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REFORM TO NEW ZEALAND'S EXTRADITION LAWS: IS THE LAW COMMISSION'S PROPOSAL A STEP FORWARD?

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Abstract

Improvements in technology, travel capabilities and communication have led to transnational crime becoming a greater threat to states. It is, therefore, critical for New Zealand to have a robust extradition system that facilitates extradition. In 2016, the Law Commission proposed a draft Bill that would largely replace the current Extradition Act 1999. The Commission is of the view that the current system is unnecessarily complex and is not in line with current international norms. The Commission has recommended to part ways with New Zealand's dependence on bilateral extradition treaties as the foundation of our extradition laws, instead adopting a comprehensive new draft Bill. This paper analyses the Commission's recommendations, arguing that the Commission's proposal to replace s 11 should not be adopted. This would cause New Zealand to breach its obligations at international law. This paper also explores the difficult relationship between extradition and human rights. It assesses the possible implications on the rights of individuals sought for extradition if the Commission's proposals were accepted. The Commission has the goal of making the extradition process more efficient. However, efficiency should not mean expediency.

Key words: *"extradition", "Extradition Act 1999", "extradition treaties", "human rights"*

Table of Contents

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I Introduction

In 2016, the Law Commission made recommendations to reform New Zealand's Extradition Act 1999 and Mutual Assistance in Criminal Matters Act 1992.[1] The recommendations by the Commission to reform the Extradition Act came about as a result of prominent extradition cases in New Zealand that highlighted some short-comings of the extradition laws.[2] The Commission is of the view that the law, as it currently stands, is too complex and is not in line with current international norms.

In the past, extradition was seen as only concerning two sovereign states. However, as international human rights law has developed, it has highlighted the importance of the rights of the individual being extradited, putting some constraints on the power of the respective sovereigns.[3] Although the requirement to extradite is not customary international law, there is a growing attitude by states that extradition is developing from what used to be an international act based on the principle of reciprocity, to the idea of states being a good global citizen.[4] This shift has caused extradition to become more prominent over the years. Consequently, countries' extradition laws have been put under the spotlight, testing the adequacy and efficiency of their extradition procedures.

There are a variety of reasons why states have extradition treaties. These include the fight against impunity, the development of good relations between states and enabling a state to ensure that its laws are respected, meaning if a person escapes their jurisdiction, they should be brought back. The Law Commission wants to largely replace New Zealand's extradition treaties with a comprehensive domestic legislation. The difficulty is whether this legislation will satisfactorily replace New Zealand's current extradition treaties. The Law Commission is of the view that the proposed Bill will cover the same essential elements mentioned. However, any changes to the process must be a step forward in the law.

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

2 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355; and *Kim v Minister of Justice* [2016] NZHC 522.

3 M Cherif Bassiouni *International Extradition and World Public Order* (A W Sijthoff International Publishing Company, New York, 1974) at 2.

4 Neil Boister "Global Simplification of Extradition: Interviews with Selected Extradition Experts in New Zealand, Canada, the US and EU" (2018) 29(3) Crim Law Forum 327 at 330.

The focus of this paper will be on the Extradition Act 1999 and the surrounding extradition laws in New Zealand. Currently, the Extradition Act governs New Zealand's extradition laws. However, they are very much dependent on the extradition treaties that New Zealand has in place.

This paper will first summarise what extradition is and why states use extradition. Part III will outline New Zealand's current extradition laws and the extradition process. Part IV examines what the Law Commission recommended in their 2014 Issues Paper and 2016 Report. Part V argues that bilateral extradition treaties are preferred to domestic legislation as the basis for New Zealand's extradition laws. Adopting the Law Commission's recommendations would cause New Zealand to breach its international obligations. New Zealand should maintain the supremacy of bilateral treaties. Finally, Part VI will explore the critical relationship between extradition and human rights. The emphasis on protecting individual's rights who are sought for surrender has increased as the law on extradition has developed.

The rise of international human rights has caused a number of extradition processes and treaties worldwide to become outdated in relation to current norms. The Law Commission has, therefore, tried to make any recommendations they proposed to be in line with these current norms. While this paper acknowledges the current protections under New Zealand's existing extradition regime need to be updated, it argues that the Commission's proposals put too much weight on streamlining the extradition process and may lead to expediency. Facilitating extradition more efficiently should not be at the expense of the rights of the person being extradited.

II Extradition Generally

Extradition is the process where one sovereign state, the requesting state, asks another sovereign state, the requested state, to return to the requesting state an accused or convicted person.[5] Extradition allows the requesting state to exercise criminal jurisdiction over that person in its territory for a crime the person has allegedly committed. Extradition is generally carried out using the mechanisms of a bilateral treaty or through an ad hoc process. A state is under no obligation to extradite under customary international law. The right to extradite is present regardless of a bilateral treaty.[6] There are, however, several international crime Conventions that provide an obligation on states to extradite under certain offences, meaning that the state may pass legislation to that effect.[7] Extradition exists to prevent criminal wrongdoers from being able to flee one country to another with impunity. Extradition requires an international mutual effort between sovereign states to punish crime.

Extradition has three substantial elements; an act of sovereignty from the two states involved, a request from one state to the other state for the surrender of the alleged wrongdoer, and the actual surrender or delivery to the state of the alleged wrongdoer.[8] Importantly, extradition involves both legal acts – the formal extradition process itself, and political acts – as seen by the great deal of discretion given to the government of the day and the Minister of Justice in determining whether the discretionary restrictions on surrender are satisfied.[9]

The extradition process is interesting because it is a mixture of both law and politics. Most treaties to which New Zealand is a party provide that the final decision to grant an extradition request is at the discretion of the Minister of Justice.[10] An extradition request is a political act

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5 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 [1.01].

6 Alberto Costi "Jurisdiction" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 361 at 414.

7 See for example, 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), art 7(1); and Crimes of Torture Act 1989.

8 Nicholls, Montgomery and Knowles, above n 5, at [1.03].

9 Extradition Act 1999, s 8.

10 See for example, Agreement on Extradition between the Government of New Zealand and the Government of the Republic of Fiji [1992] NZTS 3 (signed 21 March 1992, entered into force 14 April 1992), art 5; and Treaty on Extradition between New Zealand and the United States of America [1970] NZTS 7 (signed 12 January 1970, entered into force 8 December 1970), art 5.

that begins a legal process, but the consequences of the legal process are linked to a political decision.

Extradition aims at reducing the potential threat an individual may pose to the security of the requested state while also combatting impunity. The laws surrounding extradition seek to appease the tension between two conflicting rule of law goals; the first objective being a person alleged to have committed a crime in one sovereign state should be surrendered to answer for their wrongdoings in that state; the second objective is to protect those who are surrendered from any injustices, specifically, the extraditee's rights as an individual.[11]

III Extradition in New Zealand

In New Zealand, the Extradition Act 1999 (the Act) governs extradition. The Act is managed by different departments and agencies, with the Minister of Justice having great discretion on whether to surrender a person to a requesting state.[12] The Act applies to all extraditions to any sovereign state, enabling New Zealand to extradite to states with which it does not have a bilateral extradition treaty. Although the Act plays an important role, New Zealand's extradition law is very much based around and dependent on the extradition treaties that New Zealand has in place. New Zealand's current extradition process, contrary to the Commission's view, is thorough and effective. The current extradition procedures are essential because they provide a clear process for extradition. A thorough process allows for strong protections of the rights of individuals being extradited.

New Zealand's extradition process does not just exist under the Act. New Zealand is a party to 41 extradition treaties that the United Kingdom entered into on New Zealand's behalf which New Zealand inherited.[13] New Zealand has also negotiated four bilateral treaties with Hong Kong, Fiji, The Republic of Korea and the United States of America. Further, New Zealand is

11 Nicholls, Montgomery and Knowles, above n 5, at [1.02].

12 Extradition Act 1999, s 30.

13 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [*NZLC IP37*] at [2.9].

a member of the London Scheme for Extradition within the Commonwealth.[14] Finally, New Zealand is a party to at least 25 multilateral treaties that have extradition provisions.[15]

Outside of bilateral treaties, extradition in New Zealand is still possible on an ad hoc basis.[16] New Zealand's relationship with the People's Republic of China is an example of this and was highlighted by the Kyung Yup Kim case, which is ongoing.[17] What this case has shown is that extradition is possible without a bilateral treaty even with countries that have a questionable track record of human rights violations. For extradition to occur in this case, certain diplomatic assurances given by the requesting state needed to be considered adequate to ensure the extraditee's protection.[18] However, diplomatic assurances are not a condition of ad hoc extraditions, and the requirement for them will depend on the specific facts of an extradition request. This case also shows that the conditions for extradition are present. Even though it is an ad hoc extradition, as New Zealand does not have an extradition treaty with the People's Republic of China, theoretically the authorities will still check that there has been a crime committed by the accused.

