

# RECENT DEVELOPMENTS IN THE LAW OF EXTRADITION\*

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*[Effective extradition procedures are an essential tool of international law enforcement, both in relation to domestic crime and, increasingly, transnational crime. New international legal frameworks are emerging with the objective of enhancing international responses to organised crime, including terrorist crimes and drug trafficking. However, at the same time as the reinforcement of international extradition obligations in instruments such as the United Nations Convention against Transnational Organized Crime, less desirable developments can be observed in the erosion, in form and in practice, of principles in extradition law which are intended to safeguard individual rights. The recognition and application of some longstanding legal principles such as the 'political offence' exception have been diluted over time, while the efficacy of others, such as the principle of specialty, has been compromised in practice. The authors argue that the important development of international extradition frameworks should be balanced against the need to ensure fair protection of requested persons.]*

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## I INTRODUCTION

As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the

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\* This article is based on an address by Gavan Griffith QC to the international conference *Las ciencias penales en el siglo XXI*, Mexico City, Mexico, 20–27 August 2003. The address was given in a session which focused on balancing the enforcement of laws against organised crime with safeguards for individuals requested for extradition.

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state obliged to harbor the protected person but also tend to undermine the foundations of extradition.<sup>1</sup>

Extradition has become recognised as a major element of international cooperation in combating crime, particularly transnational crimes such as drug trafficking and terrorism.<sup>2</sup> As an eminent Australian judge recently said, '[i]n a world of increased mobility, interactive technology and new forms of criminality, extradition represents an essential response to the characteristics of contemporary crime'.<sup>3</sup> The request in July 2003 for the extradition of former President Alberto Fujimori to face murder charges in Peru<sup>4</sup> was the latest of a series of high profile extradition cases of former heads of state, including Augusto Pinochet,<sup>5</sup> and of businessmen, such as Australian Christopher Skase<sup>6</sup> and Mexican Carlos Cabal.<sup>7</sup>

### A Emerging Multilateral Laws

In the context of organised and transnational crime, the increased recognition of this an enhanced role for extradition is emerging in a body of multilateral and bilateral treaties containing extradition provisions. In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders urged Member States to increase their activity at the international level to combat organised crime.<sup>8</sup> Motivated by that resolution, the UN General Assembly in 1990 adopted a *Model Treaty on Extradition*,<sup>9</sup> in recognition of 'the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions'.<sup>10</sup> More recently, the *United Nations Convention against Transnational Organized Crime* was adopted, with 147 signatories.<sup>11</sup> The *Organized Crime Convention*, which now has 105 States Parties, entered into

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<sup>1</sup> *Soering v United Kingdom* (1989) 11 EHRR 439, 468 ('Soering').

<sup>2</sup> Joint Standing Committee on Treaties, Parliament of Australia, *Report 40: Extradition — A Review of Australia's Law and Policy* (2001) [2.5].

<sup>3</sup> *Foster v Minister for Customs and Justice* (2000) 200 CLR 442, 474 (Kirby J).

<sup>4</sup> See Stephen Lunn, 'Fujimori's Dangerous Vow', *The Weekend Australian* (Sydney, Australia), 9 August 2003, T06.

<sup>5</sup> See generally Nehal Bhuta, 'Justice without Borders? Prosecuting General Pinochet' (1999) 23 *Melbourne University Law Review* 499.

<sup>6</sup> See generally Montserrat Gorina, 'Commonwealth v Skase: A Matter of Life or Death or a Nomination for an Oscar?' (1995) 18 *University of New South Wales Law Journal* 502; Montserrat Gorina-Ysern, 'Humanitarian Bar to Extradition: The Controversial Decision of the Spanish Audiencia Nacional in *Re Skase*' [1994-95] *Australian International Law Journal* 65.

<sup>7</sup> See generally Ben Hills, 'Mexican Stand-Off', *Sydney Morning Herald* (Sydney, Australia), 21 November 2000, Insight 13; ABC Radio, 'The Man from Tabasco: The Story of Carlos Cabal Peniche', *Background Briefing*, 17 October 1998 <<http://www.abc.net.au/rn/talks/bbing/stories/s61692.htm>> at 1 May 2005.

<sup>8</sup> GA Res 39/112, UN GAOR, 39<sup>th</sup> sess, 101<sup>st</sup> mtg, UN Doc A/RES/39/112 (14 December 1984).

<sup>9</sup> GA Res 45/116, UN GAOR, 45<sup>th</sup> sess, 68<sup>th</sup> plen mtg, annex, UN Doc A/RES/45/116 (14 December 1990).

<sup>10</sup> *Ibid* preamble.

<sup>11</sup> GA Res 55/25, UN GAOR, 55<sup>th</sup> sess, 62<sup>nd</sup> plen mtg, Annex I, UN Doc A/RES/55/25 (15 November 2000) ('*Organized Crime Convention*').

force on 29 September 2003.<sup>12</sup> The *Organized Crime Convention*, as its name suggests, attempts to introduce strategies to combat organised criminal activity including money laundering, corruption and other activities of organised criminal groups.<sup>13</sup>

Article 16 of the *Organized Crime Convention* includes extradition obligations in relation to those organised crime and corruption offences. It provides that the organised crime covered by the *Convention* shall be deemed to be an extraditable offence in any extradition treaty between States Parties.<sup>14</sup> If the States Parties do not have an extradition treaty in force between them, the *Convention* may be taken to operate as the legal basis for extradition.<sup>15</sup> Mexico, for example, on its ratification in March 2003, declared that it would treat the *Convention* as the legal basis for cooperation in extradition with States Parties with which it has not concluded extradition treaties.<sup>16</sup>

Other multilateral treaties dealing with substantive areas of criminal law carrying international dimensions contain similar provisions in relation to extradition. Examples include the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*<sup>17</sup> and the 1997 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*,<sup>18</sup> amongst many others.<sup>19</sup> Such provisions are also evident at a regional level, as in art 4 of the *European Convention on the Suppression of Terrorism*.<sup>20</sup>

### B The Exception for Fiscal Offences

The strengthening of extradition procedures in relation to financial crime has not always been a feature of international extradition law. Historically, some

<sup>12</sup> In accordance with art 38(1), the *Organized Crime Convention* entered into force 90 days after the date of the deposit of the 40<sup>th</sup> instrument of ratification, which took place with Armenia's ratification on 1 July 2003. Signatories include Australia, Brazil, Cambodia, Chile, China, Malaysia, New Zealand, the Philippines, Thailand and the US.

<sup>13</sup> Ibid arts 6–9.

<sup>14</sup> Ibid art 16(3).

<sup>15</sup> Ibid art 16(4)–(5).

<sup>16</sup> Armenia, Belarus, Estonia, Latvia, Lithuania, Malta, Mexico, Romania, Russia, Slovenia, Uzbekistan and Venezuela all made similar declarations, while Myanmar, Malaysia and Laos all declared that the *Organized Crime Convention* would *not* be the basis for extradition treaties: UN Office on Drugs and Crime, Crime Programme, *United Nations Convention against Transnational Organized Crime* (2004) <[http://www.unodc.org/unodc/de/crime\\_cicp\\_signatures\\_convention.html](http://www.unodc.org/unodc/de/crime_cicp_signatures_convention.html)> at 1 May 2005.

<sup>17</sup> Opened for signature 20 December 1988, 1582 UNTS 164, art 6 (entered into force 11 November 1990).

