

**TRICKLE-DOWN ASSURANCES: COULD THE CENTRAL
AUTHORITY, TREATY, OR JUDICIARY ALLEVIATE
EXTRADITION ISSUES AMONGST NON-TRADITIONAL
TREATY PARTNERS?**

BY

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Abstract: *As New Zealand is facing its first extradition matter with China, it is becoming an increasingly cumbersome matter for the Crown. The current set of diplomatic assurances offered by the Crown in Kim lacks efficient post-sentencing monitoring mechanisms. It also lacks accountability for the Crown if a requested-person's assurance rights have been breached. This thesis suggests that new post-sentencing monitoring mechanisms should be introduced, such as the induction of the Ombudsman to perform their duties in off-shore prison facilities. This thesis is of the view that, contrary to the general opinions of NGOs, an extradition treaty with China is necessary (and perhaps long overdue). Not only for New Zealand's commitment against transnational crimes, but also to protect stringent monitoring mechanisms for pre-and post-sentencing while addressing any future breaches by the Requesting-State under the Vienna Convention on the Laws of Treaties, especially when there is an option of adjudication under the International Court of Justice. This thesis concludes the Courts should also be more involved in the extradition process, while balancing the need for comity and mutual respect, but allowing the Courts to be able to assess assurance-related evidence if absolutely necessary.*

Keywords: *extradition, diplomatic assurances, central authority, extradition treaty, public international law*

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Subjects and Topics

Extradition Law

* There is a specific extradition benefit open to New Zealand that is not addressed in this thesis (for contextual purposes): a treaty with China would ensure that fugitives fleeing from New Zealand to China could be returned to New Zealand to face trial. Referring to the murder of an Auckland man, Mr. Hiren Mohini - had a treaty existed back then, a request to extradite Xiao Zhen from China to New Zealand for Mr. Mohini's murder would have been possible. For more, see "Taxi murder suspect could get China trial" *The New Zealand Herald* (online ed, New Zealand, 16 June 2010).

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The views expressed in this thesis are my own.

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Introduction

Extradition is becoming an increasingly important issue given the pending extradition requests received in New Zealand, including from countries with whom this country has no current extradition treaty. The thesis aims to address whether New Zealand should use diplomatic assurances in extradition, and if it continues to do so, how should they be assessed and monitored? Where New Zealand is asked to extradite an accused person to a Requesting-State with whom it does not share an extradition treaty, it will need to be satisfied that the alleged offender will not be subject to human rights violations following his surrender to the Requesting-State.

This thesis will also analyse the reports from the United Kingdom on the use of diplomatic assurances.¹ The approach will involve the analysis of judgments where the Courts were both not satisfied and satisfied with the assurances the then Minister of Justice had assessed and the rationales behind the decisions of the Courts. In particular, how assurances are obtained prior to decision to surrender; and how the safeguards would be monitored after a surrender. This thesis will also analyse whether the Central Authority would be more appropriate than the Ministerial-model when it comes to obtaining and assessing assurances. For this thesis, the case of *Dotcom*² will be referred to in a very limited scope as it is still at its extradition offence stage and has not yet reached the diplomatic assurances stage. Nor will his recent Court of Appeal decision be discussed.

The topic of extradition is of particular importance due to the timing and its development in New Zealand. A current illustration is the extradition relationship with China³ as seen in judicial reviews of *Kim v Minister of Justice*.⁴ It is essential to assess and analyse the problems that could be mitigated to improve *ad hoc* extradition procedures with non-treaty bound countries in the future.

¹ E.g. David Anderson QC and Clive Walker QC "Deportation with Assurances" (July 2017) United Kingdom Government Publications <www.gov.uk/government/publications>.

² E.g. *Dotcom v United States of America* [2012] DCR 661.

³ For this thesis, China and Hong Kong (SAR) are separate States only within an extradition context. It is to avoid confusion with Hong Kong (Special Administrative Region), which is an autonomous region of China that already has a bilateral extradition agreement with New Zealand, while Mainland China does not. See Agreement between the Government of New Zealand and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters 2132 UNTS 129 (signed 3 April 1998, entered into force 1 March 1999), and *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA).

⁴ *Kim v Minister of Justice* [2016] NZHC 1490, 3 NZLR 425; and *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823.

As the Law Commission did not specifically focus on means to ensure that assurances could be proactively monitored, this thesis will examine how to resolve the issues of honouring diplomatic assurances, especially with high-risk countries. It will look at both theoretical and practical solutions.

The thesis will present five key points:

- 1) How the government currently assesses the assurances from the Requesting-States;
- 2) How officials should assess assurances and issues of potential human rights or due process violations from the Requesting-State;
- 3) Why a central authority is more ideal when dealing with extradition requests in comparison to the current Ministerial model;
- 4) Whether a Central Authority can, in fact, perform the work the Law Commission suggests it can; and
- 5) The roles the Central Authority, judiciary and the treaty system, could have in addressing these concerns.

The structure of this thesis

In order to thoroughly research and understand how the Government currently conducts extradition assessments and whether the Ministerial model can be improved with the Central Authority model, it is crucial to examine how these diplomatic assurances are assessed and this will remain a pivotal focal point for the contents that will be presented in the six chapters of this thesis. The procedure and process can then be examined so that suggestions for improvement can be made.

Chapter One: Extradition

This brief chapter explains what extradition is, its origins, and its benefits in combating cross-border crimes.

Chapter Two: Diplomatic Assurances

This chapter discusses what diplomatic assurances and monitoring mechanisms are. It includes the criticisms the Government faces when using assurances.

Chapter Three: How the government currently assesses diplomatic assurances

This chapter analyses how the Ministry of Justice currently assesses diplomatic assurances. It discusses what is taken into consideration when evaluating diplomatic assurances, what satisfies them that the assurances can be relied upon, and so forth.

Chapter Four: The Central Authority

This chapter accepts the Law Commission's recommendation that a Central Authority should be the Attorney-General, but focuses on the guidelines to prevent potential conflict in the Attorney's dual roles of a chief legal advisor and Cabinet Minister.

Chapters Five and Six: The roles the Treaty, Central Authority and Judiciary could have in addressing Extradition

The last two chapters have a practical focus and analyse whether the Treaty system would be beneficial to New Zealand and China's extradition relationship. It also explores if the Central Authority can perform the work the Law Commission suggests it can, such as evaluating the fitness of the requesting country's legal system or assurances. Next, it assesses how the judiciary would need greater oversight to examine evidence related to diplomatic assurances. Overall, it presents the possibility of the Courts having a more central role in evaluating the fitness of the requesting country and whether an extradition treaty with the Requesting-States would help frame issues of diplomatic assurances for future extraditions.

1

EXTRADITION

1. Introduction
2. What is extradition?
3. The benefits of extradition
4. The purpose of an extradition treaty
5. Difference between assurances used under the Treaty framework against *ad hoc* extraditions
6. *Ad hoc* extraditions are possible in lieu of a treaty
7. Extradition in New Zealand
8. Brief case examples
 - c) Kyung Yup Kim – extradition request from China
 - d) William Yan – mutual assistance
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1. Introduction

This thesis questions whether New Zealand should use diplomatic assurances in extradition and if a Central Authority might be the appropriate body to manage that. Before going into what diplomatic assurances are and the best body to assess them prior to the surrender of a requested person, it is essential first to discuss what extradition is. This chapter also shows the benefits of extradition as a solution for transnational and cross-border crime. At least with a Requesting-State in the absence of any treaty arrangements, the use of extradition is usually twinned with the use of diplomatic assurances. However, the procedure has been criticised for not effectively upholding the importance of human rights.⁵ The issue with diplomatic assurances will be discussed at length in the next chapter.

2. What is extradition?

Extradition is a process that allows the surrender of persons suspected of committing a crime in the jurisdiction of the Requesting-State.⁶ It is a procedure of removing a person from the Requested-State to the Requesting-State to face trial for serious crimes they have been accused of. Necessarily, for a request to be successful, it must be an extraditable offence in which the requested country would deem the alleged offence as serious and prosecutable.⁷ Historically, the origins of extradition date back to 1280 B.C. as a matter of courtesy and good will between States of ancient times.⁸ Ramses II of Egypt would return fugitive offenders to King Hattusli of Hittites.⁹ The history of diplomatic assurance also originated from this extradition agreement between the two States where they assured the requested-State that the person should not be subject to torture or death.¹⁰ Moving forward to 1174, Henry II of England and William of Scotland negotiated the return of fugitive offenders.¹¹ In modern times, extradition has

⁵ Amnesty International "China: Torture and forced confessions rampant amid systematic trampling of lawyers' rights" (12 November 2015) <www.amnesty.org>.

⁶ Clive Nicholls, Clare Montgomery and Julian B. Knowles *The Law of Extradition and Mutual Assistance* (3rd ed, Oxford University Press, Oxford, 2013) at 3. Also, a requesting country is a country or State which requests the extradition of a fugitive seeking refuge from another State.

⁷ Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC IP37, 2016) [NZLC IP37] at 6.1. For more, see *Extraditable Offence* in Chapter 6 of the report.