The ability to extradite on an ad hoc basis is argued by the Commission to be beneficial as it provides adaptability and the ability to tailor the extradition to the given circumstances.[19] The Law Commission recommended that a "treaty should still not be necessary for an extradition."[20] The Commission believes that it would be too cumbersome for every state to have an extradition treaty with New Zealand if they want to make an extradition request. The thinking behind the Commission's recommendation seems to link back to the overall objective that the Commission set out to do when it assessed the adequacy of the current laws, which was to simplify the process and ultimately facilitate extradition.[21] Requiring states to have an extradition treaty in place would run contrary to this objective. The rationale of the Commission is the current way the relationship between extradition treaties is expressed in the

14 NZLC IP37, above n 13, at [2.9].
15 See Appendix C of NZLC IP37.
16 Costi, above n 6, at 414.
17 *Kim v Minister of Justice* [2016] NZHC 522; *Kim v Minister of Justice of New Zealand* [2019] NZCA 209; and *Minister of Justice v Kim* [2019] NZSC 100.
18 Extradition Act 1999, ss 7, 8 and 30.
19 NZLC IP37, above n 13, at [3.77].
20 At 20.
21 At 11.

Act can frustrate the intention of treaties to enable extradition.[22] However, the Commission neglected the fact that a significant role of extradition treaties is also to ensure the protection of the rights of the person being sought. The Extradition Act currently works alongside any extradition treaty, although s 11 provides that an extradition treaty will override the Act when they are inconsistent.[23] However, where there is no treaty in place, the Act will determine how an ad hoc extradition request is dealt with and the procedures to be followed.

A The Extradition Process

The current extradition process in New Zealand, both for countries requesting extradition from New Zealand and New Zealand requesting extradition from another country, is governed by the Extradition Act 1999. However, as noted, bilateral treaties can both supplement and override the procedures set out in the Act. The Act outlines two separate processes for extradition from New Zealand; the standard procedure and the backed-warrant procedure.

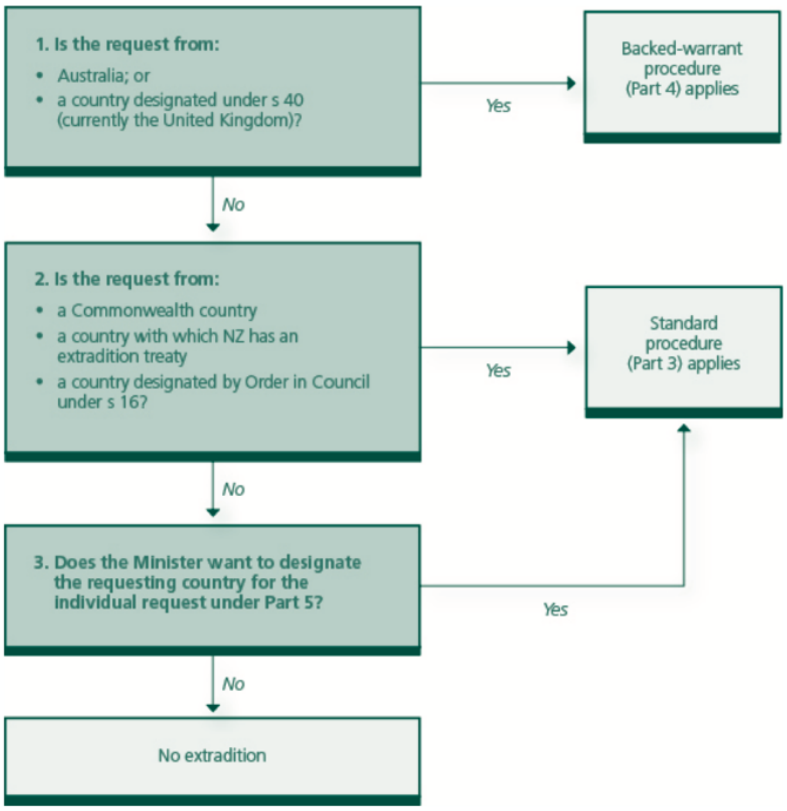
The standard procedure is outlined under Part 3 of the Act. Part 3 applies to Commonwealth countries, countries New Zealand has an extradition treaty with, countries which Part 3 applies by Order in Council, and countries which have made an individual extradition request under Part 5, as shown in Figure 1 below.[24] Under the standard provisions, an extradition request of an extraditable person must be transmitted to the Minister of Justice.[25] These requests must be made by a diplomatic representative of the country wanting the individual's extradition, or by other means prescribed in a treaty between New Zealand and the extradition country.[26]

The second process under the Act is the backed-warrant procedure which applies to Australia and any other "designated country", providing a simplified extradition process.[27] This process is different from the standard extradition process as a warrant from the requesting country for the arrest of a person can be endorsed in New Zealand.[28] Unlike the standard procedure, diplomatic avenues are not used – a New Zealand District Court Judge can endorse a warrant

22 NZLC IP37, above n 13, at 22.
23 Extradition Act 1999, s 11.
24 Section 13.
25 Section 18(1).
26 Section 18(2).
27 Sections 39 and 40.
28 Section 41.

from the requesting country. Therefore, under the backed-warrant procedure, there is no need for the requesting state to demonstrate a presumption that the person sought for extradition performed an extradition offence and is consequently eligible for extradition.[29] Figure 1, shown below, outlines how the two different procedures work under New Zealand's current extradition laws and which part of the Act applies to which countries.[30]

Figure 1: Which Part of the Act applies?



The standard procedure is of more relevance to this paper as an extradition to the countries that fall within this procedure are more likely to cause some of the concerns that are present in extradition proceedings, such as the protection of the rights of the person being sought. This is because New Zealand is comfortable with extraditing to Australia and the United Kingdom without the same "checks" in place, such as the case being referred to the Minister of Justice.[31] However, the Commission recommended simplifying the backed-warrant procedure further. This may mean New Zealand is relying too heavily on both Australia and the United Kingdom

29 Margaret Soper *Laws of New Zealand* Extradition (online ed) at [31].
30 NZLC IP37, above n 13, at [2.17].
31 Extradition Act 1999, s 48(3).

to uphold the values that New Zealand deems important in an extradition proceeding.[32] Further simplification is unwarranted.

Under the standard procedure, there must be an order for surrender, which involves a number of steps:[33]

a) issuing a warrant and arresting the subject of the request;
b) bringing the subject before the court as soon as possible;
c) determining whether the subject is eligible for extradition; and
d) deciding whether the subject should be surrendered to the extradition country and making any consequential surrender order.

1 Issuing a warrant and arresting the subject of the request

First, any request made under the standard procedure should be backed by a warrant issued in the requesting state, for the arrest of the person sought. Further, the requesting state should provide the information detailing the alleged offence and the conduct that established the offence.[34] The Minister of Justice *may then*, suggesting the Minister has discretion, notify a District Court Judge that a request has been made and may request that the Judge issue a warrant for the arrest of the person sought.[35]

Following this, the District Court may issue a warrant for the arrest of the person if they are satisfied based on the information presented to them that; the person is in, or suspected of being in New Zealand; that there are reasonable grounds to believe the person sought is an extraditable person relating to the extradition or requesting country; and that the offence the person is accused of, is an extradition offence.[36] An extradition country is a country which satisfies the requirements in the Act,[37] while an extradition offence is an offence punishable by the laws of the requesting country with a maximum penalty of no less than 12 months'

32 See discussion at page 40.
33 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [18].
34 Joseph Griffiths "The Need for a Structured Approach to Extradition between China and New Zealand" (LLM Thesis, Victoria University of Wellington, 2019) at 6.
35 Extradition Act 1999, s 19(1).
36 Section 19(2).
37 See Figure 1 at page 10; and Section 2.

imprisonment.[38] Further, it must be that if the person had committed the equivalent conduct in New Zealand, it should also have a maximum penalty of no less than 12 months' imprisonment.[39]

2 Bringing the subject before the court

After a person has been arrested using a warrant, they must be brought before a court as soon as possible.[40] Further, the individual can only be released on bail.[41] In determining whether to release an individual on bail or not the most relevant factor relating to an extradition proceeding is the flight risk that the individual poses.[42]

3 Eligibility for extradition

After the person sought for extradition has been arrested through a warrant and either detained or released on bail, the District Court will determine the person's eligibility for extradition. The Court needs to be satisfied that the alleged conduct meets the standard of being an extradition offence and that the evidence given at the hearing before the Court would justify the person's trial if the alleged conduct had happened within New Zealand's jurisdiction.[43] The *Kyung Yup Kim* proceedings tell us that the onus of proof is on the requesting state in satisfying the Court under s 24.[44] Further, the onus is on the requesting state to satisfy the Court that they have a prima facie case against the accused.[45] Additionally, it is for the Court to decide whether any mandatory restrictions on the surrender of the accused apply under s 7.[46]

If the Court has not been satisfied that the person sought is eligible for extradition, then the individual should be discharged and released from custody.[47] However, if the Court is satisfied

38 Extradition Act 1999, s 4(1)(a).
39 Section 4(2).
40 Section 23(1).
41 Section 23(2).
42 Bail Act 2000, s 8; and Griffiths, above n 34, at 8.
43 Extradition Act 1999, s 24.
44 *Kyung Yup Kim v The Prison Manager Mt Eden Correctional Facility* [2012] NZCA 471, [2012] 3 NZLR 845 at [25].
45 *Dotcom v United States of America*, above n 2, at [184].
46 Extradition Act 1999, s 24(3).
47 Section 26(4).

that the individual is eligible for surrender, then it must issue a warrant for the detention of the person in prison and subsequently send a report with all the relevant information about the case to the Minister of Justice.[48]

