocity has led to the Canadian Minister basing the acceptance of assurances on a presumption that India, as the requesting state, would not want to jeopardise its treaty relationship and therefore the Minister did not feel obliged to inquire.[109] However, judicial review required the Minister to reconsider its decision based on the lack of inquiry into the validity of assurances provided by India.[110]

Importantly, although "states are not responsible for violations of international law committed by other states", requested states can be held responsible for participating in,

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106 Quigley, above n 46, at 438; and John Parry "International Extradition, The Rule of Non-Inquiry, and the Problem of Sovereignty" (2010) 90 Boston University Law Review 1973 at 1983.

107 Shearer *Extradition in International Law*, above n 16, at 31-34; and Rose, above n 75.[108] Magnusun, above n 1, at 853.

108 Magnusun, above n 1, at 853.

109 *India v. Badesha*, 2016 BCCA 88 at [21], citing *Thailand v. Saxena* 2006 BCCA 98.

110 At [61]-[62].

assisting or facilitating the violation of an extraditee's rights in the requesting state by surrendering an individual when they should not have.[111] Inquiry is necessary to avoid violating relevant rights-protecting laws.[112]

3 "Unjust or Oppressive" Restriction on Surrender

Restrictions on surrender in bilateral extradition treaties and domestic extradition legislation have broadened to more accurately reflect international rights developments and outdated notions of state sovereignty, particularly where it would be "unjust or oppressive" to extradite after inquiring into the requesting state's justice system. Usually, Commonwealth states include the "unjust or oppressive" restriction in their domestic extradition legislation, in accordance with the mandatory ground set out in the London Scheme.[113] Because of its broad nature, the restriction is interpreted in varying ways, thus differing in application between states and consequently becoming "one of the most commonly raised objections to extradition in Commonwealth practice".[114] Indeed, the London Scheme lists relevant circumstances but also includes application to "any other sufficient cause".[115] Significant for an extraditee's post-extradition rights:[116]

> … recently there has tended to be an increase in the use of this concept for challenges which are based on the legal system of the requesting country. Despite the application of the general rule of "non-inquiry" in Commonwealth extradition practice, there is clearly more scrutiny of legal systems and practices with a view to whether the person sought can obtain a fair trial.

Australian courts have "seen international fair trial standards in the ICCPR and attendant European jurisprudence as potentially informing the notions implicit in the 'unjust exception'".[117] They have given the term broad connotations including the

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111 Quigely, above n 46, at 439.

112 At 439.

113 Articles 13(b) and 15(2)(b).

114 Cherif Bassiouni *International Criminal Law*, above n 20, at 419.

115 Article 13(b)(iv).

116 Cherif Bassiouni *International Criminal Law*, above n 20, at 418-419.

117 Peter Johnston *The Incorporation of Human Rights Fair Trial Standards into Australian Extradition Law* AIAL Forum (No. 76, Apr 2014) at 35 referring to *Zentai v Honourable Brendan*

prospect of fair trial and prison conditions in requesting states and the issue of natural justice.[118]

In the United Kingdom Act, "unjust" only relates to delay and the physical or mental condition of person.[119] However, in the pivotal decision *Soering*, the European Court of Human Rights held that:[120]

> The UK will incur liability under the ECHR [European Convention on Human Rights] if it extradites a defendant in circumstances which expose him to risk of treatment in the requesting state which is prohibited under the ECHR … even if the state itself is not a signatory to the ECHR.

Furthermore, even if a requesting state is also bound by the ECHR, it is not guaranteed that they will not breach it, therefore the requested state still has to inquire and may need to get assurances.[121]

Canada does not limit the restriction to certain circumstances.[122] Canadian case law has often equated arguments under the unjust ground with s 7 of the Canadian Charter (the right to life liberty, and security of person), obligating Canadian decision-makers to inquire into the criminal justice system, the conduct of the proceedings, and the potential punishment facing the individual in the requesting state.[123]

O'Connor (No 3) [2010] FCA 691; (2010) 187 FCR 495 and *O'Connor v Adamas* (2013) 210 FCR 364.

118 Aughterson, above n 17, at 163.

119 Extradtition Act 2003 (UK), ss 14, 25, 82 and 91.

120 Nicholls, Montgomery and Knowles, above n 7, at [7.02]; *Soering v United Kingdom* (1989) 11 EHRR 439.

121 See, for example, Nicholls, Montgomery and Knowles, above n 7, at [7.72] discussing *R (Bulla) v Secretary of State for Home Department* [2010] EWHC 3506.

122 Extradition Act SC 1999 c 18, s 44(1)(a).

123 Botting, above n 86, at 314, 318 and 327, discussing: *Doyle Fowler v Canada* [2013] QJ No. 5929, 2013 QCCA 1001 (Que. CA) at [43]-[45]; *Nemeth v Canada (Justice)*, above n 85, at [71]; and *Canada (Justice) v Fiscbacher* 2009 SCC 46, [2009] 3 SCR 170 at [39] citing *United States of America v Bonamie* [2001] AJ No. 1334, 90 CRR (2d) 269 (Alta. CA).