<sup>18</sup> Opened for signature 17 December 1997, [1999] ATS 21, art 10 (entered into force 15 February 1999).

<sup>19</sup> See, eg, *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105, art 8 (entered into force 14 October 1971) ('*Hague Convention on Unlawful Seizure of Aircraft*'); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177, art 8 (entered into force 26 January 1973) ('*Montreal Convention*'); *International Convention against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205, art 10 (entered into force 3 June 1983); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 112, art 8 (entered into force 26 June 1987).

<sup>20</sup> Opened for signature 27 January 1977, 1137 UNTS 93, art 4 (entered into force 4 August 1978).

extradition treaties excluded tax and fiscal offences from the scope of extraditable offences.<sup>21</sup> For example, the 1957 *European Convention on Extradition* contained a variation on this principle:

Extradition shall be granted, in accordance with the provisions of this *Convention*, for offences in connection with taxes, customs, duties and exchange only if the Contracting Parties have so decided in respect of any such offence or category of offences.<sup>22</sup>

The traditional exclusion is obviously problematic in an era when tax avoidance offences and finance-related crime, such as banking and securities fraud and market manipulation, have an enormously detrimental impact on national and international economies. A notorious example is provided by the banking fraud of Nick Leeson and the subsequent collapse of Barings Bank.<sup>23</sup>

The fiscal exception had originally arisen out of the view that revenue or fiscal offences were matters relating to internal regulation as opposed to common criminal conduct, or would require enforcement of public laws of a foreign state.<sup>24</sup> Some commentators note the view, held by some in countries with market economies, that fiscal offences were not so much criminal as regulatory, therefore attracting little moral stigma.<sup>25</sup>

There has been a clear transition to the view that there is no good reason for continuing to exclude fiscal offences from the scope of extradition requirements. The *Organized Crime Convention* now provides that 'States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters'.<sup>26</sup> Even before the adoption of this provision, there was an increasing tendency to make fiscal offences extraditable.<sup>27</sup> The *Treaty on Extradition between Australia and the United Mexican States*, for example, provides that '[e]xtradition shall be granted for offences relating to taxation, customs duties, foreign exchange control or other

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<sup>21</sup> See, eg, *Treaty on Extradition between Australia and the Grand Duchy of Luxembourg*, opened for signature 23 April 1987, [1988] ATS 16, art 3(2)(c) (entered into force 12 August 1988); *Treaty between Australia and the Republic of Austria concerning Extradition*, opened for signature 29 March 1973, [1975] ATS 16, art 4(1)(e) (entered into force 5 February 1975).

<sup>22</sup> Opened for signature 13 December 1957, 359 UNTS 273, art 5 (entered into force 18 April 1960) ('1957 *European Convention on Extradition*').

<sup>23</sup> See generally Luke Hunt and Karen Heinrich, *Barings Lost: Nick Leeson and the Collapse of Barings plc* (1996); Nick Leeson, *Rogue Trader: How I Brought Down Barings Bank and Shook the Financial World* (1996).

<sup>24</sup> *R v Governor of Pentonville Prison; Ex parte Khubchandani* (1980) 71 Cr App R 241, 248.

<sup>25</sup> See, eg, Satya Deva Bedi, *Extradition in International Law and Practice* (1968) 198–200; Edith Palmer, *The Austrian Law on Extradition and Mutual Assistance in Criminal Matters* (1983) 60; M Cherif Bassiouni, *International Extradition: United States Law and Practice* (2<sup>nd</sup> ed, 1987) 455–6, as cited in Edmund Paul Aughterson (ed), *Extradition: Australian Law and Procedure* (1995) 175–6.

<sup>26</sup> *Organized Crime Convention*, above n 11, art 16(15).

<sup>27</sup> In keeping with this view a growing range of financial crimes are given specific recognition as extraditable offences: see, eg, *Anti-Money Laundering Act 2001* (Philippines) s 13(g), which states: 'The Philippines shall negotiate for the inclusion of money laundering offenses as herein defined among extraditable offenses in all future treaties'.

revenue matters where the acts or omissions constitute an extraditable offence against the laws of both Parties'.<sup>28</sup>

### C *The Need for Safeguards for the Requested Person*

While the importance of workable extradition procedures in combating organised crime cannot be underestimated, extradition has obvious and very significant consequences for the liberty of the individual. The requested person is generally kept in criminal detention without the possibility of bail for what may be extended periods during the pendency of the extradition proceedings.<sup>29</sup> To some extent the element of administrative detention inherent in extradition is effectively an anticipatory punishment in itself, and may encourage the accused not to defend the extradition request, assuming they have the means to do so.

Of course extradition has long been accompanied by a range of intended restrictions and safeguards expressed to balance the interests of the requested person. However, some of these safeguards have been eroded in recent years, both in the development of extradition laws, and in practice.

## II DOUBLE CRIMINALITY AND CONTEMPORARY DIFFICULTIES WITH ITS APPLICATION

### A *The Underlying Principle*

The principle of double (or dual) criminality is a deeply ingrained principle of extradition law. The principle requires that an alleged crime for which extradition is sought be punishable in both the requested and requesting states. A traditional method of giving effect to the principle has been the adoption in extradition treaties of lists of extraditable offences, such as murder, theft, etc.<sup>30</sup> This approach, which emphasised terminology, was susceptible to a rigid and technical formality, and presented obvious difficulties for emerging categories of more complex crime. The modern approach is a general requirement that the conduct in question be punishable under the laws of both States Parties. The *Model Treaty on Extradition*, for example, provides: '[f]or the purposes of the present *Treaty*, extraditable offences are offences that are punishable under the laws of both Parties'.<sup>31</sup>

Article 2(2) of the *Model Treaty on Extradition* attempts to address potential difficulties in the application of the principle where offences are differently defined in different countries:

<sup>28</sup> Opened for signature 22 June 1990, [1991] ATS 13, art 4 (entered into force 27 March 1991) ('*Australia–Mexico Extradition Treaty*').

<sup>29</sup> But see the decision of the Supreme Court of Ireland in *People v Gilliland* [1985] IR 643, 645–6.

<sup>30</sup> See, eg, *Treaty between Australia and Sweden concerning Extradition*, opened for signature 20 March 1973, [1974] ATS 4, art 2 (entered into force 10 March 1974); *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong*, opened for signature 15 November 1993, [1997] ATS 11, art 2 (entered into force 29 June 1997).

<sup>31</sup> Above n 9, art 2(1). See also *1957 European Convention on Extradition*, above n 22, art 2(1): 'Extradition shall be granted in respect of offences punishable under the laws of the requesting party and of the requested party'. Recent changes to the position in Europe are noted below in Part II(B)(2).

In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether:

- (a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;
- (b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account.

Provisions such as these cannot, however, eliminate difficulty in the application of the double criminality requirement. Application of the requirement may depend on the extent to which the alleged criminal acts of the accused are described by the requesting state. That is, the requested country's authorities, in determining whether the crime with which a person has been charged corresponds with a crime under local law, may want to know not simply whether the abstract legal elements of the offence correspond to an offence under domestic law, but also whether the particular factual conduct alleged, including the mental state, would be punishable if committed in the requested state. The corresponding domestic offence may not be immediately recognisable from the relevant statutory provision of the requesting state, and it may be necessary to look to the alleged conduct to determine whether there is an applicable domestic offence. An inadequate description of the acts of the accused may not enable a requested country to determine whether the conduct is in fact punishable under the laws of that country.