⁸ Nicholls, Montgomery, and Knowles, above n 6 at 4.

⁹ At 4. See also Peter D. Sutherland "The Development of International Law of Extradition" (1984) 28 St. Louis U. L.J. 33 at 33.

¹⁰ Gennadiy Sergiy Bogutskiy "Improving Extradition Procedure through Strengthening the Legal Status of an Individual and Transferring the Decision Making Right from the Executive to Judiciary Branch of Power" (LLM Thesis, University of Toronto, 2012) at 6 referring to Zelins'ka, N. A. "International crimes and international criminality, Monographic research" (Odesa, Ukraine: Yurydychna literatura, 2006) at 101.

¹¹ Nicholls, Montgomery, and Knowles, above n 6 at 4.

evolved to a solution of countering transnational crimes where the offender has fled from one State to another, to avoid prosecution.

In *R v Evans ex p Pinochet Ugarte* [1998], Lord Bingham CJ defined the act of Extradition as:¹²

[A] process whereby one sovereign state, 'the requesting state', asks another sovereign state, the 'requested state', to return to the requesting state someone present in the requested state so that the subject of the request may be brought to trial on criminal charges in the requesting state. The process also applies where the subject of the request has escaped from lawful custody in the requesting state and is found in the requested state.

Extradition usually involves three elements: a request for extradition of a person from the Requesting-State to the Requested-State; the crime the requested person is accused of committing is also a crime prosecutable in the Requested-State; and the requested person is extradited for a trial or punishment in the jurisdiction of the Requesting-State.¹³ Extradition is a different process of removal compared to deportation. Deportation involves a single State¹⁴ in which the person is currently present there and the State wishes to remove him or her with the initiation of a removal process.¹⁵ Deportation in most cases involves the removal of an undesired person, such as an illegal immigrant, from the State's territory. However, both deportation and extradition have human rights protection-elements attached to them. New Zealand is a party to international conventions that are instrumental to the protection of human rights in the removal process, such as the United Nations Convention Against Torture (UNCAT),¹⁶ and the International Covenant on Civil and Political Rights (ICCPR).¹⁷ Domestically, there is the New Zealand Bill of Rights Act 1990 (NZBORA) which the Supreme Court in *Zaoui v Attorney-General (No 2)* (2005)¹⁸ affirmed the Government must consider the Act's relevance alongside the international conventions to which it is a party. Even though *Zaoui* was a deportation case and not extradition, it is still relevant as it examined the removal of a person from New Zealand without the consideration of his human rights with references to the UNCAT and ICCPR. This is similar to that of diplomatic assurances of human rights protections in extraditions. Although this paper has an

¹² *R v Evans ex p Pinochet Ugarte* [1998] 38 ILM 68 (QB) at [3] per Lord Bingham CJ.

¹³ Nicholls, Montgomery, and Knowles, above n 6 at 3.

¹⁴ At 3.

¹⁵ *R v Governor of Brixton Prison ex p Sobben* [1963] QB 243.

¹⁶ 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)(UNCAT).

¹⁷ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976)(ICCPR).

¹⁸ *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

extradition focus, it will also discuss the diplomatic assurances in the case of Lai Changxing,¹⁹ a deportation matter between Canada and China.²⁰

The problem many opponents of extradition would assert is that diplomatic assurances post-extradition could not be proactively monitored.²¹ This is explicitly evident when extradition lawyers argue the Requesting-States have a long history of abuses and human rights violation, such as China. This will be addressed in the next chapter.

3. The benefits of extradition

The main benefit that extradition brings is that it removes the possible or potential threats the individual might have on the security or national security of the Requested-State. Legal experts maintain the use of extradition plays a significant role in counter-terrorism and protecting the interests of national security.²² In the event that terrorist suspects or fugitives have been requested for extradition, there exists a danger for them to face torture after extradition. Should the Requested-State allow the extradition? If they opt not to for human rights reasons, they will face potential issues of national security by allowing the subjects to stay in the country. In theory, diplomatic assurances should prevent both of that from happening because the two States, before allowing the extradition to happen, would have reached a middle ground of assurances to ensure torture does not happen. In the United Kingdom, assurances have been used frequently with deportation. The use is similar to assurances in extradition and is also seen as a solution to protect the national security of the State:²³

DWA (Deportation With Assurances) is not a quick and easy solution to the attainment of national security with justice for foreign terrorist suspects, but it may be a solution which has more attractions than many of the preceding options. In this way, DWA can play a significant role in counter-terrorism, especially in prominent and otherwise intractable cases which are worth the cost and effort, but it will be delivered effectively and legitimately in international law only if laborious care is taken.

¹⁹ *Lai v Canada (Minister of Citizenship and Immigration)* [2007] FCJ No 476.

²⁰ Lai's case was a deportation matter. Although the media has, perhaps incorrectly, stated it is an extradition one because it is often discussed alongside an extradition treaty with China. This deportation case, however, was the first between Canada and China where explicit diplomatic assurances were sought by the Canadian Government.

²¹ Amnesty International "Diplomatic Assurances Against Torture - Inherently Wrong, Inherently Unreliable" <www.amnesty.org>.

²² David Anderson QC and Clive Walker QC "Deportation With Assurances" Cm 9462 (Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, July 2017) at 12 referring to "The elastic jurisdiction of the European Court of Human Rights", lecture at the Oxford Centre for Islamic Studies, 12 February 2014, p 4.26 (UK Deportation Report at 12).

²³ At 92.

Lord Phillips, President of the Supreme Court, was of the view that returning someone to a country where they are exposed to torture or inhumane treatment would be abhorrent. However, he was reluctant to accept the Courts position of *Chahal v The United Kingdom*²⁴ where the absoluteness of Article 3 of the European Human Rights Convention²⁵ where no one shall be subjected to torture or to inhumane or degrading treatment or punishment, overrode the UN Convention on the Status of Refugees.²⁶

The Strasbourg Court might have acted in *coram non judice* since it over-extended its jurisdiction by wrongfully applying the European Human Rights Convention over the UN Refugee Convention, which was the applicable Convention for *Chahal*. Lord Phillips was of the view that there should be exceptional measures where there is sufficient evidence that the sought-after person posed a threat to Britain's national security.²⁷ Nonetheless, the *Chahal* decision highlighted a fundamental problem for Requested-States that are used as havens for individuals. Extradition and the diplomatic assurances that come with it aims to mitigate those concerns.

4. The purpose of an extradition treaty

Under Article 26 of the Vienna Convention on the Law of Treaties,²⁸ the existence of an extradition treaty creates and imposes on State-parties the international law obligation of *pacta sunt servanda*:²⁹

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

There is no customary international law obligation for any countries to extradite anyone within their jurisdiction.³⁰ The reality is that most treaties are in fact multinational ones. However, having an extradition treaty in place would impose that obligation for the

²⁴ *Chahal v The United Kingdom* (1996) 23 EHRR 413 (ECHR).

²⁵ Art 3: Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

²⁶ See Art 32(1) on Expulsion: The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

²⁷ Walker and Anderson, above n 22 at 12 referring to “The elastic jurisdiction of the European Court of Human Rights”, lecture at the Oxford Centre for Islamic Studies, 12 February 2014, p 4.26 (UK Deportation Report at 12). “[T]here was an exception to this where there were reasonable grounds for considering that the refugee posed a threat to national security.”

²⁸ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 29 April 1970, entered into force 27 January 1980).

²⁹ The principle in the context of Article 26 is that promises must be kept and performed in good faith.

³⁰ Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 215.

Requested-State to entertain if they should surrender the person against the extradition framework in place, under good faith.³¹

Although States are obligated to consider an extradition at international law, the surrender can still be refused by their delegated decision-maker under their statutory powers,³² and by the Courts. At least in Anglo-Commonwealth countries, having a treaty ratified does not exclude the decision to surrender from being reviewed by the judiciary. Under this view, a State is not obligated to extradite but bound by an extradition treaty that obligates the Requested-State to assess whether or not to allow the surrender. There may also be an agreed process of extradition that has been negotiated by the parties in the treaty negotiation stage. If a person is extradited under the treaty and the diplomatic assurances have been breached, the Requested-State may wish to investigate the violation. If it is still not rectified by the Requesting-State, then the Requested-State may either wish to suspend the treaty now or use the option of taking the matter before the International Court of Justice under the premise of the Vienna Convention on the Law of Treaties.³³ If all else fails, then the Requested-State has the right to terminate the treaty under the Vienna Convention.

5. Difference between assurances used under the Treaty framework against *ad hoc* extraditions

The issue of diplomatic assurances can arise from both a treaty framework and outside in *ad hoc* transactions. Assurances based under a treaty footing would obligate and bind the States if ever there was a violation or breach of the articles within the Vienna Convention on the Law of Treaties. Aside from resolving breaches of the articles within a Treaty, disputes involving the interpretation of specific articles could also be resolved by the International Court of Justice, as seen in *LaGrand (Germany v. United States of America)*³⁴ where a breach of consulate relations under the Vienna Convention on Consular Relations was adjudicated by the ICJ. The question of whether *ad hoc* agreements could be binding outside of a treaty framework is possible but more problematic. The differences in a treaty based extradition as opposed to the current *ad hoc* agreements will be discussed later in Chapter 5.