4 Deciding whether the subject should be surrendered

Following these steps outlined above, it is for the Minister of Justice to determine whether the person is to be surrendered.[49] Under s 30, the powers of the Minister provides both mandatory and discretionary grounds for declining to surrender the person sought. There are some avenues available to an individual if the Minister decides the individual is eligible for surrender. An individual sought for extradition may appeal the decision of the Minister, make a habeas corpus application or judicially review the decision by the Minister. If the individual uses one of these avenues, they cannot be surrendered until the completion of the applicable procedures.[50]

The mandatory grounds for declining surrender are outlined in s 7, while the discretionary grounds are outlined in s 8. Both are examined by the Court when determining an individual's eligibility for surrender, and then by the Minister when deciding whether or not to extradite the individual. Further, the Minister must consider additional mandatory and discretionary grounds for declining surrender in accordance with s 30. Figure 2 outlines the different restrictions on surrender.[51]

5 Mandatory grounds for declining surrender

The relevant mandatory grounds for declining surrender are as follows:[52]

> A mandatory restriction on surrender exists if –
> a) the offence is of a political character; or
> b) the surrender of the person, is actually sought for the purpose of prosecuting or punishing the person based on discrimination; or
> c) the conduct is only an offence under military law; or

48 Extradition Act 1999, s 26(1).
49 Section 30.
50 Section 31(2).
51 See page 15.
52 Extradition Act 1999, s 7.

d) the person has already been acquitted or undergone punishment (double jeopardy).

6 Discretionary grounds for declining surrender

The discretionary grounds for surrender are more relevant to this paper. These are the grounds that the Law Commission wants to put in the hands of the courts predominantly. The Commission is of the view that a non-political actor would be better placed to make these decisions.[53]

Under s 8 of the Act, three discretionary restrictions would mean it would be "unjust and oppressive" to surrender the individual. The first ground is because of the trivial nature of the case. Secondly, it would be unjust or oppressive if the accusations were not made in good faith in the interests of justice.[54] Last, if there has been a delay since the offence was alleged to have been committed, then this is also a discretionary ground that the Minister may refuse to surrender on.

Section 30 of the Act provides further mandatory and discretionary grounds for refusing surrender. There are four additional mandatory restrictions on surrender under s 30. First, if the Minister has substantial grounds to believe that the individual would be in danger of being tortured in the requesting country, then the extradition request must be refused.[55] Secondly, the Minister must not surrender the individual if a mandatory restriction on surrender set out in a treaty between New Zealand and the requesting country applies.[56] Thirdly, a New Zealand citizen cannot be extradited if there is a treaty or specific agreement between New Zealand and the extradition country that says a New Zealand citizen may not be surrendered.[57] The final mandatory ground is speciality. The Minister should not surrender a person unless they are sure the individual will not be tried for a different crime in the extradition country to the one they are being surrendered for.[58]

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53 NZLC R137, above n 1, at [5.12].

54 Extradition Act 1999, s 8.

55 Section 30(2)(b).

56 Section 30(2)(ab); and see Extradition (Hong Kong Special Administrative Region of the People's Republic of China) Order 1998, art 7.

57 Section 30(2)(c).

58 Section 30(5).

Finally, the Minister has three further discretionary grounds for refusing surrender under s 30. The Minister may refuse surrender if it appears that the individual has been or may be sentenced to death.[59] The second discretionary ground is if there are extraordinary circumstances that would make it unjust and oppressive to surrender the person, such as their health.[60] The Minister also has the discretionary power to refuse surrender for "any other reason".[61] This gives the Minister a broad discretion. Meaning the Minister, for example, may consider the possibility of the individual getting a fair trial.

Figure 2 [62]

SECTION	GROUNDS	COURT OR MINISTER?	NATURE OF GROUNDS
7	Political offence Discriminatory purpose to prosecution or punishment Discrimination: prejudice in trial or punishment Military offence Double jeopardy Detention because of mental health Detention because of intellectual disability	Both	If present, decision maker "must not determine that the person is to be surrendered" A treaty cannot be construed to override them
8	Injustice or oppression due to: • triviality • lack of good faith • delay • current prosecution of an offence in New Zealand	Both	If present, decision maker "may determine that the person is not to be surrendered" A treaty may be construed to override them
30	Restriction applied by the terms of a treaty Torture New Zealand citizenship Death penalty Injustice or oppression due to personal circumstances Speciality Any other reason	Minister	Mixture of grounds that require no surrender and that allow the Minister to determine that the person is not to be surrendered A treaty may be construed to override all except torture and death penalty grounds

59 Section 30(3)(a).
60 Section 30(3)(d).
61 Section 30(3)(e).
62 Figure 2 from NZLC IP37, above n 13, at 88.

This section has outlined the broad procedure for extradition in New Zealand as it currently stands. The subsequent section will look at the Law Commission's issues with the current laws and the recommendations made by the Commission.

IV Law Commission Recommendations

The Extradition Act 1999 is the framework for the formal assistance between New Zealand and foreign states in the prevention and prosecution of crime. Therefore, it is critical for the Act to allow New Zealand to deal with the difficulties that the globalisation of transnational crime presents in these modern times. Improvements in technology, travel capabilities and communication have led to transnational crime becoming a greater threat. The Law Commission is of the view that the current procedures in place are too complex and do not effectively discharge the role of preventing and punishing crime.[63] The Commission believes the current Act is too difficult to follow and fails to come to grips with the existence of New Zealand's role within a globalised environment. The Law Commission, therefore, recommended that the Extradition Act 1999 be replaced by new legislation that aims to implement the Law Commission's recommendations. The main problem the Law Commission has with the current regime is its apparent complex and convoluted nature.

The Law Commission's proposed Bill would largely overhaul the current legislation governing extradition, replacing it with an act that aims to provide New Zealand with a modernised and fit for purpose extradition regime that gives New Zealand the flexibility to overcome future challenges, whilst also being strong enough to guarantee that New Zealand values are preserved.[64] The Commission believes the current process is failing to do this as many of the treaties that New Zealand's extradition laws are heavily dependent on are old imperial treaties. Therefore, the specific crimes outlined in those treaties fail to include modern crimes, such as cybercrimes, and also include wording that does not fit neatly with the current Act. Accordingly, the Commission says this leads to litigation over whether the treaties and Act are inconsistent, and if so, which should be paramount.[65]

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63 NZLC IP37, above n 13, at [1.7].
64 NZLC R137, above n 1, at 4.
65 At [8.1].

The Law Commission outlined four key recommendations relating to extradition: an integrated scheme for extradition; reducing delays of requests; reducing the complexity of requests; and ensuring the protection of the rights of the person sought.

A An Integrated Scheme

The first recommendation was to have an integrated scheme for extradition.[66] The basis for this recommendation was the fact that presently there is not one primary department or agency that deals with extradition. Currently, the Ministry of Justice, The Ministry of Foreign Affairs and Trade, the New Zealand Police and the Crown Law Office all play differing roles in extradition cases.[67] The Law Commission recommended the establishment of a Central Authority that would be responsible for receiving, managing and executing all extradition requests.[68]

The creation of a Central Authority is argued to have three important features. Firstly, the fact that the Central Authority would oversee all extradition proceedings in New Zealand would streamline the extradition process, increase efficiency and promote consistency. However, the Commission presents no proof that this would, in fact, be the case. Extradition procedures by nature are complex, especially when you are dealing with the relationship between municipal and international law. The Law Commission may be overstating the impact a Central Authority may have on streamlining the extradition process.

Secondly, the Central Authority would decide whether or not to begin extradition proceedings. It will be required to determine whether or not there is a "reasonable prospect of success" and whether extradition proceedings are suitable given the circumstances.[69] Further, the Law Commission recommended that all extradition requests should be heard by one court – the District Court. Given the limited number of extradition requests New Zealand gets each year, building a pool of institutional knowledge in one court makes sense and would lead to more consistent decisions moving forward.[70]

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66 NZLC R137, above n 1, at 4.

67 Paul Comrie-Thomson and Kate Salmond "Modernising New Zealand's extradition and mutual assistance laws" [2016] NZLJ 81.

68 NZLC R137, above n 1, at [2.12].

69 At [2.9].

70 At 4.

The concerns with a Central Authority is whether the extradition process will remain a very objective process, or is it more subjective to ease the process and make it more efficient. Further, can we say for sure that the District Court alone has the expertise to be the sole court to hear all extradition requests? The fact that extradition currently touches many different agencies may, in fact, mean there are greater protections of the process. Having one department may make the process more efficient. However, the danger of trying to make the process as efficient as possible is that you open the door for expediency.

B Reducing Delays

The second recommendation would aim at reducing delays. The Commission has argued that the current extradition process leads to unnecessary delays. However, this argument by the Commission is based on limited evidence.[71] The flagship case used as evidence of this is the Kim Dotcom case. However, this case is a complex case based on dual criminality, and would likely have caused similar delays in many other jurisdictions. Nevertheless, the Commission believes the draft legislation proposed would be created in a way leading to a more transparent and efficient extradition process. An example of this is streamlining the appeal and review process. Extradition proceedings are subject to numerous appeals, habeas corpus applications and judicial reviews.[72] While it would be inappropriate for the Law Commission to remove judicial review and habeas corpus applications, as they are aimed to protect the person, the proposed Bill was drafted in a way that would lead to reviews of this nature being more limited.[73]

C Reducing Complexity

The Extradition Act, as it stands, encompasses differing processes dependant on the country from which the extradition request comes. Currently, there are different procedures between backed-warrant countries (Australia and the United Kingdom) and other countries.[74] Additionally, distinctions can exist as some countries may depend on the procedures

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71 NZLC R137, above n 1, at 4.
72 At 6.
73 At 6.
74 At 5.

established in a treaty, while other countries can use a 'record of case' process.[75] Further, certain countries are required to get preliminary approval from the Minister of Justice.[76] The Law Commission is of the view that these differences make the extradition process unnecessarily complex. However, the Commission seems to overstate the significance of the complexity in terms of country designation. It does not seem cumbersome to have more than two avenues in which states have to make requests.