## B *Dilution of the Principle*

### 1 *Australian Jurisprudence*

An illustration of how this issue might arise is found in the Australian judicial proceedings relating to the extradition of Carlos Cabal for alleged banking offences and tax fraud.<sup>32</sup> The *Extradition Act 1988* (Cth) requires a state requesting extradition to provide, amongst other documents, 'a duly authenticated statement in writing setting out the conduct constituting the offence'.<sup>33</sup> This corresponds to the obligation in the *Australia–Mexico Extradition Treaty* to provide 'a statement of the acts or omissions for which the extradition is requested, indicating as precisely as possible the time and place of their commission and their legal description'.<sup>34</sup>

Australian case law affirms that one of the purposes of the statement of the conduct constituting the offence is to enable the magistrate charged with the review of the arrest warrant to be satisfied that the conduct, if it had taken place in Australia, would constitute an extradition offence.<sup>35</sup> In *Cabal v United*

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<sup>32</sup> See generally Hills, above n 7; 'The Man from Tabasco', above n 7.

<sup>33</sup> Section 19(3)(c)(ii).

<sup>34</sup> Above n 28, art 16.

<sup>35</sup> *McDade v United Kingdom* [1999] FCAFC 1868 (Unreported, French, Marshall and Kenny JJ, 23 December 1999); *Cabal v United Mexican States* (2001) 108 FCR 311.

*Mexican States [No 3]*,<sup>36</sup> detailed submissions had been filed on behalf of Mexico matching the conduct to offences under various Australian laws, including the *Corporations Law*<sup>37</sup> and the *Crimes Act 1958* (Vic),<sup>38</sup> and it had been accepted by the Magistrate that there were corresponding Australian offences.<sup>39</sup> It was argued on behalf of Cabal that the documentation provided in relation to his extradition was, inter alia, inadequate in its description of the conduct constituting the offence because it did not identify how it related to Mexican law.<sup>40</sup> The submission for Mexico — that the law does not require particular facts in the statement of conduct to be matched to particular elements of offences against the law of the requesting country — was accepted.<sup>41</sup> In our view, this finding has some potential to undermine the purpose of requiring the statement of conduct in support of the request for extradition.

Another example in Australian jurisprudence of the tendency towards the dilution of the double criminality principle is found in the judgment of the Full Federal Court in *Dutton v O'Shane*.<sup>42</sup> In that case, Dutton had been charged in South Africa for counts of fraud and forgery when companies controlled by him had purchased or sought to purchase foreign currency under the foreign exchange laws then in force in South Africa. A magistrate determined that Dutton was eligible for surrender in relation to the extradition offences. Dutton sought review of the decision under s 21 of the *Extradition Act 1988* (Cth) before James J in the Supreme Court of New South Wales, who confirmed the applicant's eligibility to surrender.<sup>43</sup> Dutton then appealed to the Full Federal Court.<sup>44</sup>

Before James J and the Full Federal Court of Finn, Dowsett and Conti JJ, Dutton contended that the requirement of double criminality in s 19(2)(c) of the *Extradition Act 1988* (Cth) was not satisfied.<sup>45</sup> That section requires that the magistrate be satisfied that

<sup>36</sup> (2000) 186 ALR 188.

<sup>37</sup> *Ibid* 265 (Justice French refers to the *Corporations Law* s 232).

<sup>38</sup> *Ibid* (Justice French refers to the *Crimes Act 1958* (Vic) ss 74, 81–2).

<sup>39</sup> *Cabal v United Mexican States [No 3]* (2000) 186 ALR 188, 265.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*. It is noted, however, that in other cases relating to other aspects of the documentation which must support the request for extradition, quite strict approaches have been taken in relation to compliance: see, eg, *Hellenic Republic v Tzatzimakis* (2003) 127 FCR 130, in relation to the different requirements for supporting material according to whether the person has been convicted of, or only 'accused' of, the relevant offence or offences. Where a person has been convicted in their absence, s 10(1) of the *Extradition Act 1988* (Cth) provides that the person is deemed not to have been convicted of that offence, but to have been accused of that offence. The Full Federal Court found in that case that the fact that an accused had been convicted of offences in Greece, after a trial at which he did not appear, did constitute being 'convicted in [his] absence' despite the fact that the accused's non-attendance at the trial was of his own choice: at 154 (but note discussion at 155 on the difficulties of interpreting the word 'absence'). Thus the more extensive documentary requirements applicable to those merely accused of, rather than convicted of, offences applied.

<sup>42</sup> (2003) 132 FCR 352 ('*Dutton*').

<sup>43</sup> *Dutton v O'Shane* [2002] NSWSC 1086 (Unreported, James J, 20 November 2002) [420].

<sup>44</sup> *Dutton* (2003) 132 FCR 352. An application for leave to appeal was subsequently refused by the High Court: Transcript of Proceedings, *Dutton v O'Shane* [2003] HCATrans 503 (High Court of Australia, McHugh and Gummow JJ, 2 December 2003).

<sup>45</sup> *Dutton v O'Shane* [2002] NSWSC 1086 (Unreported, James J, 20 November 2002) [151]; *Dutton* (2003) 132 FCR 352, 355.

if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia.

South Africa argued that the conduct would have constituted offences under fraud and false representation provisions of the *Crimes Act 1914* (Cth) and under fraud and obtaining money by deception provisions of the *Crimes Act 1900* (NSW).<sup>46</sup> Dutton answered that, because the relevant crimes could only exist in a country in which there were foreign exchange controls and a system of dual exchange rates (which does not exist in Australia), the relevant conduct could not have constituted a crime in Australia.<sup>47</sup>

After noting that the comparison is conduct based, rather than involving a comparison of the elements of the corresponding offences,<sup>48</sup> Finn and Dowsett JJ referred to authorities that indicated that consideration of double criminality will require some ‘translation’ or ‘substitution’ of factors — such as the obvious one of locality or geographic considerations — as well as, potentially, matters such as ‘institutions, officials and procedures’.<sup>49</sup>

Dutton argued that the potential consequences of such an approach are exemplified by the ‘notorious case’ of *Re Anderson*,<sup>50</sup> where Missouri sought the extradition of a slave, Anderson, from Canada to face a charge of murder in that State.<sup>51</sup> The killing had occurred when the victim had attempted to prevent the slave from escaping, as the law in Missouri required citizens to do. The Court was not persuaded by the argument that in Canada, where there were no slavery laws, Anderson may have been acting lawfully in killing to retain his liberty, holding that it was necessary to deal with the case on the assumption that the victim had been acting with lawful authority. Finn and Dowsett JJ’s answer was that the ultimate decision to surrender is not one for the courts but for the political authorities, namely the Attorney-General.<sup>52</sup>

Although the substantive outcome in *Dutton* may be accepted in its result, the principle relied on by the Full Court — the need for the ‘translation’ of matters

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<sup>46</sup> *Dutton* (2003) 132 FCR 352, 364.

<sup>47</sup> *Ibid* 366.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid* 368.

<sup>50</sup> (1860) 20 UCQB 124; 11 UCCP 9.

<sup>51</sup> *Dutton* (2003) 132 FCR 352, 369–70.