6. *Ad hoc* extraditions are possible in lieu of a treaty

³¹ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 26.

³² E.g. Extradition Act, s 48. This section provides the Minister of Justice the discretion to refuse a surrender, regardless of the Requesting-State's treaty status with New Zealand.

³³ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 29 April 1970, entered into force 27 January 1980), art 60(3)(b). See also *Laws of New Zealand Extradition from New Zealand: Termination of Treaties* (online ed) at 85.

³⁴ *LaGrand (Germany v. United States of America)* (Judgement) [2001] ICJ Rep 466.

Even in the absence of a treaty, extraditions are still possible in New Zealand as clearly shown in the case of Kyung Yup Kim. Kim is a Korean born New Zealand resident who is wanted by the Chinese Government for murder. This was problematic as New Zealand has no extradition treaty with China (except for Hong Kong due to its Special Administrative Region's status and a degree of autonomy from China). *Kim* demonstrated that *ad hoc* extraditions under the domestic legislation of the Extradition Act can be possible if the assurances obtained are satisfactory and are realistically achievable by the Requesting-State.³⁵ The Law Commission states that "A treaty should still not be necessary for an extradition or to provide mutual assistance."³⁶ The domestic legislation should complement the extradition treaty that is in place. In the absence of the treaty, the Extradition Act remains paramount in setting a blueprint for *ad hoc* requests but would lack the safeguards a treaty would bring for ensuring assurances are upheld. This is addressed in depth in Chapter 5.

7. Extradition in New Zealand

Extradition in New Zealand is governed by the Extradition Act 1999 and administered by several Government Ministries and agencies. The primary decision-maker for extradition is the Minister of Justice. The Act allows New Zealand to accept requests from non-bilateral agreement countries with whom the Crown does not have an extradition treaty.³⁷ In the current legal climate of New Zealand, there is a notable absence of a specialised agency dedicated explicitly to extradition. While the Attorney-General acts as the central authority for mutual assistance under the Mutual Assistance in Criminal Matters Act 1992, there is no official central authority for extradition matters.

When the New Zealand Government receives an extradition request from a non-treaty bound State, it is first processed by the Ministry of Foreign Affairs and Trade. However, it is the Ministry of Justice that handles the assessment of diplomatic assurances and the decision to allow extradition requests. In recent years, the Law Commission has recommended that a Central Authority would be a better agency to manage extradition requests.

8. Brief case examples

³⁵ *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823 at [7]. See also Extradition Act 1999, ss 7, 8 & 30.

³⁶ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 20. See R7.

³⁷ "Extradition" Crown Law <www.crownlaw.govt.nz>.

The following case examples will be discussed in detail in the later chapters. However, it is important to briefly explain the scope of their case before analysing their relevance to the current system in New Zealand.

a) Kyung Yup Kim – extradition request from China

In the judicial reviews of *Kim v Minister of Justice*,³⁸ the requested person was a New Zealand resident who sought to challenge the decision of the Minister of Justice to surrender him to China for his murder charge. In 2009, Kim was accused of murdering a Chinese woman in Shanghai. He subsequently fled to South Korea before the Chinese authorities could detain him, and then to New Zealand. The Chinese authorities sent an extradition request and sought for his return to China to face trial.³⁹ Subsequently, Kim has had two judicial reviews against the Minister and is waiting for its appeal at the Court of Appeal. So far, any extradition between the two States have yet to happen.

b) William Yan – mutual assistance

Another case that is relevant to this thesis is that of *Yan*,⁴⁰ a New Zealand citizen who returned to Mainland China to face trial. This case involved mutual assistance between the Governments of New Zealand and China and was not based on extradition. Yan's case should not be used as a precedent for assurances that were kept by China. It was not disclosed what happened after he returned to China. For example, was there a trial, what were the assurances given, and why was he able to return to New Zealand?

9. Summary

Extradition operates as a method for States to combat transnational crimes when returning fugitives. The purpose of extradition is often criticised for how it is used. So how does the Government ensure Foreign States would not breach the diplomatic assurances that have been promised? How does it guarantee that it fulfils the obligations of the international instruments New Zealand is a party to, especially when it is extraditing a person to a State with a questionable human rights' record? These are significant issues which would carry weight in the overall analysis. The next chapter will identify how diplomatic assurances have been used in the past and present to support extraditions and how it could be improved to ensure they will be effective.

³⁸ *Kim v Minister of Justice* [2016] NZHC 1490, 3 NZLR 425 (First judicial review decision); and *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823 (Second judicial review decision).

³⁹ *Kim* (First judicial review decision), above n 38, at [1].

⁴⁰ *Yan v Commissioner of Police* [2015] NZCA 576, [2016] 2 NZLR 593.

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DIPLOMATIC ASSURANCES

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6. Criticisms the New Zealand Government faces when relying on assurances
7. In the absence of a treaty, the assurances are not legally binding on the requesting/receiving State.
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1. Introduction

Before analysing whether New Zealand should use diplomatic assurances in extradition and whether the central authority is the best body to manage the extradition process, it is essential to discuss and analyse what diplomatic assurances are and how New Zealand and the Requesting-State have so far used diplomatic assurances. This chapter also discusses the criticisms the Government currently faces when relying on them, and solutions that could help mitigate concerns of potential violations of assurances. Once the usage of diplomatic assurances and how they are monitored have been discussed, the thesis can then move onto whether a central authority is a preferable body when obtaining, assessing and monitoring those assurances.

It is paramount that monitoring mechanisms exist not just for pre-trial assurances but also post-trial. Evidentially, this has been a problem when seeing how another Commonwealth country has cooperated with China: Canada. Referring to Canada, *Lai v Canada*⁴¹ sets the precedent for surrendered-persons' diplomatic assurances with China, albeit being a deportation case. The Canadian Government did not negotiate the assurance mechanisms beyond Lai's trial in China and claimed it was not responsible for Lai after his trial. Therefore, whatever diplomatic assurance mechanisms Governments arrange, post-sentencing assurances must also be discussed, negotiated and monitored by the appropriate bodies. The Requested-State cannot absolve itself from any monitoring mechanisms when a requested person has been sentenced after extradition.

It is important to note that this analysis aims to examine the assurances that were in place and how the Canadian Government had absolved themselves of any responsibilities. This analysis is not concerned with the specific treatments of Lai that happened post-trial, but why post-trial monitoring assurances were not given. On the contrary, it was also reported in the same article that Lai had been treated quite well and could be seen as given priority in medical care and attention.⁴² *Prima facie*, it appears that a person who had been returned with conditional assurances attached had been given preferable priority treatment over ordinary prisoners.

In New Zealand, the proposed assurances in place for Kim's extradition to China allows medical practitioners and MFAT's consular officials to visit him once a reasonable

⁴¹ *Lai v Canada (Minister of Citizenship and Immigration)* 2007 FC 361; [2008] 2 F.C.R. 3; *Lai v Canada (Citizenship and Immigration)* 2011 FC 915; [2013] 2 F.C.R. 56.

⁴² Nathan Vanderklippe "Family of imprisoned smuggler wants Ottawa to pressure Beijing for medical care" *The Globe and Mail* (online ed, Ontario, 14 April 2017). The Canadians absolved themselves of responsibilities for Lai after he was sentenced in China, where they rejected the continuation of their obligation to monitor him after his trial in China.

request has been made to the Chinese. However, this lacks a stringent investigative body able to monitor and investigate his prison conditions and whether he is given the appropriate treatments. Monitoring any treatments would only be effective if there is an appointed investigative body that could monitor, report and oversee the prisoner's conditions offshore beyond the reasonable visits and consultations.

There are three reasons as to why monitoring is vital. First, it assesses the sought-after person's conditions. Second, whether assurances have been honoured. Third, it provides a comprehensive report to the Cabinet. The report to the Cabinet is crucial because it would shape future extraditions with that Requesting-State. Since some countries who do not share an extradition treaty with New Zealand rely heavily on their reputation of keeping assurances, having monitoring bodies to ensure there are no breaches would set a firm deterrence for all countries, who are dealing with that particular Requesting-State. The issue is, the current monitoring bodies lack the depth to carry out their tasks. Relying purely on New Zealand consulates from MFAT would not be sufficient, as they might have less investigative and monitoring experience for prisons. One possible solution is to have separately appointed bodies independent from the Government, a body or individual who possesses experience in this area so that they can monitor the extradited person's conditions. This will be further discussed in Chapters 5 and 6 with the proposals of monitoring bodies and mechanisms.

2. What are diplomatic assurances?

The Requesting-State's human rights record is often a cause for concern in New Zealand when deciding on whether to surrender the sought-after person. The role that diplomatic assurances assume in extradition is to bridge any uncertainties of human rights' violations. A diplomatic assurance is an undertaking by the Requesting-State (receiving State) that ensures the person who is returned will be treated under the assurances the States have agreed on in alignment with any human rights principles.⁴³ These assurances usually involve the right to a fair-trial, no torture, ill-treatment and most importantly, the removal of the death penalty. The difficulty with extraditing people on an *ad hoc* basis to a non-treaty bound requesting country can now be resolved if the assurances provided are satisfactory.