The draft Bill put forward by the Commission proposes only two specific procedures – based on whether the country applying for extradition is an 'approved country'.[77] An approved country would be eligible to use a simplified procedure, similar to the current backed-warrant system, in which there would be no need for an evidential inquiry into the application of the person sought for extradition.[78] However, there is a real danger that further simplification of the current backed-warrant procedure could have a negative consequence on the rights of the person being sought.[79] Countries encompassed as 'approved countries' would include Australia, the United Kingdom and other countries which New Zealand has a close extradition relationship with.[80] All other countries would use the standard extradition procedure. This would require presenting a summary of the evidence against the individual sought for extradition from which the Court would determine liability for extradition.[81]

Further, the Bill would change the role that bilateral extradition treaties New Zealand has signed up to have on extradition proceedings. As mentioned, many of the bilateral treaties to which New Zealand is a party were inherited from the United Kingdom and are now up to a hundred years old. The Extradition Act 1999 makes clear that an extradition treaty will override the Act where the two are inconsistent. The Commission viewed this as the cause of delay and broad litigation, as inconsistencies and determining what the appropriate procedural steps are under a bilateral treaty can often be challenging to establish.[82] The Bill would change s 11 of the current Act, limiting the ways that an extradition treaty can supplement the statutory

75 Extradition Act 1999, s 25.
76 Section 60(2).
77 NZLC R137, above n 1, at 5.
78 At [9.19].
79 See discussion at page 40.
80 NZLC R137, above n 1, at 5.
81 At 5.
82 At 5 and [8.1].

procedure.[83] This change could have wide-ranging consequences and will be explored in Part V.

D Protection of Rights

The final recommendation aims to protect the rights of the person sought for extradition. While the recommendations and proposed Bill have the ultimate goal of streamlining the extradition process and increasing the efficiency of New Zealand's extradition law, it must be balanced with ensuring the protection of an individual's rights.[84] This can be linked back to the two conflicting rule of law objectives mentioned – ensuring justice by punishing crime and protecting an extraditee's rights. The Commission aimed to ensure their proposals were consistent with the New Zealand Bill of Rights Act 1990. Further, the role of the court under the proposed Bill would be expanded to decide most of the grounds for refusing an extradition request.[85] However, the consequence of having the judiciary make most of the decisions in an extradition proceeding rather than the executive, through the Minister of Justice, is that this may lead to extradition being more expensive and ultimately complex. This being something the Commission wants to reduce. Further, the emphasis placed on the efficiency of the process may, in fact, work contrary to the objective of the protection of rights. Nevertheless, the human rights implications the Commission's proposal may have will be the focus of Part VI of the paper.

E The Main Differences Between the Current Regime and the Proposal's

There are some significant differences between how New Zealand's current extradition laws operate and how the Law Commission would have the extradition laws operate. Below is a summary of the substantive differences and changes that would be made if the Commission's proposals were to be accepted:

- The Commission would remove s 11 of the current Act. This section gives bilateral extradition treaties supremacy when treaties are inconsistent with the wording of the

83 NZLC R137, above n 1, at [3.7].
84 At [4.1].
85 At 5.

Act. The Commission would replace s 11 with a provision that would only allow bilateral extradition treaties to supplement, not override, the new Act in limited circumstances. This would cause New Zealand's extradition laws to be predominantly statute based.

- A Central Authority would be created to handle all extradition requests. Currently, several different government agencies and departments are all involved in extradition requests.

- The Minister of Justice would have a more limited role under the Commission's proposals. The Court would have the sole responsibility of evaluating the restrictions on surrender. The Minister would only consider the grounds that deal with governmental and diplomatic assurances.

Overall, the debate between which approach is best for New Zealand to follow comes down to what the relationship between extradition treaties and domestic legislation should be. Different jurisdictions take differing views on how much weight should be placed on each element. The next part will look at whether one approach is preferable to the other or if a hybrid approach is best.

V Domestic Legislation vs Treaty-Based Approach to Extradition

This part will aim to outline why a treaty-based approach to extradition law is preferable to the domestic legislation approach proposed by the Law Commission. Further, this part will highlight the main aspects and advantages of extradition treaties, while flagging some of the short-comings relying purely on domestic legislation may have. The ideal approach moving forward will be considered with a comparison to the different approaches taken by other Commonwealth jurisdictions.

A International Law and Municipal Law

The relevance of this section is to show that if the Law Commission's proposal was accepted and s 11 was replaced, meaning bilateral extradition treaties would no longer be paramount to the domestic legislation governing extradition in New Zealand, it could cause New Zealand to breach its international obligations.

The international nature of extradition means there is an important relationship between international law and municipal law. A foundation of international law is that there is a presumption against conflicts between international and national law.[86] Although domestic courts must apply national laws regardless of whether they conflict with international law, a presumption exists which aims to prevent the existence of conflict from occurring.[87] International and municipal law can overlap and conflict, with both the international law system influencing the domestic law system and also domestic law influencing the international law system.[88] Therefore, international law plays a significant role in the interpretation and application of domestic laws. As Rosalyn Higgins puts it, "[t]here is no legal system in the world where international law is treated as 'foreign law'".[89]

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86 Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law* (9th ed, Longman, London, 1992) at 81.

87 At 81.

88 Treasa Dunworth "International Law in New Zealand Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 597 at 598.

89 Rosalyn Higgins *Themes and theories: selected essays, speeches and writings in international law* (Oxford University Press, Oxford, 2009) at 545.

Accordingly, once New Zealand has ratified a bilateral extradition treaty, it gives rise to international obligations and New Zealand is obliged to follow the treaty at international law. If New Zealand does not fulfil their obligations at international law, they will be held accountable for not doing so.[90] Further, it is settled in international law that when a state is charged with breaching its obligations at international law, it cannot plead as a defence that its domestic law consisted of rules which conflicted with international law.[91]

Ensuring that New Zealand's bilateral extradition treaties are paramount to the domestic extradition legislation guarantees that New Zealand's domestic courts are not put in a position of breaching their international obligations by applying national laws which conflict with New Zealand's bilateral extradition treaties.

However, at the end of the day, nothing is stopping New Zealand or any other country from violating international law.[92] What breaching international law does do though is it puts a country in a position that if it breaches its international law obligations, then it opens the door for the other country that is a party to the treaty, as a countermeasure, to do the same.[93] For instance, if by the discretion of the Minister, New Zealand does not allow the extradition of a person, where the treaty provides the person should be extradited in the given circumstances, then the next time New Zealand asks that country to surrender a person to New Zealand they will also not extradite.

Where there are multilateral treaties in place, like human rights treaties, it may well be that if states end up breaching the obligations in these treaties, it may open the door for individuals to have a petition before a human rights body or may put the state in a position where other states can say they are violating their obligations. Nevertheless, technically from a domestic law viewpoint, New Zealand can violate international law if it wishes. This is undesirable, however, as it works counter to the overall objective of extradition, which is to fight against impunity, develop good relations between states and ultimately be a good international citizen.

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90 Jennings and Watts, above n 86, at 82.

91 At 84; and Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 29 April 1970, entered into force 27 January 1980) [*VCLT*], art 27.

92 Dunworth, above n 88, at 616.

93 At 616.

B The Flexibility of Bilateral Treaties

The desirability of bilateral treaties as the primary mechanism for extradition lies in the flexibility that it provides to the states involved. Extradition of an individual from one state to another is, to a certain extent, the requested state having faith in the judicial system of the requesting state.[94] Countries in which an extradition treaty is needed for the application of the domestic legislation can guarantee that extradition will only happen with countries who have a level of justice which is sufficient by limiting to concluding treaties with countries that meet the desired threshold of justice.

Extradition treaties can have the further benefit of binding states to their assurances at international law. There is no consensus among academics as to whether diplomatic assurances create legally binding obligations on states. Klabbers argues that "Treaties rest upon the agreements of states. More importantly, as soon as there is some form of agreement, international legal rights and/or obligations are created."[95] On the other hand, Aust is of the view that diplomatic assurances do not always bind states. The intention of the parties is central to determining whether the agreement is binding.[96] This debate among scholars means that if extradition were limited to ad hoc extraditions and domestic legislation, any assurances given by the requesting state would have the potential to be less binding than if extradition assurances had the backing of a formal, ratified extradition treaty. This can become more important when dealing with states whose track record on human rights violations are of concern to the requested state.