<sup>52</sup> This may have appeared a technical objection since it has traditionally been the case that the Attorney-General’s consent to extradition would follow once the eligibility for surrender has been judicially determined: *Extradition Act 1988* (Cth) s 22(2). However, the substance of this observation has been demonstrated by a recent Australian example showing that the executive may refuse extradition notwithstanding that the conditions for extradition have been fulfilled. The request made by Hong Kong for the extradition of Australian executives David Hendy and Carl Voigt to stand trial for corruption-related charges was refused by Minister for Justice and Customs Chris Ellison, who declined to give reasons for the refusal: see Hamish McDonald and Craig Skehan, ‘Big Stink in Little China’, *Sydney Morning Herald* (Sydney, Australia), 18 May 2004, 11. The refusal provoked a formal diplomatic protest by Hong Kong: Hamish McDonald and Craig Skehan, ‘Hong Kong Livid over Extradition Refusal’, *Sydney Morning Herald* (Sydney, Australia), 31 May 2004, 6; Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 3 June 2004, 17 (Lydia Morton, First Assistant Secretary, North Asia Division, Department of Foreign Affairs and Trade).

such as ‘institutions, officials and procedures’ from third states to Australia for the purpose of determining double criminality — has a potential for wider, uncertain and objectionable operation. Some provisions of a state’s criminal laws may be alien and unacceptable to the Australian body politic and legal system. By way of hypothetical example, in the past the making of false representations (for example, as to racial origin) to an apartheid enforcement institution of South Africa might have been punishable under South African law. It is suggested that a Court applying the *Dutton* principle should not accept that it is appropriate to make ‘translations’ of the relevant institutions so that such conduct is considered the equivalent of, for example, conduct constituting a false representation to the Commonwealth or a public authority, punishable under the *Crimes Act 1914* (Cth).<sup>53</sup> In such circumstances, it might be argued that the manner of application of the double criminality requirements will not be decisive in any event, because the political exception should apply. However, given the difficulties of application of the political exception,<sup>54</sup> it may, at present, not be an entirely reliable safety net.

## 2 European Jurisprudence

Recent developments in extradition law in Europe also evidence a decline in the significance of the double criminality principle. A recent *Framework Decision* adopted by the Council of the European Union removes the principle entirely in relation to certain types of crimes.<sup>55</sup> Following these developments the United Kingdom has enacted the *Extradition Act 2003* (UK), adopting a ‘fast-track’ extradition programme to certain EU Member States.<sup>56</sup> This system would allow extradition from the UK for persons sentenced for offences carrying a maximum sentence of one year or more, without any requirement that they are also offences in the UK.<sup>57</sup> The rationale for this development was given in a Home Office discussion paper:

We considered that it was not necessary to retain the requirement for the offence to be an offence in both the requesting and requested country (dual criminality). This was thought to be an inappropriate judgement on the criminal justice systems of our European partners. If an offence is a crime on the statute book of our European partners then the UK should respect that.<sup>58</sup>

<sup>53</sup> Sections 35–6.

<sup>54</sup> See, eg, *Dutton* (2003) 132 FCR 352, 394 (citing *Cheng v Governor of Pentonville Prison* [1973] AC 931, 942). See also below Part III.

<sup>55</sup> Council of the European Union, *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States* [2002] OJ L 190, art 2.

<sup>56</sup> Chapter 41, s 65.

<sup>57</sup> *Extradition Act 2003* (UK) c 41, s 65(2). In the case of persons not sentenced for the offence, the double criminality requirement is dispensed with where the conduct is punishable with imprisonment or detention for a term of three years or more: s 64(2). In both cases, the crimes must be certified by an authority of the requesting country to fall within the categories of crime in the ‘European Framework List’: see *Extradition Act 2003* (UK) sch 2.

<sup>58</sup> UK Home Office, *The Law on Extradition: A Review* (2001) 21, available from <<http://www.homeoffice.gov.uk/crimpol/oic/extradition>> at 1 May 2005.

The adoption of such a principle may be appropriate in the circumstances of relatively 'homogeneous' states such as those in the EU, where the degree of integration ensures a high level of familiarity with the legal systems of Member States, and where common legal standards with accompanying enforcement mechanisms, such as the *Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>59</sup> ensure clear safeguards against potential abuses. The abandonment of the double criminality principle is clearly less appropriate where such commonality is absent. This obvious difference was recognised by the UK Government, which did not recommend the elimination of the double criminality requirement in its extradition relations with states outside the EU.<sup>60</sup>

### III THE POLITICAL OFFENCE EXCEPTION

Extradition treaties generally include a series of mandatory and optional grounds on which a request for extradition may be refused. One of the longest-standing is the 'political offence' exception. The *Model Treaty on Extradition* states that extradition shall not be granted if, inter alia, 'the offence for which extradition is requested is regarded by the requested State as an offence of a political nature'.<sup>61</sup> Bilateral treaties routinely include the political offence exception.<sup>62</sup> However 'political offence' is frequently defined in a negative manner — for example by excluding from the scope of 'political offences' crimes such as 'the murder or other offence against the life, physical integrity or liberty of a Head of State or of Government, or a member of that person's family'.<sup>63</sup>

The *Organized Crime Convention* does not include a specific political offence exception but retains the principle that extradition need not be granted if there are grounds to believe that the request has been made for the purpose of prosecuting or punishing a person on account of race, sex, religion, nationality, ethnic origin or political opinions.<sup>64</sup> This is far removed from the political offence exception.

Not only is the concept of 'political offence' ill-defined, but moreover there are also practical difficulties with regard to putting appropriate evidence before a

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<sup>59</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

<sup>60</sup> UK Home Office, above n 58, 21.

<sup>61</sup> Above n 9, art 3(a). See also *1957 European Convention on Extradition*, above n 22, art 3: 'Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence'. For an overview of recent changes to the position in Europe see below n 79 and accompanying text.

<sup>62</sup> See, eg, *Australia–Mexico Extradition Treaty*, above n 28, art 5.

<sup>63</sup> Ibid art 5(1). See also *Treaty on Extradition between Australia and the Republic of Korea*, opened for signature 5 September 1990, [1991] ATS 3, art 4 (entered into force 16 January 1991); *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong*, above n 30, art 6.

<sup>64</sup> *Organized Crime Convention*, above n 11, art 16(14).

court to establish such an exception. Consequently, the political offence exception is declining in importance and practical operation.<sup>65</sup>

An obvious difficulty with the exception is that of determining the meaning of an offence of a political nature. Most treaties, bilateral and multilateral, do not attempt to define the term exhaustively. It is uncontroversial that it is intended to cover non-violent crimes such as slander of a head of state or offences based on political protest.<sup>66</sup> However, outside this area of clear exception, there is little consensus regarding which crimes, particularly crimes including violence, should fall within its confines. The definitions contained in these treaties were initially so general as to be impossible to apply literally.<sup>67</sup> They subsequently became characterised by technical criteria such as proportionality, namely that the offence will not qualify as political unless its nature and degree are in proportion to its political ends.<sup>68</sup> However, such distinctions have also been criticised for their difficulty and the inevitable subjectivity involved in their application,<sup>69</sup> depending, as it does, on the judge's own values in determining whether the accused has 'overstepped the bounds of permissible political action'.<sup>70</sup> Commonly judges are ill-equipped and reluctant to engage with these issues. When they do so, they often expose their predisposition to defer to the interests of the requesting state.<sup>71</sup>

While domestic legislation may attempt to define the meaning of a political offence, it is potentially in terms which provide little guidance. For example, the *Extradition Act 1988* (Cth) defines 'political offence' in relation to a country as 'an offence against the law of the country that is of a political character, (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country)'.<sup>72</sup> The definition does also provide a limiting factor by excluding particular offences, including genocidal offences, hostage-taking, torture, hijacking offences, murder,

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<sup>65</sup> In *T v Immigration Officer* [1996] AC 742, 753, Lord Mustill stated in relation to the application of the political exception: 'What I regard as the exceptional difficulty of this appeal is that the courts here, as in other legal systems, must struggle to apply a concept which is out of date'. See also Finn and Dowsett JJ in *Dutton* (2003) 132 FCR 352, 394: 'The words "political offence" in the Act have been defined by reference to a formula (that is an "offence of a political character") that itself has "so far defied precise definition"' (citing *Cheng v Governor of Pentonville Prison* [1973] AC 931, 942).