Accepting diplomatic assurances might also be contrary to the principle of "non-refoulement" and in potential violation of Article 3 of the Convention Against Torture. Non-refoulement is the principle of not forcing people to return to a country where they

⁴³ Johannes Silvis "Extradition and Human Rights Diplomatic assurances and Human Rights in the Extradition Context" (Strasbourg Lecture 2014, The Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters, Strasbourg, 20 May 2014) at 1.

face a real risk of torture. The persistent problem identified by some Non-Government Organisations is that assurances cannot be relied upon by Requested-States. Amnesty International states assurances, in general, and not State-specific, are:⁴⁴

An undertaking not to torture, made by a state which denies that its agents commit torture, and any breach of which will be done in secret, is inherently self-contradictory and cannot be relied on.

On balance, while some in the international community of NGOs, human rights experts and United Nations rapporteurs have cautioned against the use of assurances, they are nonetheless vital and necessary to ensure the safety of the sought-after person once he or she returns to the Requesting-State. The more significant picture is that diplomatic assurances if adequately obtained and the outcome of its assessment is satisfactory, can be used to extradite those who use New Zealand as a haven to evade their off-shore criminal activities.

The Human Rights Watch points out the weaknesses a monitoring mechanism would have and how the process of monitoring would be abused if internal staff monitored detainees. The ability to complain about their treatment would be non-existent due to consequential fears the detainee would have.⁴⁵ Visits by a third party that gives a “reasonable request” to the receiving State as part of the assurance does not mitigate the possibility of preparation by the prison facility to warn the detainee of any reprisals. The Requested-State should only accept an extradition request if the receiving/Requesting-State has approved the assurances of a high standard. By not allowing these monitoring mechanisms, the Requesting-State runs the risk of having its legitimacy to undertake diplomatic assurances questioned.

The UNHCR states:⁴⁶

Their use [of assurances] is common in death penalty cases, but assurances are also sought if the requested State has concerns about the fairness of judicial proceedings in the requesting State, or if there are fears that extradition may expose the wanted person to a risk of being subjected to torture or other forms of ill-treatment.

Understandably, Special Rapporteurs have not been able to accept the reliability of assurances since some States have used them to circumvent the principles of non-

⁴⁴ Amnesty International "Diplomatic assurances - no protection against torture or ill-treatment" <www.amnesty.org>.

⁴⁵ Human Rights Watch "Diplomatic Assurances against Torture Questions and Answers", at 3.

⁴⁶ United Nations High Commissioner for Refugees *Note on Diplomatic Assurances and International Refugee Protection (Protection Operations and Legal Advice Section Division of International Protection Services)* (2006) at 2.

refoulement.⁴⁷ The benefit of enabling diplomatic assurances is that it is vital for countries to allow the extradition of a requested person to a requesting country that possesses the death penalty and potentially poor and torturous treatment of detainees because they will not carry out such forms of capital punishment. It is as imperative for the Requested-State to receive and assess these assurances, as it is for the Requesting-State to provide and ensure the guarantees are honoured. Essentially, diplomatic assurance allows the continuity of extradition and to prevent individuals from using New Zealand as a haven to evade consequences of their crimes.

3. Other countries' history of surrender with Mainland China

Since this thesis revolves around the extradition between New Zealand and China, it would be important to briefly touch on return cases between other Common Law countries and China. The following shows whether assurances pre-and post-trial have been negotiated.⁴⁸ Not all cases are extradition related and some have returned based on their own accord. It also highlights the importance of seeking assurances if the requested-person is a resident or citizen of the Requested-State.

United States: So far, none of those returned from the US to China are US citizens. Between the US-China return of persons, *Yang Xiuzhu's* deportation in 2016 and her brother, *Yang JinJun* in 2015⁴⁹ did not have any public records of diplomatic assurances, especially post-trial assurances. It is important to note that although under Operations Sky Net and Fox Hunt, while many have returned to China, only a select few have been labelled "extraditions". The surrender of *Zhu* in 2017 for example,⁵⁰ is labelled as the first extradition between the US and China. The cases from the United States did not disclose whether assurances were granted under diplomatic negotiations. This is especially true for the case of *Zhu* when both countries refused to disclose any details.⁵¹

⁴⁷ The United Nation's Special Rapporteurs function as special investigators for the United Nations Human Rights Council and are part of the Special Procedures of the Human Rights Council. For more, see "Special Procedures of the Human Rights Council" United Nations Human Rights Office of the High Commissioner <www.ohchr.com>. See also "Dangerous deals: Europe's reliance on 'diplomatic assurances' against torture" Amnesty International European Institutions Office <www.amnesty.eu>. "The UN Special Rapporteur on torture Manfred Nowak noted in his February 2010 report to the UN Human Rights Council that he stated "repeatedly" that "diplomatic assurances related to torture are nothing but an attempt to circumvent the absolute nature of the principle of non-refoulement."

⁴⁸ The information was compiled with publicly available information, such as the judgments of *Lai* and *Kim*, while data in U.S. cases were from news resources as those Federal judgments were sealed. The timeline begins from 2011 to July 2018.

⁴⁹ "US repatriates first Chinese Sky Net suspect Yang Jinjun" (18 September 2015) British Broadcasting Channel <www.bbc.com>.

⁵⁰ There was no officially released Federal judgment or case citation for *Zhu*, or that *Zhu* was the returned person's real name as that was the only given name to media. "China Hails First Fugitive Extradition From U.S. Under Trump" (1 June 2017) Reuters <www.reuters.com>.

⁵¹ Reuters, above n 49 "*The suspect, only identified by his surname Zhu... China's Foreign Ministry said it had no information about the case and the U.S. Embassy in Beijing declined to comment.*"

Therefore, with the secretive nature and the limited information available to the public, it is particularly difficult to establish if there are any assurances at all. There may very well have been assurances negotiated between the two States. However, no information has been publicly released. The outcome of negotiation of assurances could have been different if the three extradited from the US were US Citizens.

Canada: For the surrender of *Lai* in 2011, although there was a complaint about inadequate medical treatments, he did not complain about being tortured. In fact, his family was quite satisfied he was being treated properly. Lai did not receive post-trial assurances as the Canadians have denied it is their obligation and responsibility since he is not a Canadian citizen. Therefore, just like the returned persons from the US, the Canadians also seem to remove themselves from the obligation of post-trial monitoring if the person is not their Citizen. Compare this with New Zealand's case where Kim is a New Zealand resident.

However, it is worth noting that in Kim's second judicial review and in the Extradition Act,⁵² that the Minister may determine not to surrender a person if he or she is a New Zealand citizen and the circumstances of the case would mean it is not in the interests of justice to allow the surrender. However, this is a discretionary determination where the person must meet both limbs (citizenship and interests of justice) to be considered ineligible for surrender.

New Zealand: In the case of *Kim*, post-extradition monitoring assurances were scarcely referenced but have been presumed to be obtained by a lesser degree compared to pre-trial assurances. This is based on the assumption that MFAT has continued to provide active consular assistance and monitoring⁵³ to the nine NZ citizens currently detained in China (on non-extradition related cases) as mentioned in the first judicial review about the briefing papers provided to the Court and the judgments of Kim's reviews.⁵⁴ However, it is uncertain whether those monitoring mechanisms are proactive.⁵⁵ It is also uncertain if New Zealand would follow Canada's example in *Lai* to not obtain post-sentencing monitoring assurances had Kim not been a New Zealand resident. Out of all

⁵² *Kim* (Second judicial review decision), above n 38, at [126]. "...the person is a New Zealand citizen and, having regard to the circumstances of the case, it would not be in the interests of justice to surrender the person". This is also provided in the Extradition Act, s 30(3)(c).

⁵³ *Kim* (First judicial review decision), above n 38, at [220].

⁵⁴ *Kim* (Second judicial review decision), above n 38, at [152], [155] & [156].

⁵⁵ *Kim* (First judicial review decision), above n 38, at [221]. Also, it is unclear in the judgment of Kim's second judicial review whether the proactive monitoring referred specifically to his pre-trial or post-trial. See *Kim* (Second judicial review decision), above n 38, at [51], [57](b)&(c), [60], [65], & [81].

these examples, Kim's case is the only extradition request from China based on the crime of murder, as opposed to bribery and embezzlement.

For William Yan, his mutual assistance and his return to China is not an extradition case. Both Governments sealed the records of his trial, conviction, and assurances. While Yan's case is not an example of extradition, he is nonetheless a New Zealand citizen. It is not clear if this led to possibly better assurances since nothing has been officially disclosed with his return to China and whether there was a trial or sentencing. The case of *Kim* and *Yan* will be analysed in the next chapter.

Comparing New Zealand and other countries' experience with China, it shows the Crown has conducted a much more thorough consideration for pre-trial and post-trial monitoring of assurances compared to *Lai*, at least with the information available to the public. Interestingly, it does show a higher threshold of assurance negotiations have taken place for Kim, perhaps due to his status as a New Zealand resident.