The absence of an extradition treaty that binds both the requested and requesting state on the international plane has the greater potential for the rights of the extraditee to be infringed. If a state was to breach diplomatic assurances that a person extradited would, for example, get a fair trial which had the backing of an extradition treaty then the states to that bilateral treaty would have a clearer potential dispute resolution pathway, the International Court of Justice. Although diplomatic assurances arising from both domestic legislation and ad hoc extraditions

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94 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.

95 Jan Klabbers *The Concept of Treaty in International Law* (Kluwer Law International, The Hague, 1996) at 13.

96 Anthony Aust *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press, New York, 2007) at 49 – 52.

can be proved to amount to a unilateral declaration that binds the states on the international plane, it is more uncertain whether it will bind the requesting state.[97] A formal bilateral treaty does not have this degree of uncertainty.

One may argue that under the discretionary powers currently given to the Minister of Justice that there is also a level of uncertainty regardless of the presence of an extradition treaty or not, as one can never be certain the decision the Minister will make. However, these discretionary powers should be viewed as an extra layer of protection of the person wanted for surrender rather than being viewed as limiting an extraditee's rights. On the other hand, some elements of the approach that the Law Commission have proposed may limit the post-extradition rights of the extraditee. The mindset of the Commission ultimately wanting to make the process more efficient and facilitate extradition could lead to expediency. The lack of a treaty or binding agreement means it is more difficult to check that any assurances made about the treatment of the person surrendered are complied with. Additionally, there is the absence of an accountability mechanism that international law provides. It should be noted that the presence of an extradition treaty does not mean there is no need for diplomatic assurances, rather what a treaty does is bind those assurances on the international plane.

Whether diplomatic assurances are binding on states that made them is an area that has limited clarity. This is because a diplomatic assurance does not neatly fall within the international law mechanisms of a treaty or a unilateral declaration, as diplomatic assurances are often not designed to be binding. The presence of a treaty that is binding and sets out the procedures to be followed is desirable to avoid this lack of clarity that is characterised by diplomatic assurances.

The flexibility of extradition treaties means that New Zealand can widen the scope of restrictions on surrendering an individual when treaties are negotiated with certain states, this will aim to mitigate the ability for the requesting state to breach the rights of the extraditee. An example of this is the treaty between New Zealand and Hong Kong negotiated in 1998. Under

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97 Jack Wong "Trickled-down Assurances: Could the Central Authority, Treaty, or Judiciary Alleviate Extradition Issues Amongst Non-traditional Treaty Partners?" (LLM Thesis, Victoria University of Wellington, 2018) at 78.

this treaty, Article 7 outlined that surrender may be refused if the Requested Party considers that:[98]

> **d)** in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in the view of age, health or other personal circumstances of the person sought.

The existence of s 11 of the Act means that the Act must be construed to give effect to this article. Therefore, as was held in *Yuen Kwok-Fung*, the grounds for refusing surrender are extended in the specific circumstances of extradition between New Zealand and Hong Kong.[99] This case and treaty highlight the flexibility of bilateral treaties in relation to extradition, enabling New Zealand to ensure a higher threshold is met before an individual is required to be extradited to Hong Kong.[100] Further, the Court of Appeal in *Bujak v Republic of Poland* outlined the relevant treaty with Poland meant that a normal discretionary restriction on surrender was viewed as a mandatory restriction, therefore, providing wider protection than under the Act.[101] This can work in the opposite direction also. A treaty may offer lesser protections if a government wants to transfer the person. However, with modern international human rights movements this is becoming more unlikely. Domestic legislation in a state is often seen as the 'floor' for the protection of the extraditee's rights.[102]

A further benefit of treaties is the ability of the requested state to terminate or suspend the treaty in the case of a material breach.[103] The principle 'rebus sic stantibus' could be used by either the requesting or requested state. The 'rebus sic stantibus' principle is an international law doctrine allowing a contract or treaty to be terminated if there is a fundamental change in the circumstances concerning the functioning of the contract or treaty.[104] Using this principle to suspend or terminate an extradition treaty would have greater effect and be more of a public annunciation of a state's values than if extradition was undertaken and declined using an ad

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98 Agreement for the Surrender of Accused and Convicted Persons Between the Government of New Zealand and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (signed 3 April 1998, entered into force 1 October 1998); and Extradition (Hong Kong Special Administrative Region of the People's Republic of China) Order 1998, art 7.

99 *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA).

100 Note that of 31 July 2020 New Zealand has suspended the extradition treaty with Hong Kong.

101 *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604 at [18].

102 NZLC IP37, above n 13, at 22.

103 See discussion at Part V, Section A.

104 VCLT, above n 91, art 62(1)(b).

hoc extradition or domestic legislation process. If a state were to breach its obligations or assurances under the latter scenarios, there would not be the same accountability on the international plane. This international law principle is a very high threshold to prevent states from withdrawing from treaties on tenuous grounds.[105] There lacks evidence showing this principle has been used in relation to extradition treaties in the past. However, a significant breach of an extradition treaty may open the door for the principle to be used.

Although there are clear benefits of bilateral extradition treaties such as flexibility and the ability for states to examine the judicial system of other states and draft treaties accordingly, it does not mean extradition treaties are not vulnerable. There is the reality that treaties can quickly become outdated and fall behind the current norms.[106] This is especially relevant with massive improvements in technology, communication and globalisation in the twenty-first century. The fact that 41 of the 45 bilateral treaties to which New Zealand is a party, were entered into on our behalf in the 19th and 20th centuries leaves New Zealand vulnerable for the standards set out in those treaties to become obsolete, especially regarding international human rights.[107] Further, one could make the argument that because of current international human rights standards, a state should not need a treaty to examine another state's judicial system and approach to human rights. There should be an examination by any extraditing state irrespective of any treaties into the prospect that the requesting state will uphold current standards of international human rights.[108]

In summary, the benefits of extradition treaties outweigh the limitations. Extradition treaties make it easier to hold all states involved in extradition accountable on the international plane by creating international obligations that endanger the principles of reciprocity and good diplomatic relations if not followed. Ad hoc extraditions and extraditions that only follow a domestic legislation process face a greater risk of being unable to unilaterally bind states at international law. Even if a diplomatic assurance is considered binding on the state, the lack of any enforceability mechanism or public repercussions presents problems. On the other hand, treaties will bind states on the international plane and may even support judgment from an

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105 Alberto Costi, Scott Davidson and Lisa Yarwood "The Creation of International Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 153 at 224.

106 NZLC IP37, above n 13, at [3.74].

107 Ivan Shearer "Extradition Without Treaty" (1975) 49 Australian Law Journal 116 at 119.

108 NZLC IP37, above n 13, at 100; and Extradition Act 1999, ss 7, 8 and 30.

international body, such as the International Court of Justice. While the challenges presented by globalisation and the development of international human rights are acknowledged, the benefits that bilateral extradition treaties provide of flexibility and the creation of binding international obligations necessitate New Zealand to continue to have bilateral extradition treaties as the backbone of our extradition laws.

C The Supremacy of Bilateral Treaties in New Zealand Extradition Law

As mentioned s 11 of the Extradition Act provides for treaties to have supremacy over the Act in situations of inconsistency. Section 11 of the Extradition states:[109]

> **11 Construction of extradition treaties**
> (1) If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.

The strength and wording of s 11 highlights the principles of international law mentioned, that treaties must be complied with and that a state cannot use its domestic law as a justification for failing to perform their international law obligations.[110] This can be further highlighted in New Zealand by the wording of one of the objectives of the Extradition Act:[111]

> **12 Object of this Act**
> (a) to enable New Zealand to carry out its obligations under extradition treaties.

The leading case in New Zealand on s 11 is *Yuen Kwok-Feng* which states that the section is a "very strong direction."[112] Section 11 requires a "reconstruction of the Act, to the extent it is inconsistent with the treaty, to make it consistent."[113] This approach was confirmed by the Court of Appeal in *Bujak v Minister of Justice*.[114]

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109 Extradition Act 1999, s 11.
110 VCLT, above n 91, arts 36 and 37.
111 Extradition Act 1999, s 12(a).
112 *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China*, above n 99, at [15].
113 At [16].
114 *Bujak v Minister of Justice* [2009] NZCA 570 at [47].

The Law Commission does not like the supremacy s 11 gives for treaties to override the Act when the two are inconsistent. This general rule is subject to an exception in s 11(2) that no bilateral treaty can be interpreted to override the mandatory grounds for refusal under s 7 or grounds related to torture and the death penalty in s 30.[115] The issue the Commission has is that the imperial bilateral treaties that were entered into on New Zealand's behalf are subject to and cannot override the old mandatory provisions in the Extradition Act 1965. The 1999 Act was not in force when these imperial treaties were entered into on New Zealand's behalf. Therefore, the mandatory provisions for refusing surrender, which cannot be overridden, in the 1965 Act are more limited than in the 1999 Act. The Commission believes that as international human rights and crimes have developed significantly since the 1960s, the old imperial treaties should be subject to updated mandatory grounds for refusal.

The Commission, in their draft Bill proposed to remove s 11 and would:[116]

> … propose that bilateral extradition treaties should not be capable of overriding the grounds for refusal in the Act. The treaties should, however, be able to supplement the statutory grounds. Our proposed statutory grounds reflect fundamental values and rights that we think ought to be protected in all extraditions.