<sup>66</sup> See, eg, *Australia-Mexico Extradition Treaty*, above n 28, art 5.

<sup>67</sup> See, eg, *Schtraks v Government of Israel* [1964] AC 556, 591 (Viscount Radcliffe): 'In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country'.

<sup>68</sup> See, eg, *McMullen v Immigration and Naturalization Service*, 788 F 2d 591, 596 (9<sup>th</sup> Cir, 1985).

<sup>69</sup> See, eg, Geoff Gilbert, 'Terrorism and the Political Offence Exemption Reappraised' (1985) 34 *International and Comparative Law Quarterly* 695, 703-4.

<sup>70</sup> *T v Immigration Officer* [1996] AC 742, 770.

<sup>71</sup> See Geoff Gilbert, *Aspects of Extradition Law* (1991) 55-6. See generally Steven Lubet, 'Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists' (1982) 15 *Cornell International Law Journal* 247; M Cherif Bassiouni, 'Ideologically Motivated Offenses and the Political Offenses Exception in Extradition — A Proposed Juridical Standard for an Unruly Problem' (1969) 19 *DePaul Law Review* 217.

<sup>72</sup> *Extradition Act 1988* (Cth) s 5.

kidnapping and crimes against diplomats and other internationally protected persons.<sup>73</sup>

In the extradition proceedings in Australia, Cabal argued before the reviewing Magistrate and on appeal that there were substantial grounds for believing that Mexico sought him for extradition for the offences on the basis of his political opinions.<sup>74</sup> A range of evidence on the political environment in Mexico was called from lawyers, professors of political science, and a political consultant, as well as country information from organisations such as Amnesty International.<sup>75</sup>

Justice French accepted that in making an objection to extradition on the grounds that extradition is sought based on political opinion it was not necessary for the accused person to establish that the extradition was sought *solely* on account of the political opinion. However, French J also accepted the distinction between an individual being the subject of political *controversy*, for example because of the offences alleged against him, and an individual who must establish that he is being prosecuted by reason of his political opinions.<sup>76</sup> Ultimately it was found that Cabal had not established that his surrender had actually been sought for the purpose of prosecuting or punishing him on account of his political opinions. In so concluding, French J noted that the

onus is not easily discharged. It is no light matter for the magistrate or this Court to conclude that there are substantial grounds for believing that the requesting country is acting in bad faith, especially given the necessary assumption that the offences have been committed.<sup>77</sup>

An additional reason for the declining significance of the political exception is the obvious potential, if misused, for the exception to stand in the way of the prosecution of terrorist crime. As observed by Lord Mustill of the House of Lords in a case dealing with the political exception, '[i]nternational terrorism must be fought, but the vague outlines of the political exception are no help. Something more clear-cut is needed'.<sup>78</sup>

There is now an increasing trend in multilateral treaties dealing with specific categories of international crime towards excluding certain offences from the scope of political offences. For example, the 1977 *European Convention on the Suppression of Terrorism*<sup>79</sup> includes a list of offences which are not to be regarded as political offences for the purposes of extradition, including crimes under the *Hague Convention on Unlawful Seizure of Aircraft*<sup>80</sup> and the *Montreal*

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<sup>73</sup> *Extradition Act 1988* (Cth) s 5(a)–(d).

<sup>74</sup> *Cabal v United Mexican States [No 3]* (2000) 186 ALR 188, 265. If made out, these matters would constitute an extradition objection for the purposes of s 19(2)(d) of the *Extradition Act 1988* (Cth). Extradition objections set out in s 7 include, in addition to the 'political offence' exception (s 7(a)), that the surrender is 'sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions' (s 7(b)) or that, on surrender, the person 'may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions' (s 7(c)).

<sup>75</sup> *Cabal v United Mexican States [No 3]* (2000) 186 ALR 188, 271–3.

<sup>76</sup> *Ibid* 268.

<sup>77</sup> *Ibid*.

<sup>78</sup> *T v Immigration Officer* [1996] AC 742, 762.

<sup>79</sup> Above n 20.

<sup>80</sup> Above n 19.

*Convention*,<sup>81</sup> violent offences against diplomats and other internationally protected persons, kidnapping and hostage taking, and offences involving bombs and firearms which result in harm to persons.<sup>82</sup> Further, under art 2 of the *European Convention on the Suppression of Terrorism*, states have the discretion not to regard any serious violent offence as a political offence.

Continuing the trend towards stronger extradition powers with fewer exceptions, the 1996 *Convention relating to Extradition between Member States of the European Union*<sup>83</sup> departed from the 1957 *European Convention on Extradition*<sup>84</sup> by including the broad principle that no offences should be regarded as political offences,<sup>85</sup> but it also does allow Member States an alternative position that offences under the *European Convention on the Suppression of Terrorism* are, at the least, not regarded as political offences.<sup>86</sup>

#### IV HUMAN RIGHTS ISSUES

##### A An Objection to Extradition

While the political offence objection involves substantial difficulties of application and has become ‘an increasingly rare consideration in extradition’,<sup>87</sup> other safeguards have been developed to protect the human rights of potential extraditees in more defined ways. The *Model Treaty on Extradition* contains mandatory grounds for refusal of extradition which are based on established anti-discrimination and human rights standards. Article 3 provides that extradition shall not be granted, inter alia:

- (b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person’s position may be prejudiced for any of those reasons;<sup>88</sup> [or]
- ...
- (f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or that if that person has not received or would not receive

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<sup>81</sup> Above n 19.

<sup>82</sup> Above n 20, art 1.

<sup>83</sup> Council of the European Union, *Convention relating to Extradition between Member States of the European Union* [1996] OJ C 313.

<sup>84</sup> Above n 22, art 3.

<sup>85</sup> *Convention relating to Extradition between Member States of the European Union*, above n 83, art 5(1).

<sup>86</sup> *Ibid* art 5(2).

<sup>87</sup> UK Home Office, above n 58, 41.