Can the Requested-State be responsible for post-sentencing assurances if the requested-person is a national of the Requested-State and could the use of diplomatic protection be used to protect the requested-person once they have been transferred to a Foreign-State? These will be discussed further in Chapter 6.

4. Do nationals of the Requested-State receive better assurances than non-nationals?

In the transactions between the United States and China, the issues of diplomatic assurances were never revealed to the public. However, what has been established at least from the information available in *Lai* is that post-sentencing guarantees, particularly anti-torture monitoring mechanisms were not negotiated. The Canadian Government even went as far as admitting this is no longer their responsibility.⁵⁶ This concept is discussed at length in Chapter 6. It is necessary to analyse whether negotiating for stronger assurances, especially anti-torture assurances post-sentencing if the requested-person is a resident or citizen of the Requested-State.

5. Benefits of using Diplomatic Assurances

It is difficult to promote the merits of assurances in the face of public criticisms, especially when there is strong opposition from human rights' groups voicing the view that a government's use of diplomatic assurances is to circumvent the prohibition of

⁵⁶ Nathan Vanderklippe, above n 42.

torture.⁵⁷ However, the criticisms against assurances should not obscure the merits and necessity of it. Below is an analysis of how diplomatic assurances, if used correctly, can, in fact, assist the use of extradition and prevent the violation of human rights:

- 1) It allows the gathering of human rights' protection and other assurances through the States' diplomatic channels;
- 2) it creates a blueprint for smoother extradition proceedings with the Requesting-State in the future; and
- 3) it plays a considerable role in counter-terrorism and adds legitimacy to the extradition process.

Diplomatic assurances are a vital necessity for extradition because they have effects that extend beyond the current matter at hand and could potentially pave a smoother pathway for future extradition cases with the same Requesting-State since by then there would have been a record of honouring assurances. Essentially, Requested-States have taken a responsible position of ensuring those who are returned continues to have the human rights assurances afforded to them domestically. While the system of obtaining, assessing and monitoring assurances is not perfect, its proxy as an extradition-undertaking should be credited.

Contrary to former UN Special Rapporteur Manfred Nowak's position that diplomatic assurances might be used to absolve the Requested-State from human rights obligations, assurances obligate the Minister or Secretary to maintain and adhere to those very commitments. Assurances are a safeguard that protects the individual where the Governments go through a thorough process of ensuring the individual would be protected from any abuses.

If the Government's reliance on the assurances were not taken with adequate decision-making steps, the Courts can review the decision and require the decision-maker to mitigate those concerns. This is evident from the judicial reviews of Kyung Yup Kim where in the first review of the Minister's decision, Mallon J ordered the Minister to reconsider with the steps recommended by the High Court. However, the second judicial review by Kim was dismissed as the Court was satisfied the Minister had taken exact procedural steps before re-deciding on surrendering Kim.

6. Criticisms the New Zealand Government faces when relying on assurances

⁵⁷ Amnesty International "Diplomatic Assurances Against Torture - Inherently Wrong, Inherently Unreliable" <www.amnesty.org>.

To have a fair and balanced view, it is essential to evaluate the positives and negatives of assurances. The main problem is, how does the Government evaluate the fitness of the requesting country and can those assurances obtained, be reliable and kept by the Requesting-State? How does the New Zealand Government ensure the assurances of no-torture and inhumane treatment are kept when the current monitoring mechanisms provided by MFAT have previously failed?⁵⁸ If the Requesting-State breaches its assurances, there will be potential consequences for China in future extradition cooperation, but there is no direct remedy for the requested person who is affected by the violation.

The following are the criticisms the New Zealand Government faces when relying on assurances:

- 1) In place of a treaty, the assurances are not legally binding on the requesting/receiving State; therefore, if there any violations, there are only reputational consequences;
- 2) they are used by the Requested-State to absolve themselves of any human rights obligations;
- 3) they cannot be proactively monitored;
- 4) they should not be relied upon if the requesting/receiving State has a long history of human rights violations; and
- 5) impartiality - could the position of the Minister of Justice within the Cabinet be a cause of conflict? Since he or she decides on the surrender of a person to a Requesting-State for which the Government might have aligned interests with?

While these points highlight the issues diplomatic assurances have, point number 5 prompts the notion of why the Minister may not be the most appropriate person to be delegated the power of surrendering a person. The thesis will discuss if an independent body or the Judiciary should also be given the power of refusal due to its judicial independence.

7. In the absence of a treaty, the assurances are not legally binding on the requesting/receiving State.

The United Nations High Commissioner for Refugees (UNHCR) points out that the use

⁵⁸ In *Kim* (First judicial review decision), above n 38, at [220]. “In one case, a NZer made a complaint of mistreatment and forced labour to the media following release and return to NZ. A formal complaint was not made to consular officials.” Note: However, one key mitigating factor is that the negotiations for that individual were likely nowhere near those given to Kim, and if the guiding principles of *Othman* are followed (as discussed at the end of this chapter), then Kim’s assurances would obviously be placed at a much higher level of protection.

of diplomatic assurances does not normally constitute *vinculum juris*, a legally binding undertaking⁵⁹. Moreover, the Commissioner stressed that assurances provide no mechanism for their enforcement, and if those assurances have been violated or breached, there are no legal remedies for the Requested-State.⁶⁰

However, while the existence of a treaty relationship provides better avenues for the Requested-State to ensure the undertakings are fulfilled by the Requesting-State, *ad hoc* extradition undertakings could also bind the States under the international legal principle of a unilateral declaration. Interestingly, the Commissioner did not point out the effectiveness of this declaration in the report.

8. Unilateral Declaration

In international law, most obligations arise from an agreement by treaty or through general customary international law. However, under public international law, there exists a legal norm of a unilateral declaration. This achieved huge significance for New Zealand when the International Court of Justice held the nuclear testing by France was bound by a declaration it made about the decision it made to cease testing from the Pacific to New Zealand.⁶¹

The International Court of Justice states in *Nuclear Tests Case (New Zealand v France)*:⁶²

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific...An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

The ICJ states there are two criteria: (1) the wording in the agreement (whether it is oral or written) must be very specific; and (2) the undertaking if given publicly, must show an intention to be bound. But will this apply to diplomatic assurances?

There are two reasons why the use of diplomatic assurances, as seen in *Kim*, might not constitute a binding unilateral declaration. To examine this, the context of *Kim* must be

⁵⁹ United Nations High Commissioner for Refugees *Note on Diplomatic Assurances and International Refugee Protection (Protection Operations and Legal Advice Section Division of International Protection Services)* (2006) at 3.

⁶⁰ UNHCR, above n 59, at 3.

⁶¹ *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Rep 457.

⁶² At [43].

applied rigorously against the application and scope covered by the guiding principles.⁶³ First, if the Requested-State does not intend to bind the Requesting-State, then the language might specifically point out that the agreement is not binding, therefore, not allow the Requesting-State to be bound by this declaration. Second, the statements issued in public by the Minister, including submissions advanced in the Courts contravene the *first guiding principle* of unilateral declarations:⁶⁴

Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations.

Therefore, comments made by the Requested-State's high-ranking officials under the *fourth guiding principle*,⁶⁵ such as the Minister of Justice (by extension, the Minister's Crown counsel) who is directly responsible for the negotiation and agreement of the diplomatic assurances, may also affect the nature of the declaration. For example, in the first judicial review of *Kim*, the Minister gave reasons why non-binding diplomatic assurances such as the ones proposed for Kim were preferable.⁶⁶ They are perceived as non-binding because the Minister had publicly acknowledged that these assurances are not binding on the Requesting-State as she referred to the consequences of breaching non-binding assurances. The ICJ also states that for the first guiding principle to be enforced, it all depends on the intention of the States when they came to an agreement.⁶⁷

In *Kim*, the lack of intention to be bound is supported by the submission by the Minister in the judicial reviews, therefore, not creating any legal obligations between China and New Zealand. It would be difficult for New Zealand to bring a claim in the ICJ that China had breached its obligations under a unilateral declaration when it had, time and again, stated in its domestic Courts that the assurances are not legally binding.

These two reasons would be why the ex-post diplomatic assurances from Kim will unlikely be legally binding in the form of a unilateral declaration. Therefore, the language in the agreement, whether it is an *ad hoc* or treaty-based extradition, must have

⁶³ Report of the International Law Commission on Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto [2006] (A/61/10).

⁶⁴ ILC *Guiding Principles*, above n 63, at 370.

⁶⁵ At 372. "A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence."

⁶⁶ *Kim v Minister of Justice* (First judicial review decision), above n 38, at [158] & [180].

⁶⁷ *Frontier Dispute (Burkina Faso v. Republic of Mali)* [1986] ICJ Rep 573 at [39] and Guiding Principles at 370.

clear and specific language recognising the binding effect of the diplomatic assurances. This is reflected in the *seventh guiding principle*:⁶⁸

A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.