Both Canadian and United Kingdom applications require a high threshold: a violation that "shocks the conscience"[124] or results in a "flagrant denial of justice".[125] If this high threshold did not exist, extradition would be rare or the accused may be able to dubiously delay extradition.[126] It is a "stringent" test going beyond "mere irregularities or lack of safeguards in the trial procedures such as might result in a breach … if occurring within the Contracting State itself".[127] Nevertheless, the rise of international human rights law has increased the post-extradition protections for an extraditee.

B New Zealand's Current Protections

The New Zealand Bill of Rights Act 1990 and international treaties such as the ICCPR protect the fundamental rights and freedoms of individuals in New Zealand.[128] However, extradition hearings in requested states are preliminary in nature and do not constitute a process for the determination of guilt or innocence and therefore do not afford full criminal trial rights to requested persons.[129] Nevertheless, extradition proceedings engage the right to natural justice under s 27 of NZBORA because extradition hearings are a type of judicial process and have "the same adversarial character as a committal hearing".[130] Effectively, a modified version of criminal trial rights applies, to accommodate the special nature of extradition proceedings.[131] The Supreme Court's interpretation begs the question of whether New Zealand courts are also obliged to ensure similar rights will be upheld in the criminal trial in a requesting state.

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124 *United States v Burns*, above n 89, at [60]; *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at [35] and [63]; and *Canada v Schmidt* [1987] 1 SCR 500 at 522.

125 *Soering v United Kingdom*, above n 120, at [113]; and *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [24].

126 NZLC IP37, above n 6, at [8.82].

127 *Othman (Abu Qatada) v The United Kingdom* (2012) 55 EHRR 1, [2012] ECHR 817 at [260].

128 Above n 67; and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

129 *Dotcom v United States of America*, above n 2, at [115], citing *Krikwood v UK* (1984) 6 EHRR 373.

130 At [184].

131 For example, see NZLC R137, above n 8, at [4.14].

New Zealand is bound to protect international standards of justice as a state party to the ICCPR and must ensure it does not participate, facilitate or assist in the breach of these rights by extraditing someone to a state that may violate them.[132] Therefore, New Zealand is obligated to inquire even though the current Act does not deem the "unjust" discretionary restriction on surrender to include the denial of justice in the requesting state, but instead focuses on delay, discrimination based on age, health or other reasons, and trivial or bad-natured requests.[133]

New Zealand is likely to be obliged to inquire into the practices of the requesting state in order to determine if other treaty and statutory restrictions on surrender apply.[134] Restrictions on surrender are assessed after the court has ruled that the person is eligible for surrender, so they "act as a check on whether extradition really is desirable and warranted where the law otherwise says that extradition can occur". [135] For example, New Zealand must not surrender a requested individual where there is a danger of torture or the application of the death penalty in the requesting state.[136] Significantly, after the Commission released its Report, the High Court in *Kim* held that the Minister could decline to order surrender because of fair trial concerns in the requesting state based on the Minister's discretionary power to consider "any other reason".[137] A lack of inquiry would result in insufficient consideration of these restrictions causing New Zealand to breach its statutory and treaty obligations. There are, however, notable gaps in the current protection of post-extradition rights: the lack of an express obligation to ensure a fair trial in the requesting state and the limited restrictions applying to pre-1999 treaty states. Thus, New Zealand must update its extradition law to reflect current international human rights laws.

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132 For example, see *Kim v Minister of Justice*, above n 4.

133 Extradition Act 1999, ss 8 and 30(d).

134 See sections 7, 8 and 30 of the Extradition Act 1999.

135 NZLC IP37, above n 6, at [8.4].

136 Extradition Act 1999, s 30.

137 *Kim v The Minister of Justice*, above n 4, at [85], citing Extradition Act 1999, s 30(3)(e).

C *The Law Commission's View of the Scope of a Requested Person's Rights*

The Commission emphasises their focus on rights at each stage of the extradition process, but as aforementioned, this paper is critical of the lack of focus placed on treaty obligations and the removal of the incentive to negotiate treaties that strengthen accountability on the international plane for a breach of the obligation to inquire.[138]

In saying this, the Commission's proposals correspond with international human rights developments. The Commission's main focus on post-extradition rights is the proposed extension of the "unjust or oppressive" restriction on surrender to expressly include "the likelihood of a flagrant denial of a fair trial in the requesting county".[139] This restriction strengthens from a discretionary ground in the 1999 Act to a mandatory ground in the proposed Bill. Furthermore, it creates a significantly stronger obligation for New Zealand to consider post-surrender treatment, as opposed to the current provision providing the Minister with discretion to consider "any other reason".[140] The Commission's proposal appropriately designates the court as the only decision maker for this restriction. This avoids the exercise of politically charged Ministerial discretion – the question of whether a requested individual has access to justice "is a question of law for the court to determine" and not a policy decision "for the executive to certify", especially as restrictions on surrender reflect "international human rights minima that ought to be objectively assessed".[141] The Commission's Commentary explains:[142]

> It covers issues such as abuse of process and delay. The important point to note here is that this must be assessed with reference to the international minimum standards for a fair trial, not by directly applying the relevant provisions in the New Zealand Bill of Rights Act 1990 as if the trial were to be conducted in New Zealand. If we required all foreign trials to be conducted in the same manner that they would be

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138 See Part III D and E above.