<sup>88</sup> See also 1957 *European Convention on Extradition*, above n 22, art 3.

the minimum guarantees in criminal proceedings, as contained in the *International Covenant on Civil and Political Rights*, article 14 ...<sup>89</sup>

These exceptions have obvious parallels with existing obligations of *non-refoulement* in the international law of asylum and refugee law.<sup>90</sup> Given that they probably constitute in whole or part a freestanding international law principle under those obligations, they are relatively uncontroversial, even if not universally and rigorously observed in practice in national jurisdictions.<sup>91</sup>

The provision in art 3(f) of the *Model Treaty on Extradition* reflects the established position in Europe. There it has been held that where substantial grounds have been shown for believing that a person, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country, the requested country would violate art 3 of the *European Convention on Human Rights*<sup>92</sup> if it accedes to extradition.<sup>93</sup> In the 1989 case of *Soering* the United States had requested the UK to extradite a German national charged with capital murder, to be tried in Virginia. Soering argued that he faced a real risk, if extradited, of being sentenced to death, which would expose him to 'death row phenomenon'.<sup>94</sup> Evidence was adduced that this phenomenon arises, inter alia, from the extended period of detention in death row, with accompanying extreme stress, psychological deterioration and risk of sexual abuse and physical attack.<sup>95</sup> The Court accepted that there were substantial grounds for believing that Soering would face a risk of being sentenced to death and being subjected to 'death row phenomenon', which, in view of his age and diminished mental state at the time of the offence, would constitute treatment 'going beyond the threshold set by Article 3'.<sup>96</sup>

The *Soering* principle remains an important one within the European framework, although the ability of an individual to rely on it in practice in any

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<sup>89</sup> Important additional protections in the *Model Treaty on Extradition* and many bilateral conventions are those based on the principle of double jeopardy: *Model Treaty on Extradition*, above n 9, art 3(d)–(e); see, eg, *Australia–Mexico Extradition Treaty*, above n 28, art 7: 'Extradition shall not be granted if final judgment has been passed or the person has been pardoned or granted an amnesty in the Requested State or has served the sentence for the acts or omissions constituting the offence for which extradition is requested'.

<sup>90</sup> Charles Colquhoun, 'Human Rights and Extradition Law in Australia' (2000) 6(2) *Australian Journal of Human Rights* 101, 103–4.

<sup>91</sup> *Ibid.*

<sup>92</sup> See above n 59, art 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

<sup>93</sup> *Soering* (1989) 11 EHRR 439, 440.

<sup>94</sup> Capital punishment itself was permitted under certain circumstances by the *European Convention on Human Rights*, above n 59, art 2(1): 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'. Despite the *Sixth Protocol to the European Convention on Human Rights*, opened for signature 28 April 1983, 1496 UNTS 232 (entered into force 1 March 1985), providing for the abolition of the death penalty, the Court could not interpret art 3 as generally prohibiting the death penalty. Nevertheless the Court acknowledged that the manner of its imposition could bring the punishment within art 3: *Soering* (1989) 11 EHRR 439, 467. See now *Thirteenth Protocol to the European Convention on Human Rights*, opened for signature 3 May 2002, ETS 187 (entered into force 1 July 2003) concerning the abolition of the death penalty.

<sup>95</sup> *Soering* (1989) 11 EHRR 439, 448.

<sup>96</sup> *Ibid* 478. The Court also took into account the possibility of extradition instead to Germany, where the death penalty had been abolished: at 477.

given case obviously depends on the degree to which he or she can establish to the Court's satisfaction the substantial grounds for believing that a risk of inhuman or degrading treatment or punishment exists. A 'mere possibility' of ill-treatment will not suffice, and Court has, on occasion, taken a comparatively robust view of what constitutes a mere possibility as opposed to a real risk.<sup>97</sup>

In a more specific context, the 1977 *European Convention on the Suppression of Terrorism*, whilst limiting to emasculation the political offence exception, does preserve human rights based exceptions,<sup>98</sup> as do many bilateral extradition treaties. For example, the *Australia–Mexico Extradition Treaty* states that extradition will not be granted if the requested party

has substantial grounds for believing that the request for extradition has been made with the aim of prosecuting or punishing a person on account of that person's race, religion, nationality or political opinions, or that the person's situation may be prejudiced for any of those reasons.<sup>99</sup>

Unlike the *Model Treaty on Extradition*, this bilateral treaty also regards as a *discretionary* ground for refusal of extradition the fact that an extraditee would be subjected to torture or cruel or degrading treatment or punishment.<sup>100</sup>

### B Application of the Objection

While these discrimination and human rights based provisions are clearer and more defined in scope than the political offence exception, they nevertheless involve some difficulty of application in practice. Without substantial resources, an accused person will find it very difficult to summon evidence in the requested state to establish the required substantial grounds for believing that they are being proceeded against in a discriminatory way or that their punishment would breach human rights standards. As a practical matter, it is even more difficult to persuade a judge<sup>101</sup> or a member of the executive in one country that the prosecuting authorities or penal systems of another country — with which the requested state potentially has close relations<sup>102</sup> and, at minimum, treaty relations — will breach fundamental human rights standards.

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<sup>97</sup> See, eg, *Vijayanathan v France* (1992) 241 Eur Court HR (ser A) 54; 15 EHRR 62, in the context of expulsion of asylum seekers.

<sup>98</sup> Above n 20, art 5:

Nothing in this *Convention* shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

<sup>99</sup> *Australia–Mexico Extradition Treaty*, above n 28, art 5(2).

<sup>100</sup> *Ibid* art 14.

<sup>101</sup> A US court has said that 'there is substantial authority for the proposition that this is not a proper matter for consideration by the certifying judicial officer': *Ahmad v Wigen*, 910 F 2d 1063, 1066 (2<sup>nd</sup> Cir, 1990) (van Graafeiland J).

<sup>102</sup> Justice van Graafeiland stated that '[t]he interests of international comity are ill-served by requiring a foreign nation ... to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced': *ibid* 1067.

This difficulty is exemplified by *R v Secretary of State for the Home Department; Ex parte Launder*.<sup>103</sup> In that case, a UK national was the subject of a request for extradition from the UK by Hong Kong for charges of accepting bribes in Hong Kong. Launder requested the Home Secretary to reconsider his decision to order extradition to Hong Kong in light of the fact that his trial and sentence would take place after the transfer of sovereignty of Hong Kong to the People's Republic of China ('PRC'), as there consequently would be no guarantee that he would receive either a fair trial or humane punishment (the death penalty being available in the PRC for crimes of serious corruption). The Home Secretary declined to withdraw the order, stating that the UK Government was required to proceed on the basis that the PRC would respect its obligations under the handover treaty<sup>104</sup> and that there would be nothing unjust or oppressive in ordering his return.<sup>105</sup> Launder applied for judicial review of that decision, arguing, inter alia, that the Home Secretary's decision was dictated by a collective decision of the Cabinet in relation to its policy towards the PRC and the handover of Hong Kong.<sup>106</sup>

Lord Hope of Craighead (with whom the other Lords agreed) acknowledged that

there is room for two quite different views. On one view, which is that taken by the respondent and is supported by a substantial body of evidence from expert witnesses, the PRC has already demonstrated by its conduct in recent years that it is incapable of giving effect to the rule of law on which the Basic Law must depend. On this view there is a risk, especially in a case which would be politically sensitive, that any trial would be unfair and that on conviction the Executive would insist on inhuman and excessive punishment. The other view, which is that taken by the Secretary of State, is that the PRC has good reason to make every effort in Hong Kong SAR to preserve the existing criminal justice system, in recognition that it would not be appropriate to practise the socialist system and policies there ... In these circumstances, optimism about the future for human rights in Hong Kong after the handover ... cannot be said to be unreasonable. Past conduct within China is not necessarily a good guide to what will happen in Hong Kong after the transfer of sovereignty.<sup>107</sup>

The decision turned on his Lordship being satisfied that the Home Secretary had considered the relevant issues and, his decision not being an irrational one, that it should stand.<sup>108</sup> Possibly a different result would now ensue following the enactment of the *Human Rights Act 1998* (UK).<sup>109</sup>

The discrimination and human rights based provisions can also present problems for the requested and requesting states, given the extensive amount of time that may be spent considering such objections in judicial proceedings.