Here, it stipulates a unilateral declaration necessitates obligations for the States if the language of the agreement is stated in clear and specific terms, and the context and circumstances of which the agreement is made would also, be considered. Therefore, both the Requested and Requesting-States must use specific terms that could be interpreted that the agreement is binding:⁶⁹

In its Judgments in the *Nuclear Tests cases*, the International Court of Justice stressed that a unilateral declaration may have the effect of creating legal obligations for the State making the declaration only if it is stated in clear and specific terms.

Interestingly, no mention of unilateral declarations was made by the Crown in the judicial reviews of Kim, when asked about the consequences of the breach of any diplomatic assurances.

In order to be specific about the diplomatic assurances being honoured, the Minister of Justice must ensure the language in the negotiations, (included in the agreement or memorandum of understanding) is clear and specific enough to hold the agreement with binding effect. The wording cannot be flexible to allow the other party (China) to state the terms are not specific enough without the proper intention, therefore, havenot breached a unilateral declaration.

9. Criticism by Non-Government Organisations

When criticising the effectiveness and legal effect of assurances, the Human Rights Watch states:⁷⁰

⁶⁸ ILC *Guiding Principles*, above n 63, at 377.

⁶⁹ At 377 [Commentary (1), footnote 966] referring to the *Nuclear Tests Cases (Australia v France; New Zealand v France)* [1974] ICJ Rep 457, 267 at [43], 269 at [51], and 472 at [46], 474 at [53].

⁷⁰ “Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture” (15 April 2005) Refworld <www.refworld.org>.

[W]hen diplomatic assurances fail to protect returnees from torture as they so often do, there is no way to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person who they aim to protect has no recourse if the safeguards are breached.

However, it should be noted that there would be substantial consequences for the Requesting-State if any serious breaches were to occur, as that could induce an increase in difficulty for future extradition requests. What remedies could the New Zealand Government explore if a violation by the Requesting-States occurs? If the Requesting-State did violate the assurances, triggering a breach in the extradition treaty's article, then what consequences would there be? Realistically, the most serious consequence would be to have the treaty terminated after suspension. An important consequence would be the deterrence of extradition co-operation from future Requested-States with the treaty-breaching Requesting-State. If a material breach occurs and is not rectified, this could be disclosed to third parties.⁷¹ This would, in turn, affect future extraditions between Commonwealth countries and China. In 2015, the Chinese Government launched Operation Sky Net in an attempt to capture offshore fugitives wanted for corruption, with the assistance of foreign governments.⁷² The Chinese Government's hunt for fugitives under this operation would also be greatly affected as this would be a point Ministers and Courts of Requested-States have to consider. The bilateral relationship between New Zealand and China would also be affected, such as their trade relationship.⁷³ As noted in Kim's second judicial review:⁷⁴

[N]on-compliance with the death penalty assurance would have repercussions for the bilateral relationship between China and New Zealand, and China's international reputation.

However, if it were placed in a treaty context, China would at least be given the opportunity to rectify the breach if New Zealand had suspended the treaty due to a material breach. If it is not rectified, then termination will ensue if the Government deems it necessary. The importance of having a treaty is that it sets out the framework for what needs to be in place, for example, negotiations for diplomatic assurances and mechanisms that allow the monitoring of those assurances. However, this does not guarantee that a minor and material breach of assurance will never happen. The latter statement quoted from the Human Rights Watch that diplomatic assurances have no legal effect if they are breached, is simply not true as the previous part of the chapter

⁷¹ *Kim* (Second judicial review decision), above n 38, at [77].

⁷² "China launches Sky Net to catch corrupt officials overseas" (27 March 2015) British Broadcasting Channel <www.bbc.com>.

⁷³ Referring to the briefing paper from *Kim* (First judicial review decision), above n 38, at [227].

⁷⁴ *Kim* (Second judicial review decision), above n 38, at [116].

points out. Provided the guiding principles are met, diplomatic assurances could be constituted as a binding unilateral declaration by the ICJ.

10. Diplomatic assurances are used by the Requested-State to absolve themselves of any human rights obligations.

Former United Nations Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Manfred Nowak stressed that assurances cannot be used to absolve a country from Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, commonly known as the Convention Against Torture.⁷⁵ Article 3 places an obligation on New Zealand not to extradite anyone to a Requesting-State if there is a real possibility of impending torture or inhumane treatment once they are surrendered. The New Zealand Government has taken steps to mitigate potential Article 3 violations as shown in *Kim v Minister of Justice*.⁷⁶ In *Kim*, the Judgment indicated the volume of information that was needed to be open to the Minister before obtaining assurance and ordering a surrender. This suggests the gravity of human rights obligations imposed on the New Zealand Government if China were to breach any assurances. The reasons are because there is no extradition treaty between the two countries and the New Zealand Government is relying on non-binding assurances that the sought-after person would not be exposed to the treatments that they have received assurances against. The human rights obligations are still there, as MFAT and other New Zealand foreign personnel would monitor Kim's conditions, uphold its assurances to Kim himself to ensure his human rights are protected.

However, can these assurances be honoured and relied upon, especially when they are not binding? The *Kim* judgments indicate there are areas which the assurances could be improved on since there are some issues by China such as the refusal to allow international monitoring bodies access to their prisons and complaints by a New Zealand citizen of mistreatment during his imprisonment in China.⁷⁷ Are there further safeguards the Government could negotiate to ensure the monitoring mechanisms within the

⁷⁵ United Nations 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 3. See also Professor Manfred Nowak "The Principles of Non-Refoulement" in Catarina Krause, Martin Scheinin, Åbo akademi *International protection of human rights: a textbook* (2nd ed, Åbo Akademi University, Institute for Human Rights, Finland, 2012) 153 at 163.

⁷⁶ *Kim* (Second judicial review decision), above n 38.

⁷⁷ At [63]. See also *Kim* (First judicial review decision), above n 38, at [221]. "Despite the monitoring provided by New Zealand officials it seems that in one case a complaint was made only following the detainee's return from [China]. It is not known from the information provided whether that complaint had validity. It is also not clear if the assistance referred to in the briefing paper is proactively provided or whether it depends on a request from the detainee."

assurances are even more legitimised? The Government might, however, be satisfied with using the assurances for Kim in future extradition assurances with China. Perhaps, this is due to diplomatic issues with the Requesting-State and the difficulty in negotiating and obtaining the current set of assurances in the first place.

11. How does New Zealand ensure the requested-persons are properly monitored?

Assurances obtained as seen in overseas authorities and Kim's example, relies on the Requesting-State being given notice they deem "reasonable". UN Special Rapporteurs also noted in the past that monitoring the individuals is a cat-and-mouse like expedition where some forms of torture and inhuman treatment would not be able to be mitigated by monitoring mechanisms:⁷⁸

[T]he Special Rapporteur on Torture has expressed the view that post-return mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability. In a similar vein, the High Commissioner for Human Rights has expressed concern about the effectiveness of monitoring where the individual concerned faces a risk of torture and cruel, inhuman or degrading treatment.

The monitoring of assurances obtained in the Kim case shows a careful plan of observation to ensure inhumane treatment and torture are prevented. For diplomatic assurances to work successfully, the monitoring mechanisms must be highly effective to ensure any human rights violation by the receiving State on the requested person is mitigated.

NGOs such as the Human Rights Watch stresses that assurances cannot protect individuals at risk of torture and that governments seeking assurances against torture of returned persons are indirectly trying to circumvent their obligations.⁷⁹ However, this should only apply to extradition transactions where the assurances and monitoring mechanisms are below a high threshold. If efficient and effective arrangements were in place, then criticisms of circumventing obligations would naturally be made redundant.

12. Assurances cannot be relied upon if the Requesting-State has a history of human rights violations

⁷⁸ UNCHR *Note on Diplomatic Assurances and International Refugee Protection*, above n 59, at 12.

⁷⁹ Human Rights Watch "Diplomatic Assurances against Torture Questions and Answers", at 2.

How can countries rely on assurances if the Requesting-State has a long history of human rights violations? A logical argument against the use of diplomatic assurances would be if a country already adheres to international human rights obligations, then the use of such guarantees would be redundant. It is because the Requesting-State has a poor record of human rights violations that the Requested-State has decided to obtain assurances.⁸⁰ The fact that assurances needed to be obtained and relied on shows the Requesting-State is not one which respects human rights or its judicial system lacks the same level of pre-trial and due-process the Requested-State would typically guarantee.⁸¹ However, Requesting-States would have a point to prove by adhering to these assurances. First, it is to ensure future extraditions between the two States would be continued. Second, returned persons are treated differently from the normative offenders of that State because of the undertaking provided by the Requesting-State.