139 NZLC R137, above n 8, at Extradition Bill, cl 20(e)(i).

140 Extradition Act 1999, s 30(3)(e).

141 McLachlan, above n 47, at [11.16] and [11.17] citing *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 47; Parry, above n 106, at 2018-2019; and NZLC R137, above n 8, at [5.12].

142 NZLC R137, above n 8, at Commentary 196.

> conducted in New Zealand, then very few extraditions would ever occur. Legitimate differences need to be accommodated in criminal justice systems.

The Commission adopts the high threshold applied by other jurisdictions and the New Zealand Court of Appeal.[143] However, treaties can alter this standard. [144] Furthermore, Crown Law advised the Minister deciding the *Kim* case that "because there is no extradition treaty between NZ and the PRC [China], there is arguably less reason for NZ to accept a lower standard of procedural fairness on the basis of comity".[145] More appropriately, the test should be whether "to a reasonable extent" prospective treatment in the requesting state "accords with the fundamental principles of criminal justice reflected in article 14 of the ICCPR".[146] The Court agreed this lower threshold was appropriate.[147]

Consequently, the standard applied to determine if an extraditee will receive a fair trial in the requesting state should not be restricted to a high threshold, but a reasonable threshold based on international standards. Where a treaty does exist it can ensure that the requesting state must adhere to a higher standard of justice. Although, if a treaty does not determine the standard, it is likely that the existence of a treaty will encourage application of the high threshold test based on reasons of comity. The existence of a treaty allows flexibility in providing for greater or lesser protections of a requested individual's rights, in accordance with the legitimacy of another state's justice system, and holds New Zealand accountable on the international plane for a breach of these protections.

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143 See *Bujak v Republic of Poland*, above n 48, at [43]; *Soering v United Kingdom*, above n 120, at [113]; *R (Ullah) v Special* Adjudicator, above n 125, at [24]; *United States v Burns*, above n 89, at [60]; *Kindler v Canada (Minister of Justice)*, above n 124, at [35] and [63]; and *Canada v Schmidt*, above n 124, at 522.

144 *Bujak v Republic of Poland*, above n 48, at [43]. Affirmed in *Kim v Minister of Justice*, above n 4, at [108].

145 *Kim v Minister of Justice*, above n 4, at [109].

146 At [109].

147 At [111].

V Conclusion

New Zealand has an apparent need to update extradition law. The majority of New Zealand's bilateral extradition treaties are imperial and outdated, causing inefficiencies in extradition processes. Restrictions on surrender do not expressly correspond with international human rights law obligations by lacking requisite inquiry into a requesting state's justice system. However, repealing the treaty paramountcy provision from the current law would go too far. It would cause New Zealand to breach bilateral treaty obligations to extradite by importing the proposed extended restrictions on surrender into treaties and deter future negotiations, thus endangering an extraditee's post-surrender rights by removing a mechanism of accountability – the international plane – and relinquishing the chance to tailor-make treaties in accordance with foreign states' human rights records.

New Zealand should update human rights protections in its extradition law arrangements to reflect international obligations, but must not breach prevailing extradition law obligations by repealing the treaty paramountcy provision in the process. New Zealand should aim to renegotiate bilateral treaties to reflect the proposals requiring inquiry into a requesting state's justice system, while retaining s 11 treaty paramountcy. Renegotiation would avoid the breach of international obligations while retaining accountability on the international plane. It will also remedy the treaties outdated provisions. If renegotiation is impossible, New Zealand should withdraw from bilateral treaties in accordance with withdrawal provisions provided therein (usually requiring six months' notice). Although some states have withdrawn from all bilateral extradition treaties in anticipation of domestic law reform, this unattractive option limits an individual's protections to international human rights law or the national plane.[148] Furthermore, it may be politically unpalatable to break the continuity of relations or

[148] See Shearer "Extradition without treaty", above n 22, at 120 and Cherif Bassiouni *International Extradition and World Public Order*, above n 51, at 15, discussing Brazil in 1913, Denmark in 1968 and Sweden in 1951.

inefficient and arbitrary to enter into ad hoc extradition agreements every time a country requests extradition.[149]

Ultimately, as a sovereign state in an increasingly interdependent world, New Zealand has a duty to aid the development of international law by fulfilling its international legal obligations.

149 Cherif Bassiouni *International Extradition and World Public Order*, above n 53, at 15.

Word count: The text of this paper (excluding title page, abstract, table of contents, footnotes, and bibliography) comprises 7,998 words.

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