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<sup>103</sup> [1997] 3 All ER 961.

<sup>104</sup> *China and United Kingdom of Great Britain and Northern Ireland Joint Declaration on the Question of Hong Kong*, opened for signature 19 December 1984, 1399 UNTS 60 (entered into force 27 May 1985).

<sup>105</sup> See *R v Secretary of State for the Home Department; Ex parte Launder* [1997] 3 All ER 961, 967.

<sup>106</sup> *Ibid* 968.

<sup>107</sup> *Ibid* 978.

<sup>108</sup> *Ibid* 989.

<sup>109</sup> Chapter 42.

Nevertheless, both international and domestic tribunals have refused extradition on the basis of human rights issues.<sup>110</sup> Extradition to the US has been refused because the accused person may face years on death row,<sup>111</sup> or death by gas asphyxiation,<sup>112</sup> or death for peacetime offences (in the case of a military accused),<sup>113</sup> An assurance that the death penalty would not be carried out by the requesting state may be insufficient for a requested state whose constitution or other domestic law prohibits the death penalty.<sup>114</sup> Domestic courts have also refused extradition when it would violate either a right guaranteed by a convention to which that state is a party<sup>115</sup> or its sense of decency,<sup>116</sup> or where the standards of justice in the requesting state are less than the rights guaranteed by the constitution of the state to whom the request for extradition was made.<sup>117</sup> In the case of persons accused of terrorist acts, it remains to be seen whether such human rights considerations would prevent extradition. The response to a request for extradition may be influenced by whether nationals of the country to whom the request is made were directly affected by the terrorist acts, as well as by the relationship with the requesting state.<sup>118</sup> It may be assumed that the current climate will not promote stringent application of human rights standards in extradition cases relating to terrorist offences.

#### V THE PRINCIPLE OF SPECIALTY

The principle of specialty is a rule of extradition law which requires that a person extradited to a requesting state is not to be detained, prosecuted or punished by the requesting state for any offence committed prior to the extradition, apart from that for which extradition was granted. M Cherif Bassiouni, writing on US law and practice, has gone so far as to elevate the principle to one of customary international law: ‘specialty is a principle so broadly recognised in international law and practice that it has become a rule of customary international law’.<sup>119</sup> The inclusion of the principle of specialty in

<sup>110</sup> We are indebted to Charles Colquhoun for his research and citation of cases in Colquhoun, above n 90, 101.

<sup>111</sup> See, eg, *Soering* (1989) 11 EHRR 439, 448.

<sup>112</sup> See, eg, *Ng v Canada*, Human Rights Committee, Communication No 469/1991, UN Doc CCPR/C/49/D/469/1991 (7 January 1994).

<sup>113</sup> See, eg, *The Netherlands v Short* (1990) Netherlands Supreme Court (English translation available in (1990) 29 ILM 1375).

<sup>114</sup> See, eg, *Venezia v Ministero di Grazia e Giustizia*, Judgment No 223 (1996) 79 Rivista di diritto internazionale 815.

<sup>115</sup> See, eg, *Dharmarajah v Ministère public fédéral* (1981) 107 Arrets du Tribunal fédéral suisse Ib 68, 69, 72.

<sup>116</sup> See, eg, *Gallina v Fraser*, 278 F 2d 77, 79 (2<sup>nd</sup> Cir, 1960).

<sup>117</sup> For other circumstances in which extradition was refused, or a decision to extradite was appealed, on rights based grounds, see *Shannon v Ireland* [1984] IR 548; *Finucane v McMahon* [1990] 1 IR 165; *Magee v O’Dea* [1994] 1 IR 500.

<sup>118</sup> For example, an accused person cannot be extradited from Australia unless the Attorney-General is satisfied that the person will not be subject to torture or the death penalty: *Extradition Act 1988* (Cth) s 22(3)(b)–(c).

<sup>119</sup> M Cherif Bassiouni, *International Extradition: United States Law and Practice* (4<sup>th</sup> ed, 2001) 512.

various international instruments, including the *Rome Statute of the International Criminal Court*,<sup>120</sup> lends some support to this view.

The *Model Treaty on Extradition* states the rule of speciality in art 14(1):

A person extradited under the present *Treaty* shall not be proceeded against, sentenced, detained, re-extradited to a third state, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than:

- (a) An offence for which extradition was granted;
- (b) Any other offence in respect of which the requested State consents. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present *Treaty*.<sup>121</sup>

Article 101 of the *Rome Statute* states the principle in similar terms:

- (1) A person surrendered to the Court under this *Statute* shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
- (2) The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with Article 91 [relating to contents of request for arrest and surrender]. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

The traditional rationale for this rule is motivated by the protection of state sovereignty. As described by a recent commentary:

Underlying the rule is the fact that extradition is a contractual arrangement between states. It is intended to reflect a condition on which the requested state surrenders its sovereign rights over the defendant within its territory and the

<sup>120</sup> Opened for signature 17 July 1998, 2187 UNTS 3, art 101 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>121</sup> See also *1957 European Convention on Extradition*, above n 22, art 14(1):

A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:

- (a) When the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this *Convention*;
- (b) When that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.

requesting state surrenders its sovereign powers within its territory upon his surrender.<sup>122</sup>

There is a second, and from the perspective of the requested person, a critically more important function of the rule of specialty which is directed to the protection of the rights of the person subject to extradition. The intention of the rule is to require — in respect of all crimes for which an extradited person might be tried — compliance with all of the guarantees of the extradition process, such as double criminality and political objections. This should have the effect of preventing a requesting state from using the extradition process for an impermissible purpose. In that sense, the other guarantees and protections built into extradition procedures, such as double criminality, political objections, and the death penalty exception, are only as strong as the extent to which the principle of specialty is observed.

As exemplified by the specialty provisions in the 1990 *Model Treaty on Extradition* and the *Rome Statute*, the principle does not have an absolute operation, and the prosecution or punishment of crimes other than those for which extradition was granted is enabled if the requested state gives its consent. However, in a convoluted expression of intention, the *Model Extradition Treaty* goes on to impose an *obligation* on states to consent to prosecution of additional prior offences,<sup>123</sup> which would appear to make the consent somewhat illusory. It then, however, limits that obligation of consent to offences which are subject to extradition under the treaty, thus effectively importing the same requirements and safeguards on extradition (including double criminality, the political offence exception, the discrimination exceptions and double jeopardy).<sup>124</sup>

Not all treaties contain an appropriate limitation on the circumstances in which consent can be granted. The *Australia–Mexico Extradition Treaty*, which includes the rule of specialty, contains an exception where consent is granted by the requested state's Attorney-General.<sup>125</sup> Significantly it does not explicitly require that other extradition safeguards in the *Model Treaty on Extradition*, such

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<sup>122</sup> Clive Nicholls, Clare Montgomery and Julian Knowles, *The Law of Extradition and Mutual Assistance: International Criminal Law — Practice and Procedure* (2002) 180. See also Gilbert, *Aspects of Extradition Law*, above n 71, 106: 'the principle of specialty ... upholds the contractual nature of the agreement between the two states in that the requesting state has to accept that the asylum state has granted extradition for the specified offences and no others'.