13. The case of *Othman (Abu Qatada)*

A good starting point for assessing whether diplomatic assurances against torture, especially with a non-extradition treaty State, would be *Othman (Abu Qatada) v The United Kingdom*.⁸²

In this case, the European Court of Human Rights reviewed whether the deportation of Abu Qatada by the British Government to Jordan amounted to a breach of the European Convention on Human Rights.⁸³ The Court dismissed the use of diplomatic assurances as a breach of Article 3 of the European Convention on Human Rights. Article 3 prohibits a State Party from returning (which includes extradition and deportation) a person to another State where there are substantial grounds for believing that that person would be subject to torture.⁸⁴

To ensure the return of the requested-person does not constitute a violation of Article 3, the States should attempt to use the five guidelines set out by the Court.⁸⁵ First, there

⁸⁰ For more, see "Letter to the Swiss Government Regarding Diplomatic Assurances" (14 December 2006) Human Rights Watch <www.hrw.org>. "Diplomatic assurances against torture and ill-treatment from countries where such abuses remain a serious problem, or where certain categories of people are at risk of such abuse, are inherently unreliable and practically unenforceable."

⁸¹ *Kim* (First judicial review decision), above n 38, at [145].

⁸² *Othman (Abu Qatada) v The United Kingdom* (2012) 55 EHRR 1, [2012] ECHR 817.

⁸³ European Convention on Human Rights 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

⁸⁴ Art 3.

⁸⁵ While this section addresses the guidelines from the ECtHR in *Othman*, there is a good secondary source (which is referenced here) by Dr. Conor McCarthy, who commentated and analysed this case in an analytical piece for the European Journal of International Law: Talk! website. He provided an excellent break down and in-depth analysis on the core points the ECtHR delivered, especially with the three guidelines he highlighted: "(i) the strength of the bilateral relationship between the UK and Jordan (ii) the importance of the MOU to that relationship (iii) that the

was a bilateral relationship ties' test, where the Court noted the relationship between the two States have historically been very strong.⁸⁶ Second, if the Requesting-State has a concerning human rights' record, then genuine commitments with clear and transparent process for obtaining assurances must be made.⁸⁷ Third, the Memorandum of Understanding carrying the assurances must be specific and comprehensive.⁸⁸ This is relatable to any memorandum between transacting States for extradition. Fourth, the assurances must have been obtained from the highest level of Government, and in this case express support and approval was given by His Majesty King Abdullah II.⁸⁹ Finally, the high-stakes test - the Court was of the view that the high-profile nature of Othman's case would deter the Jordanian Government from violating the assurances, therefore, upsetting the British Government and deterring their bilateral relationship, although the final guideline could not be directly followed by the States, it nonetheless requires the stakes to be set so high that breaching the assurances would have severe consequences on the States' relationship with each other and cause international outrage.⁹⁰

The Court was satisfied that both Governments had met the guidelines and threshold it had set out. Instead, it held his deportation would be in breach of Article 6, the right to receive a fair trial. There was a substantial risk that the Jordanian prosecutors would use testimonies against him, which were obtained through the torture of other witnesses. The Court noted the connection between Article 6 and 3:⁹¹

The use of evidence obtained by torture is prohibited in Convention law not just because that will make the trial unfair, but also and more particularly because of the connexion of the issue with article 3, a fundamental, unconditional and non-derogable prohibition that stands at the centre of the Convention protections.

Therefore, the Court held that his deportation would have amounted to a breach of Article 6, the right to a fair trial.⁹² This case points out while diplomatic assurances from torture are important, the right of a fair trial in a foreign country is equally paramount. The latter issue was eventually resolved when both Governments sought a new mutual assistance treaty in which evidence obtained by torture could not be used in

assurances were provided at the highest levels of the Jordanian government by individuals with power to bind that government, having the express approval of the Jordanian King." For more, see Conor McCarthy "Diplomatic Assurances, Torture and Extradition: The Case of Othman (Abu Qatada) v. the United Kingdom" (18 January 2012) European Journal of International Law: Talk! <www.ejiltalk.org>.

⁸⁶ *Othman*, above n 82, at [195], and McCarthy, above n 85.

⁸⁷ At [194].

⁸⁸ At [194], and McCarthy, above n 85.

⁸⁹ At [195], and McCarthy, above n 85.

⁹⁰ At [196], and McCarthy, above n 85.

⁹¹ At [48].

⁹² European Convention on Human Rights, above n 83, art 6.

a trial or re-trial.⁹³ Abu Qatada was therefore deported to Jordan but due to Article 27 of the new treaty, his prosecution excluded the use of torture-obtained evidence and he was therefore released in 2014. The aftermath of Othman is equally interesting in that the British Government decided to push for a mutual assistance treaty in order to mitigate the issues raised by the European Court of Human Rights on torture-obtained evidence used in trials. Perhaps, such instances for New Zealand's extradition-assurance issues with China could be mitigated by ways of articles enacted within new treaties between the two States. Specific articles aimed at preserving the fair-trial rights of the requested-person could be entrenched in a new treaty. The aftermath of Othman shows a treaty could strengthen the legitimacy and binding nature of the diplomatic assurances. But more importantly, the case of Othman shows diplomatic assurances, if it meets the test or is significantly close to the threshold set out by the ECtHR, could be used for the surrender of a requested-person while the inclusion of a treaty to prevent a breach of an Article (fair-trial) would also be a solution.

14. Summary

Having assurances in place is a necessity, especially when dealing with a non-treaty Requesting-State. The difficulty lies in the negotiating and regulating of those assurances. The majority of safeguards in extradition and deportation cases seem to revolve on pre-trial assurances, with a lack of acknowledgement on post-trial monitoring. Would the New Zealand Government be willing to take a tougher stance when negotiating for better assurances, or would the interest of diplomacy limit it? In Chapter 6 a few monitoring mechanisms will be proposed. However, they can only be achieved if the Government is willing to advocate and negotiate vigorously for them without accepting a surrender lightly.

⁹³ Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, Jordan United Kingdom of Great Britain and Northern Ireland-Jordan 2950 UNTS (24 March 2013) art 27(3) & (4).

3

HOW THE GOVERNMENT CURRENTLY ASSESSES DIPLOMATIC ASSURANCES

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5. Summary

1. Introduction

This chapter has the burden of assessing how the New Zealand Government currently assesses diplomatic assurances from Requesting-States. To do this, the methodology involves looking at the judicial reviews of *Kim v Minister of Justice* and the Law Commission's reports. The approach to viewing different judgments and supporting information given by the Ministry would give a clearer view of how assurances are assessed. The methodology of this chapter's research is to approach it with a forensic exercise based mind-set that aims to figure out what the Crown is currently doing in extradition. However, this methodology is not without limitations due to the nature of some diplomatic information being confidential under the principle of comity and mutual respect between countries.⁹⁴

The judicial reviews of *Kim* are good starting points as they are New Zealand's first extradition case involving the Chinese Government. The review exposes the limits of the High Court's purview as the then Minister of Justice Amy Adams had addressed the points that the Court was not satisfied in from the first judicial review. The first judicial review gave the impression that Mallon J wanted to have her grand objective of ensuring proper and thorough canvass of all relevant human right issues, and the adequate protection of Kim's rights by the Court. However, the second judicial review showed the purview of the Court was limited. Once the Minister of Justice had made her second decision to surrender, the scope of the Court was limited to assessing whether information was reasonably open to the Minister prior to making a decision. This case highlights a problem in using judicial reviews to challenge Ministerial decisions in extradition, which will be discussed later in this chapter and in Chapter 6.2.

2. How extraditions are likely to occur at the moment

⁹⁴ There are two aspects of comity, as explained by Professor La Forest in the context of Canadian common law: (1) "Two interrelated aspects of comity are relevant in this context. The first is that there should be respect for the criminal proceedings of the requesting state, a matter assessed by the executive when entering into an extradition treaty. It was also for this reason that the hearing was analogous not to a trial but to a preliminary hearing. Courts were careful to maintain this important but limited role for the extradition judge and to prevent the hearing from becoming a trial on the merits; the trial was to take place in the requesting state. In particular, Canadian law governed the hearing, so the extradition judge was not generally concerned with assessing the law of the requesting state." (2) "The second relevant aspect of comity was the recognition of differences between the preliminary proceedings in the requesting state and in Canada, and that the extradition procedure in Canada should not have the effect of preventing or hindering the removal of persons in proper cases." For more, see La Forest, Anne Warner "The balance between liberty and comity in the evidentiary requirements applicable to extradition proceedings" (2002) 28(1) *Queen's Law Journal* 95 at 98-99.

In practice, when a non-treaty State such as China sends an extradition request to Minister of Justice, he or she must decide if there are grounds for a surrender or refusal under s 30 of the Extradition Act.⁹⁵ If there are grounds for surrender, then the Minister must decide whether the assurances obtained from the Requesting-State are reliable. Extradition requests with traditional partners (treaty-bound States) may only be referred by the Courts to the Minister and be decided for a refusal to surrender under s 48 of the Act. The Ministry of Foreign Affairs and Trade acts in a diplomatic capacity, negotiating and obtaining diplomatic assurances for the Ministry and Minister of Justice. The decision for surrendering the requested-person can be reviewed by the High Court under judicial review. The Court would need to decide if the Minister of Justice had exercised his or her statutory decision-making powers lawfully.