The issue with the Commission's proposal is that they would make the imperial treaties which are subject to the mandatory grounds for refusal under the 1965 Act, subject to the new mandatory grounds for refusal under the draft Bill that they proposed.[117] New Zealand's extradition laws as they stand, allow New Zealand to fulfil our international obligations and not act inconsistently to them. However, if what the Law Commission proposed is accepted, removing the pre-1999 treaty distinction would mean New Zealand will not be able to act consistently with our bilateral treaties and would lead to New Zealand breaching our international obligations. This could cause New Zealand or other states to withdraw from the bilateral extradition treaties.

If the Commission's proposals were accepted, with statute being the basis of New Zealand's extradition laws, it would remove an obligation to extradite. Bilateral extradition treaties create

115 Extradition Act 1999, s 11(2).
116 NZLC IP37, above n 13, at [8.17].
117 At [3.37].

this obligation on states. The Commission's proposals would extinguish the need for New Zealand to negotiate new or renegotiate old extradition treaties. With an absence of this obligation to extradite, it could have the unintended consequence of facilitating impunity. Criminals tend to seek refuge in countries where there are no extradition treaties. This may not affect New Zealand extraditing a person to another country so much. However, it could cause difficulties for New Zealand requesting another country to extradite as without a bilateral extradition treaty there would be an absence of an obligation to extradite.[118] An example of the difficulties to extradite in the absence of an extradition treaty is the Kyung Yup Kim proceedings, which have spanned over close to a decade.

Allowing bilateral treaties supremacy over domestic legislation gives the extradition laws of states more certainty in terms of the obligations required of states.[119] This is especially relevant when countries follow similar legal traditions.

D Approaches Taken by Other Jurisdictions

To determine what the best approach is for New Zealand to take it is useful to look at how some comparable jurisdictions have grappled with the difficult relationship between treaties, legislation and the evolution of extradition globally. The United Kingdom, Canada and Australia are the jurisdictions that have similar values to New Zealand and are, therefore, the jurisdictions best placed to compare New Zealand's approach to. All three jurisdictions have taken differing approaches to this issue.

Australia has taken an approach which is heavily treaty-reliant. Since the late 1980s, Australia has aimed to negotiate new bilateral extradition treaties and arrangements with other states.[120] These bilateral treaties form the basis of Australia's extradition laws. Like New Zealand, prominent extradition cases caused Australia to review its extradition laws in the 1980s.[121] Subsequently, Australia introduced the 'no evidence' requirement. This meant that a country did not have to give any evidence to the requested state to support the extradition request. The

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118 Costi, above n 6, at 414.

119 United Nations Office on Drugs and Crime "Manual on Mutual Legal Assistance and Extradition" (2012) at 19.

120 NZLC IP37, above n 13, at [3.65].

121 At [3.66]; and Joint Standing Committee on Treaties *Extradition – A review of Australia's law and policy* (Report 40, August 2001).

'no evidence' requirement was more favourable for civil law justice systems which are not familiar with the evidence requirements that characterise the common law jurisdictions.[122] The 'no evidence' requirement was then legislated in the Extradition Act 1988 (Cth), becoming the default position for any ensuing treaties entered into with Australia.[123]

Due to the make-up of the Australian Extradition Act, a state can only start the extradition process with Australia if they have an extradition treaty or arrangement in place.[124] Therefore, unlike New Zealand's ability to extradite on an ad hoc basis, a state is not able to make one-off extraditions with Australia.

On the other end of the spectrum sits the United Kingdom. Before the introduction of current legislation, the United Kingdom too was heavily treaty-reliant. The United Kingdom's approach before 2003 operated in a similar way to New Zealand's current Extradition Act 1999.[125] However, this changed after the introduction of the Extradition Act 2003 (UK). The Act fails to explicitly outline the specific relationship between the bilateral extradition treaties that the United Kingdom already had in place and the Act.[126]

Similar to New Zealand's standard procedure and backed-warrant procedure, the United Kingdom has Category 1 and 2, which determines the relevant extradition process to be followed. The 2003 Act details the extradition process for both categories. The bilateral treaties the United Kingdom has in place are only relevant to the extent of the designation of a state into one of the categories under the Act.[127] The extradition procedures and steps for an extradition request in the United Kingdom are, therefore, entirely statutory. In contrast to Australia, a treaty is not required for an extradition to take place.[128]

Falling in the middle of the Australian and the United Kingdom's approach to the relationship between legislation and bilateral treaties is the Canadian approach. Similar to both New Zealand and Australia, high-profile extradition cases led to Canada reassessing its extradition

122 NZLC IP37, above n 13, at [3.66].
123 Extradition Act 1988 (Cth).
124 Section 11.
125 NZLC IP37, above n 13, at [3.62].
126 At [3.63].
127 At [3.64].
128 At [3.64].

laws. Canada decided to try and modernise old extradition treaties and negotiate new ones. Before Canada introduced their Extradition Act 1999, the old legislation contained a blanket rule that allowed extradition treaties to override the Act in the event of an inconsistency.[129] However, the current Act only allows treaties to override specific provisions of the Act. The current Canadian Act, therefore, is clearer than the New Zealand Act, which does not outline what provisions of the Act a treaty can or cannot override.[130]

So what approach should New Zealand follow? Or should we maintain the current approach? The Law Commission has proposed a similar approach to the Canadians. Replacing s 11 of New Zealand's Extradition Act and restricting extradition treaties ability to override the domestic legislation is the basis of what Canada did in its 1999 Act.

The 'no evidence' requirement in the Australian approach allowed them to negotiate 58 new bilateral extradition treaties and arrangements in the late 1980s.[131] Therefore, the Australian approach to extradition is arguably more in line than New Zealand's approach with current international human rights movements. However, this approach would likely be undesirable for New Zealand to follow. The 'no evidence' requirement would go against the values New Zealand sees as significant and their important role within the international community.

The United Kingdom's approach too would likely be unworkable for New Zealand. Under the United Kingdom's approach, there is no ability for any future or existing treaties to change their exclusively statutory process to extradition.[132] This works for the United Kingdom because they have renegotiated a majority of the old imperial treaties to which they were party. Further, the arrangements the United Kingdom has under the London Scheme, their arrangements with the European Union and the European Convention on Extradition means the United Kingdom's extradition laws can operate effectively without the need for bilateral extradition treaties.[133] Conversely, New Zealand's membership in the London Scheme for Extradition alone would not justify moving to a purely statutory approach.

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129 NZLC IP37, above n 13, at [3.70].

130 At [3.71].

131 Twenty-seven bilateral extradition treaties and 31 non-treaty extradition arrangements: see Australian Attorney-General's Department "International crime cooperation arrangements" <www.ag.gov.au>.

132 NZLC IP37, above n 13, at [3.77].

133 At [3.77]; and European Convention on Extradition 359 UNTS 273 (opened for signature 13 December 1957, entered into force 18 April 1960).

The Canadian approach at first glance seems the most applicable approach to New Zealand. It provides the flexibility of both legislation and treaties to work alongside one another. However, there are some stark differences between the Canadian approach and the proposal by the Law Commission. First, Canada has entered into numerous bilateral extradition treaties in the years preceding the 1999 Act, therefore, making the treaties more in line with current international developments.[134] In comparison, New Zealand's bilateral treaties are predominantly old imperial treaties. Therefore, if New Zealand were to pass legislation that repealed the treaty supremacy, it would impact more treaties than the Canadian approach as there would be greater inconsistencies between the Act and the treaties. It would consequently mean New Zealand would be more likely to violate their international obligations.

Secondly, the proposal from the Commission outlines that any bilateral extradition treaty cannot override the restrictions for surrender in the proposed Bill.[135] Whereas the Canadian approach allows for the restrictions on surrender that are outlined in treaties to override most of the restrictions that their Act provides.[136] This is because, in Canada, it was decided that there was a presumption that the domestic legislation was to comply with their international obligations, something the Law Commission does not seem to put the same weight on.[137]

The Commission's assertions that having a treaty-based extradition regime causes confusion, litigation and delay have limited backing. The Commission's argument here is rather weak as it only sights two cases in their report as evidence of this.[138] One of the cases being *Kim Dotcom*, where the main issue of that case, dual criminality, would have arisen regardless of whether New Zealand's extradition laws were predominantly treaty-based or statute-based.[139]

The Commission also argues that treaties can quickly become outdated.[140] This is true in some senses, but it does not mean that they do not have their benefits. The Commission seems to ignore this in their proposals, only focussing on the drawbacks treaties have in comparison to

134 Global Affairs Canada "Treaty Law Division" <https://treaty-accord.gc.ca/result-resultat.aspx?type=1>.
135 NZLC IP37, above n 13, at 86.
136 Extradition Act SC 1999 c 18, s 45.
137 *Nemeth v Canada (Justice)* 2010 SCC 56 [2010] 3 SCR.
138 NZLC IP37, above n 13, at 8.
139 *Dotcom v United States of America*, above n 2.
140 NZLC IP37, above n 13, at [3.74].

the benefits statutes have. As mentioned, treaties provide flexibility. They allow states to make arrangements fit for purpose and can reflect the most up-to-date practices. Treaties allow accountability on the international plane.