<sup>123</sup> Above n 9, art 14(1)(b).

<sup>124</sup> *Ibid.*

<sup>125</sup> Above n 28, arts 15, 18. See also *Treaty on Extradition between Australia and the Republic of Korea*, opened for signature 5 September 1990, [1991] ATS 3, art 16 (entered into force 16 January 1991).

as double criminality or double jeopardy, be observed.<sup>126</sup> No doubt such requirements are factors which a decision-maker charged with a request for waiver of specialty *should* take into account to safeguard the interests of the extradited person — but without such express limitations there is a real possibility for abuse of power.

This absence of clear guidelines on the making of requests for waiver of specialty gives considerable scope for circumvention of the various safeguards on extradition. For example, under the Australian system, a magistrate who is required to review an extradition request to determine eligibility for surrender reviews the relevant material to determine whether the offences are extraditable (including under the double criminality principle) and whether any extradition objections are made out.<sup>127</sup> This process does not apply to the subject of a request to waive specialty after the extradition. There is potential for offences which do not satisfy double criminality, or which are not based on the same conduct as the conduct on which the extradition requests were founded, to be included in a waiver of specialty request. If those offences had been included in an extradition request, the magistrate would have been in a position to hear evidence and submissions on these issues and to consider the issues collectively. This is a practical problem that can lead to injustice to extradited persons, and undermine the integrity of the extradition system.

While there are no express treaty provisions requiring that specialty should not be waived where the requesting state knew of the basis of the relevant offences at the time of the initial extradition request, there is a good basis for the view that such a limitation must be implicit to avoid the circumvention of the extradition requirements.<sup>128</sup> The suggestion that the requesting state's knowledge of the particulars at the time of the initial request may prove a bar should be supported.<sup>129</sup>

In addition to the dilution of the rule of specialty through the consent provisions in bilateral and multilateral conventions, there are disturbing examples of an apparent disregard of the rule in practice. UK commentators have observed that the specialty rule has been breached on several occasions by certain States of the US, simply by trying extradited offenders for offences

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<sup>126</sup> *Australia–Mexico Extradition Treaty*, above n 28, art 18:

A person extradited under this *Treaty* shall not be detained, tried or punished in the territory of the Requesting State for an offence other than that for which extradition has been granted nor be extradited by the Requesting Party to a third State, for any offence committed prior to the extradition, unless:

- (a) the person has left the territory of the Requesting State after extradition and has voluntarily returned to it;
- (b) the person has not left the territory of the requesting State within 60 days of after being free to do so; or
- (c) the Requested Party has given its consent to such detention, trial, punishment or to extradition to a third State.

<sup>127</sup> *Extradition Act 1988* (Cth) s 19.

<sup>128</sup> See *Extradition Act 1988* (Cth) s 22(3)(d).

<sup>129</sup> Gilbert, *Aspects of Extradition Law*, above n 71, 106.

outside the scope of the extradition request.<sup>130</sup> In our view, if the courts of the requesting state, even at a provincial level, do not comply with the requirements of specialty in confining the offenders prosecuted on return, foreign states should decline to cooperate on extradition matters with that state in the future.

## VI OTHER LIMITATIONS

Apart from the practical circumstance that the political offences exception is almost impossible to establish as a forensic matter in the proceedings in the requested state, the requested person also often has other disabling practical difficulties in establishing a defence to extradition once the processes are commenced. Indeed, there are other aspects which inhibit the capacity of a requested person to engage effectively the protections of procedures under terms of bilateral or multilateral extradition agreements, or the procedures under the law of the requested state.

One practical inhibition for a fair procedure is that usually the requested state acts (at its own expense) as the prosecuting agent for the requesting state. Inherently there is a conflict of interest in this role,<sup>131</sup> given that as a matter of fairness the requested state should have regard to the interests of the extradited person to be fairly treated and able to invoke protective procedural provisions. In effect, in a contest between the requested state's roles as a prosecuting authority and as the custodian of the rights of the requested person, it is the latter role that will be prejudiced.<sup>132</sup>

Further, extradition treaties do not now commonly require that the extradition request contain material demonstrating what the common law defines as a prima facie or arguable case, or indeed any material beyond a mere assertion by the requesting state that the offence has been committed.<sup>133</sup> As a practical matter, the absence of a requirement for any factual proof makes it almost impossible for a requested person to make out any of the statutory exceptions, such as the political offence exception. These difficulties are exacerbated by the situation that frequently, persons detained for extradition may not have the resources to contest the procedures.

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<sup>130</sup> See, eg, Linda Woolley, 'Extradition: Abuse by US Authorities' (2001) 145 *Solicitor's Journal (UK)* 140, 140–1, citing US conduct post-extradition in the cases of *R v Governor of Brixton Prison*; *Ex parte Levin* [1997] AC 741; *Laycock v Governor of Brixton Prison* [1997] EWHC Admin 596; *R v Secretary of State for the Home Department*; *Ex parte Gilmore* [1999] QB 611 (where, in breach of specialty provisions in the *Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland*, opened for signature 8 June 1972, 28 UST 227 (entered into force 21 January 1977), the Home Secretary had made orders to extradite two individuals although their alleged crimes (conspiracy offences) were not extradition crimes under the *Extradition Act 1989* (UK)). See also the trial of a defendant for offences in breach of specialty provisions (after a UK magistrate had expressly refused to commit for these offences) in *United States v Ruksana Diwan*, 864 F 2d 715 (11<sup>th</sup> Cir, 1989).

<sup>131</sup> See *Von Arnim v Federal Republic of Germany* (2002) 125 FCR 324, 326–7.

<sup>132</sup> *Ibid.*

<sup>133</sup> See, eg, Parliament of Australia, *An Extradition Agreement with Latvia and an Agreement with the United States of America on Space Vehicle Tracking and Communication*, Report No 36 (2000) 26, 45–6, available at <[http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/730B5EA036676E14CA256F71004E8393/\\$file/Extradition88.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/730B5EA036676E14CA256F71004E8393/$file/Extradition88.pdf)> at 1 May 2005.

Hence, in a real sense it might be said that the balance of calibration is firmly in favour of the interests of the requested state as against what is fair and appropriate having regard to the interests of the requested person. At the least, there is scope for further consideration and engagement of the extent to which an appropriate balancing of these conflicting interests may be achieved.

## VII CONCLUSION

For the reasons outlined above, the proper balancing of contemporary extradition laws may be regarded more as a work in progress rather than an area where the recent developments, including those with respect to multilateral treaties, adequately address the capacity of states to deal appropriately with alleged international crimes whilst at the same time providing proper protection for requested persons. At the least, the procedures for extradition should not be predicated upon assumptions of guilt followed by extradition as a matter of course, nor upon compliance with matters of form. At the moment the balance is tilted against the fair protection of the requested persons. Exceptional circumstances are required for a person to have any real prospect of resisting the process engaged upon the making of extradition requests, whether made under the usual form of a bilateral extradition arrangement or under the emerging international multilateral agreements.

The recent developments in international extradition frameworks undoubtedly enhance law enforcement mechanisms. They should be balanced with adequate safeguards for the individual accused, both established in form and respected in practice.