Further, the Commission ignores fundamental international law concepts when making this assertion. The idea of the systemic interpretation of customary law is relevant. Systemic interpretation is the process "whereby international obligations are interpreted by reference to their normative environment".[141] The Vienna Convention on the Law of Treaties tells us that treaties should not be interpreted in a vacuum and any relevant rules of international law applicable to the parties are pertinent.[142] Therefore, the argument the Commission puts forward that treaties quickly become outdated is less relevant. Further, the context is not limited to the context of international law at the time the treaty was ratified, but also contemporary law, such as modern international rights movements.[143]

In summary, s 11 of the Extradition Act should remain, as it allows New Zealand to act in accordance with our international obligations. The proposed Bill the Commission has put forward to replace s 11 would mean new statutory restrictions on surrender would override New Zealand's international obligations to extradite following their bilateral extradition treaties, leading to New Zealand breaching their international obligations. The hurdles that bilateral treaties face are acknowledged. It can be cumbersome to have bilateral extradition treaties with all states, and the difficulties, both legally and politically, of renegotiating existing treaties are accepted. However, the ability to tailor-make extradition processes that are in line with New Zealand's values outweighs the hurdles that the current approach faces. Extradition treaties are the backbone of New Zealand's extradition laws, and this should remain the case.

The next section will focus on the difficult relationship between extradition and human rights. It will assess the consequences to the protection of the extraditee's human rights if the Law Commission's proposals were followed.

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141 Costi, Davidson and Yarwood, above n 105, at 210.

142 VCLT, above n 91, art 31(3)(c).

143 Costi, Davidson and Yarwood, above n 105, at 210.

VI Extradition and Human Rights

Since after World War II, international human rights has become a prominent concept in both international and domestic legal systems.[144] Human rights have begun to significantly shape and impact areas of law that had in the past not been touched by the topic. The laws surrounding extradition is one of these areas.

As the international human rights movement has advanced, the laws surrounding extradition has also had to develop to try to keep up with these international norms. As mentioned, extradition has traditionally been viewed as only concerning two sovereign states. However, the importance of the rights of the individual being extradited has put some constraints on the power of the respective sovereigns.[145]

There have long been a number of protections surrounding the extradition process that have aimed to protect the individual being sought for surrender. Firstly, the principle of double criminality, one of the issues in the Kim Dotcom case, requires that the offence for which extradition relies on must be an offence in both the requesting and the extraditing states.[146] Secondly, the speciality principle is an almost universal condition upon permitting extradition. It states that the person sought for extradition may only be tried and punished for the specific offence for which they were extradited.[147] This principle is expressly mentioned in New Zealand's Extradition Act.[148] Further, it is commonly held extradition sought based on a political offence will be unsuccessful.[149]

These protections are crucial to the laws of extradition. However, it would be erroneous to say that these protections exist to preserve the human rights of individuals. The double criminality principle ensures an individual is not punished for something the extraditing state does not consider criminal. At the same time, the speciality principle is a measure to stop states from

144 Charles Colquhoun "Human rights and extradition law in Australia" (2000) 6 Australian Journal of Human Rights 101 at 101.
145 Bassiouni, above n 3, at 2.
146 Costi, above n 6, at 419.
147 At 420.
148 Extradition Act 1999, ss 7(b) and (c).
149 Quigley, above n 94, at 402.

abusing the criminal process of the requested state.[150] Finally, the political offence restriction aims to prevent internal political disputes in one state being adjudicated by the requesting state's courts.[151] More accurately, these protections are safeguards for the requested states criminal system, rather than individual human rights protections.

Nevertheless, extradition laws have not entirely neglected the rights of individuals. Countries have started to expressly include more human rights provisions in bilateral extradition treaties. An example being the treaty concluded between New Zealand and Hong Kong, which establishes a discretionary restriction on surrender if the extradition is "incompatible with humanitarian considerations".[152] Further, countries often now include provisions in extradition treaties to exclude extradition where no assurance can be given that the death penalty will not be enforced or if the individual may be in danger of being tortured.

These expansions in human rights protections have not been limited to bilateral extradition treaties. Multilateral treaties and conventions have also begun to recognise the importance of protecting an individual being extradited. The United Nations Convention Against Torture expressly prevents extradition to a requesting state where the individual sought is in danger of being exposed to torture.[153] Further, the European Convention on Extradition contains provisions where a state may refuse to extradite if the requesting state fails to make assurances that the death penalty will not be carried out and if the requested state believes the request has been made to punish the individual on account of their race, religion, nationality or political opinion.[154]

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150 Colquhoun, above n 144, at 102.

151 Costi, above n 6, at 421.

152 Agreement for the Surrender of Accused and Convicted Persons Between the Government of New Zealand and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (signed 3 April 1998, entered into force 1 October 1998); and Extradition (Hong Kong Special Administrative Region of the People's Republic of China) Order 1998, art 7.

153 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above n 7, art 3.

154 European Convention on Extradition, above n 133, arts 3 and 11.

A New Zealand's Extradition Laws and Human Rights

New Zealand's extradition laws have been criticised for being out of touch with modern international human rights movements.[155] This is due in part to the fact that 41 of the 45 of New Zealand's bilateral extradition treaties are old imperial treaties. These treaties have not been updated to include human rights protections that are considered international norms in the twenty-first century, such as the right to a fair trial. However, it is questionable whether these protections are needed to be explicitly included in extradition treaties. The extradition process itself is there to provide protection to the person sought for extradition. Outdated treaties can still function to ensure human rights protections. New Zealand's current extradition process is evidence of this.

Fundamental human rights and freedoms that are considered important are statutorily recognised in the New Zealand Bill of Rights Act 1990 (New Zealand BORA). The application of these domestic fundamental rights and freedoms are, however, difficult to apply to international extradition proceedings. For example, ss 24 and 25 of the New Zealand BORA are considered fundamental rights to an individual facing a criminal proceeding.[156] However, the Supreme Court decided in the Kim Dotcom proceedings that both of these sections did not apply to an individual being sought for extradition.[157] This is because, in an extradition proceeding, the individual has not been "charged with an offence". Therefore, individuals are not afforded the same protections as in a criminal proceeding, due to extradition proceedings being preliminary.[158] However, an individual does have the protection of the right to natural justice afforded by s 27 of New Zealand BORA due to the judicial process that is involved in an extradition proceeding.[159] This is a strong protection for individuals in New Zealand but fails to ensure that the requesting state protects these rights.

New Zealand's international obligations under international customary law also provide individuals being extradited with protections.[160] Fundamental human rights are now considered

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155 NZLC IP37, above n 13, at [8.17].

156 New Zealand Bill of Rights Act 1990, ss 24 and 25.

157 *Dotcom v United States of America*, above n 2, at [212].

158 At [115].

159 At [184]; and New Zealand Bill of Rights Act 1990, s 27.

160 See for example, International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [*ICCPR*]; Convention against Torture and Other

to form a part of customary international law.[161] However, there lacks consensus on the specific rights that are covered by customary international law.[162] Human rights, such as preventing torture, murder, slavery, and genocide, are included in the commonly held rights covered by customary international law. Therefore, states must not extradite in a way that would violate these rights, unless they contract out of customary international law, which seems less relevant the more prominent human rights become.[163] The importance of more recent rights, such as fair trial rights, are not considered customary international law at this stage. Consequently, the extradition laws of states must be flexible and robust enough to try and uphold these rights.

Although all treaties are technically on equal footing, the principles encapsulated in a treaty may cause one treaty to have more importance than another. The rationale behind some human rights treaties and conventions being more important than extradition treaties is the fact that some human rights are jus cogens norms in international law.[164] Freedom from torture has jus cogens status, and therefore, this right is a norm of international law which cannot be set aside.[165] Other rights that do not hold the jus cogens status can, however, still be protected by states in extradition proceedings. Although it would be improbable that individuals would have recourse if there were a breach of their human rights under a bilateral extradition treaty since the obligations surrounding extradition focus on state obligations, the substance of an extradition treaty can still provide individual human rights protections.[166] The way this can be done is by framing the restrictions on surrender so that states will only extradite to another state that has agreed, through a binding international instrument, that they will respect the relevant individual rights. Bilateral treaties ensure that states can be held accountable at international law for a breach of the rights promised to an extraditee.

Cruel, Inhuman or Degrading Treatment or Punishment, above n 7; and International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (adopted 21 December 1965, entered into force 4 January 1965).

161 James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 618.

162 At 618.

163 *Kindler v. Canada*, UNHRC Communication No. 470/1991, CCPR/C/48/D/470/1991 (1993); and Costi, Davidson and Yarwood, above n 105, at 176.

164 M Cherif Bassiouni "International Crimes: Jus Cogens and Obligatio Erga Omnes" (1996) 59(4) Law and Contemporary Problems 63 at 67.

165 Costi, Davidson and Yarwood, above n 105, at 168.

166 Jennings and Watts, above n 86, at 961.

In contrast, there is no recourse if an individual's rights are breached under domestic legislation. Further, the relevant international human rights, such as fair trial rights, are unlikely to be enforceable as they are not considered customary international law. Bilateral treaties place a greater responsibility on states to protect individual rights.

B Issues with the Law Commission's Proposals

The recommendations made by the Commission, in my opinion, could have a crucial impact on the rights of the person sought. As argued by the Commission treaties can quickly become outdated.[167] It is accepted that the 41 imperial treaties to which New Zealand is a party, do not adequately reflect modern human rights. That being said, it is a weak argument by the Commission to cite this as one of the major reasons for repealing the bilateral extradition supremacy and moving away from bilateral treaties as the backbone of New Zealand's extradition laws.

It must be remembered that treaties are not interpreted in a vacuum. The consequences of treaties are coloured by other international obligations that states are party to.[168] Just because an extradition treaty does not explicitly mention human rights, it does not mean that states that are party to human rights treaties, get to disregard their obligations under other instruments when extraditing. The International Court of Justice applied this idea of systemic interpretation, stating "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation".[169] Therefore, the imperial extradition treaties present in New Zealand's extradition laws must be interpreted as to comply with New Zealand's other international obligations. An illustration of this is New Zealand being party to the ICCPR. Under this Covenant, New Zealand is obliged to ensure the protection of international standards of justice.[170] Consequently, New Zealand cannot facilitate the extradition of a person to a state where that other state may breach the rights protected under this Covenant.[171]

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167 NZLC IP37, above n 13, at [3.74].

168 Costi, Davidson and Yarwood, above n 105, at 209.

169 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16 at 31.

170 ICCPR, above n 160.

171 *Kim v Minister of Justice*, above n 33, at [260].

Further, the Commission's emphasis on efficiency would lead to New Zealand placing too much trust in other states. The Commission recommended the further simplification of the current backed-warrant procedure.[172] One would assume that because only Australia and the United Kingdom fall under this procedure that there is no need for any human rights protections. But this simplification places too much emphasis on comity. The proposal to remove the double criminality requirement overestimates the similarity between New Zealand and Australia.[173] This simplification of the process to increase efficiency is unwarranted. It would be an avoidable sacrifice of an individual's human rights in favour of comity – a principle that has become less relevant in extradition.[174] This simplification could lead to motives, such as maintaining good business relations with Australia, into pressuring New Zealand to extradite. The simplification of the process without adequate protections for human rights should not be allowed.

The benefit of extradition treaties is that they set out a clear process that needs to be followed. As a good international citizen, New Zealand needs to ensure that the extradition process does not facilitate extradition in a way that means someone is just going to be extradited and forced to go to another state.[175] The emphasis the Commission places on the efficiency of the process would mean this is more likely under their proposals. The extradition process is meant to ensure that an individual has protection. If New Zealand has specific extradition treaties that deal exclusively with one state, then those two states can decide on what types of crimes they want to include in the treaty. Further, they can agree on what protections they want to afford individuals, making the treaty and subsequent extradition process more fit for purpose. This can be especially relevant when dealing with states that have a questionable track record of human rights violations. Extradition treaties are more effective than the Law Commission's proposals to have countries dealt with under two broad categories.[176] This does not leave any room for New Zealand to tailor-make the extradition process for the specific country involved.

On the other hand, general domestic legislation, in my opinion, would lead to the level of protection of human rights to be less important. The ultimate aim of the Commission's

172 NZLC R137, above n 1, at [7.1] – [7.2].
173 Rynae Butler "Imbalance in Extradition: The Backing of Warrants Procedure with Australia under Part 4 of the Extradition Act 1999" (2017) NZCLR 63 at 98.
174 At 98; and NZLC IP37, above n 13, at [2.2].
175 Boister, above n 4, at 330.
176 NZLC IP37, above n 13, at [6.16].

proposals is to facilitate more extraditions. There is the danger that if the Law Commission's proposals were to be accepted, efficiency could lead to expediency.[177] The reason that the courts are involved in the extradition process is precisely for this reason. They act as a check on the executive to ensure that decisions are not made because of political motivations.[178] However, the protections provided under the treaty process are arguably greater.

First, during the treaty negotiation process, states would have already completed quality control on the requesting states judicial system.[179] Meaning the treaty will include provisions protecting the rights of the individuals which are tailored specifically to the requesting state. Secondly, bilateral treaties bind states on the international plane. Under a general domestic extradition legislation, there is no accountability mechanism for states if human rights are violated under the extradition process. Avenues exist for individuals to bring claims of human rights violations.[180] However, New Zealand, as a state, would have no accountability mechanism if another state breached the human rights of a person extradited to another state. It is acknowledged that significant rights such as prohibiting torture are protected under international customary law. However, other important rights, such as fair trial rights are not protected under international customary law. Therefore, if New Zealand extradited a person to another state following the Commission's domestic legislation and the right to a fair trial of the extraditee was violated there would be a lack of recourse for New Zealand as a state. In comparison, the treaty-based approach would bind the states and make them accountable to one another.

It is correct that a de facto or domestic legislation extradition process still has the protection of the judiciary. This is to ensure the executive is not just extraditing people to gain a political advantage or build better relations with foreign states.[181] However, the more protection afforded to individuals that are subject to extradition, the better. Extradition is about balancing the protection of those who are surrendered from any injustices, while also ensuring a person alleged to have committed a crime in one sovereign state should be surrendered to answer for

177 Butler, above n 173, at 97.
178 NZLC IP37, above n 13, at 86.
179 Boister, above n 4, at 357.
180 For example, see the Human Rights Committee and the Committee against Torture.
181 Costi, Davidson and Yarwood, above n 105, at 154.

their wrongdoings in that state.[182] The Law Commission has placed too much emphasis on efficiency, which could have negative human rights consequences.

C What is the Best Approach Moving Forward?

Extradition has developed over the years from traditionally only concerning two states to a three-dimensional relationship, with the individual subject to extradition as the third party.[183] This begs the question of what is the best way to address the difficult relationship between extradition and human rights. It does seem that New Zealand needs to update its extradition laws. New Zealand's current laws fail to explicitly cover fundamental human rights that should be afforded to all individuals post-surrender.

The preferred option to having a general, domestic legislation would be for New Zealand to renegotiate and add provisions to existing bilateral treaties to which New Zealand is party in order to conform with current international human rights. It is easy to dismiss this option as unattainable due to the perceived long and complex nature of negotiating treaties.[184] Further, the Commission argues that New Zealand's small and geographically isolated nature means that other states will not prioritise negotiating extradition treaties with New Zealand.[185] However, this claim by the Commission has no evidence to support it. Renegotiating treaties is achievable. Australia and the United Kingdom are evidence of this. Australia has negotiated 58 new bilateral extradition arrangements and treaties since the late 1980s.[186] The United Kingdom also renegotiated a majority of their old imperial treaties.[187] This shows that New Zealand can renegotiate old treaties to ensure the human rights protections are in line with international obligations and values.

It is accepted that it can be cumbersome to have bilateral extradition treaties with all states that New Zealand wants to extradite with. There are challenges, both political and legal, that may make being able to have an extradition treaty with all states difficult. The legal differences

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182 Nicholls, Montgomery and Knowles, above n 5, at [1.02].

183 Boister, above n 4, at 355.

184 Costi, Davidson and Yarwood, above n 105, at 193.

185 NZLC IP37, above n 13, at [3.74].

186 Twenty-seven bilateral extradition treaties and 31 non-treaty extradition arrangements: see Australian Attorney-General's Department "International crime cooperation arrangements" <www.ag.gov.au>.

187 NZLC IP37, above n 13, at [3.77].

between the common law and civil law jurisdictions have presented problems to states in the past. Further, there are stark political and cultural differences between New Zealand and states that do not fall under the "western culture". However, these differences should not be a barrier to New Zealand ensuring the most significant protections for individuals post-surrender. The extradition process needs to be efficient if it is to achieve the objectives states desire, such as fighting against impunity and holding criminals accountable in the jurisdiction a crime has been committed. Nevertheless, efficiency should not be allowed to become expediency. There is a real danger that if the Commission's proposals are accepted that simplification of the process will be at the expense of individuals rights.

The flexibility bilateral extradition treaties give states, enabling extradition to be tailor-made to the circumstances outweighs the difficulties the current regime faces. Ensuring bilateral extradition treaties remain the backbone of New Zealand's extradition laws means New Zealand upholds their international obligations and provides accountability to states.

VII Conclusion

This paper set out to analyse and critique the Law Commission's recommendations to comprehensively change New Zealand's extradition laws. The Commission had the goal of simplifying the extradition process to facilitate more extraditions. The Commission put too much weight on the prominent New Zealand extradition cases, Kim Dotcom and Kyung Yup Kim.

New Zealand's extradition laws are very much dependent on extradition treaties. As mentioned, due to s 11, the Extradition Act is subordinate to New Zealand's bilateral extradition treaties when an inconsistency arises. It may be that New Zealand's extradition laws do require updating to become more in line with modern international human rights movements. However, this paper has argued that abolishing the treaty supremacy provision would be going too far. It would cause New Zealand to violate their international treaty obligations and could have an adverse effect on diplomatic relations.

The Commission considers the rights of the extraditee to be paramount in any extradition procedure. However, the lack of international obligations and therefore accountability on the international plane that exists in the Commission's proposal to have a domestic legislation could endanger an extraditee's rights after they have been surrendered. As a good international citizen, New Zealand should aim to develop international law by striving to fulfil its international obligations.

Extradition is a dynamic area of international law. Improvements in communication and technology capabilities will continue to mean that transnational crime is a threat to states. However, the extradition process should protect individuals post-surrender. Moving forward, New Zealand should aim to renegotiate its existing bilateral treaties, if possible, to make them more in line with international norms. Any changes New Zealand makes to their extradition laws should both efficiently facilitate extradition, but also adequately protect the person being extradited.

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