3. How the Government assesses requests from non-traditional (non-treaty) States

Kim v The Minister of Justice (judicial review)

Excluding past extraditions New Zealand has had with Hong Kong,⁹⁶ the case of Kim is currently the first extradition matter between China and New Zealand.⁹⁷ Kyung Yup Kim is a Korean born New Zealand resident. In 2009, Kim was accused of murder in Shanghai and fled to South Korea before the police could question him. Upon his return to New Zealand, China sought for his extradition. He has maintained his innocence the entire time. The Minister of Justice considered he was to be surrendered, but Kim made an application for judicial review to the High Court.⁹⁸ So far, two judicial review applications have been heard.

The atmosphere in the first judicial review showed the initial approach of Mallon J where her grand aim was to ensure human rights' issues were properly assessed and protected. Kim's primary contention was that the Minister had failed to realise the realities of the Chinese legal system in which a fair trial is not possible, and the assurances of no torture and inhuman treatments and not carrying out the death penalty could not be relied upon.⁹⁹ The Court ordered the Justice Minister to reconsider the decision to surrender based on five core grounds. They are addressed separately below.

⁹⁵ Extradition Act 1999, s 30. Minister must determine whether a person is to be surrendered.

⁹⁶ E.g. *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA). and 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).

⁹⁷ At the moment of writing, Kim is appealing his judicial review decision before the Court of Appeal.

⁹⁸ *Kim* (First judicial review decision), above n 38, at [1].

⁹⁹ Above n 38.

First, whether the assurances could be relied upon to protect him when they do not appear to permit consulates and representatives to disclose his treatment to third parties. Second, the limited experience with New Zealand dealing with assurances from China and the limited information from other countries' experiences with China honouring their assurances was of particular concern.¹⁰⁰ Third, the threat of public security officers has been criticised by the UN Committee to wield excessive powers without delegated control. There was also the issue of whether Kim would be subjected to questioning in a different criminal procedure. In the Minister's first decision to surrender, the Court points out it this was not explicitly addressed as part of the diplomatic assurances.¹⁰¹ Fourth, Her Honour was not satisfied that the Minister concluded China had satisfied Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as she did not explicitly address whether the assurances could sufficiently protect Mr Kim during his pre-trial interrogations. Article 14 of the ICCPR states:¹⁰²

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Finally, the Court points out that the Minister had failed to explicitly address whether the assurances would sufficiently protect him from torture and ill-treatment, including his right to silence during pre-trial interrogations. The Justice Minister, with the assistance provided by her Ministry and the Ministry of Foreign Affairs and Trade, sought further assurances from the Chinese government. After which, she again ordered Kim to be surrendered.

The High Court dismissed Kim's second judicial review application against the Minister of Justice as it was satisfied that the Justice Minister had dealt with the issues from the first judicial review comprehensively.¹⁰³ The judgment laid out the steps the Justice Minister took, along with collaboration with MFAT in obtaining and reassuring the diplomatic assurances would be honoured. Specifically, the following indicates what assurances were obtained and why the Minister was able to rely on them.

a) No-death penalty assurance

¹⁰⁰ At [496].

¹⁰¹ At [260].

¹⁰² International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

¹⁰³ *Kim* (Second judicial review decision), above n 38, at [155].

The Justice Minister accepted the no-death penalty undertaking from China was credible and was able to be relied upon by the New Zealand Government.

The Minister had based her decision on a previous no-death penalty assurance of a person between the two States. It is unclear which case the Minister was referring to. The Minister referred to the agreed cooperation between the two Governments to allow the monitoring of Kim and warned that non-compliance with the death penalty assurance would have repercussions between the two States' bilateral relationship and China's international reputation.¹⁰⁴ The Minister was also given the deterrent consequence of disclosing the breaches to any third parties.¹⁰⁵ Mallon J concluded this was a proper basis for the Minister to reach the conclusion she did as the information was reasonably open to her. However, the consequences are based solely on the threat of a deterred bilateral relationship between the two States, without a direct safeguard to protect the requested-person if the breach occurs. But this view of a breach resulting in a deterred relationship is not without merit as it was previously adopted in *Othman*,¹⁰⁶ where the ECtHR held a breach from the Jordanian Government would greatly damage the bilateral relationship with Great Britain.

b) Monitoring to prevent torture and inhumane treatment

The Minister obtained further assurances on accepting the monitoring mechanisms to prevent Kim's inhumane treatment and torture. She sought expert advice from Professor Fu, a Professor of Law from the University of Hong Kong. The Minister followed the Fu's advice on the appropriate times for monitoring Kim in his pre-trial detention. He instructed the monitoring should take place no less than 48 hours during the investigation, and gave discretion for daily monitoring if needed. The monitoring needed to take place no less than once every 15 days until Kim's trial. No reasons for this specific time inclusion were given instead of a closer period of monitoring intervals. However, the Minister was satisfied that Kim's rights would be protected with these assurances.¹⁰⁷

Kim was given assurances that allowed him to contact MFAT's consulates and other New Zealand's Government representatives, where Kim could notify the Crown of any violations.¹⁰⁸ He would also have medical experts available at his disposal, this, according to the Minister, would add an extra layer of deterrence as such experts and

¹⁰⁴ At [116].

¹⁰⁵ At [133].

¹⁰⁶ *Othman*, above n 82.

¹⁰⁷ *Kim* (Second judicial review), above n 38, at [115].

¹⁰⁸ At [81](d).

examiners could readily detect most forms of inhumane treatment.¹⁰⁹ However, with regards to the availability for point of contact for Kim from the New Zealand Government, the Minister was silent as to whether this would be available to him indefinitely after his trial. It also seems unreasonable to expect Kim to make good use of his consulate channels in the event of an assurance breach, without considering more severe consequences that might follow for him as a result of contacting the Crown.

c) No forced interrogations

The Minister was satisfied that the Chinese Government would keep its undertaking that there would be no forced interrogations and that the Courts would not accept any evidence obtained through such methods. Fu expressed that any evidence obtained through recordings at the detention stage would have to be revealed to the Requested-State. He states in reference to recordings from interrogations:¹¹⁰

The detention facility manages the recording process and also keeps the record. There are rules to prevent manipulation of recording. The entire interrogation is to be recorded, the procuracy has the power to supervise the proper recording and can order its production for examination, and the court can order the production of the recording.

China agreed to provide New Zealand's diplomatic officials and consulates with full access of unedited recordings of all the pre-trial interrogations during the investigative phase.¹¹¹

The following excerpts from the judgment indicates some of the information the Minister had based her decision on with regards to assurances against forced interrogation:

[49](b) Interrogation: A suspect is interrogated by the police at the investigative stage and by the prosecutors at the prosecution stage. Lawyers are not present during any of these interrogations. The procurators do not attend the interrogation. Shanghai is part of a pilot programme in which procurators may be allowed to attend police interrogation but such participation is not usual.¹¹²

[49](c) Rights to silence: ... forced confessions are prohibited, a court is duly bound to exclude evidence that is unlawfully obtained, a mere confession

¹⁰⁹ At [81](d).

¹¹⁰ At [49](e) & [57](b).

¹¹¹ At [55].

¹¹² At [49](b).

is not sufficient for a conviction and a court can convict without a confession.¹¹³

[49](f) High risk cases: ...Professor Fu says that the Supreme People's Court has "sent out strong signals that exclusion of confession statement[s] obtained through torture is a judicial duty and is politically possible".¹¹⁴

As attractive as the above rationales are in mitigating fears of forced interrogations, there is a lack of an appropriate body from New Zealand to effectively monitor and ensure proper interrogation and rights to silence would be observed. For the rights to silence, there are no actual checks to ensure the courts will exercise their right to exclude evidence. Comity to the courts of the Foreign-States should be respected, but there is also a level of responsibility the Home-State must ensure, at least to appoint a body from the Home-State to monitor the assurances of non-forced interrogations would be observed. The strength of the view is that this not only ensures legitimacy in the undertakings made by China but allows other Requested-States to improve their trust in the Chinese legal system when an independent monitoring body from New Zealand has effectively monitored the compliance of these assurances. It also makes it less difficult for the Central Authority to allow extraditions to China in the future. Finally, with the high-risk cases having torture-obtained evidence to be excluded, there are no publicly available judgments that reflect this. It could be argued that the Chinese judiciary operates differently from countries like New Zealand when disclosing judgments to the public.

d) Fair-trial

The issues of pre-trial and fair-trial from the Chinese criminal justice system was at the heart of Kim's fight against extradition. The Minister had sought more advice from Fu and MFAT to understand if there was indeed such a disparity in the Chinese legal system.

The Minister referred to the overhaul of the Criminal Procedural Law (CPL) in the years 1996 and 2012, which addressed issues of fair-trial deficiencies.¹¹⁵ She acknowledged the UN's concerns that the Chinese judiciary is not independent of the Executive. She was, however, satisfied he would receive a fair trial in accordance with Article 14 of the ICCPR.

¹¹³ At [49](c).

¹¹⁴ At [49](f).

¹¹⁵ At [80].

Fu's advice referred to China's adoption of adversarial elements into their trial process, which is based mainly on an inquisitorial system. These elements have already been introduced prior to Minister Adam's first decision to surrender. Fu advised her that since the amendments of the CPL in 2012, witnesses must appear before the Court to provide testimony if the prosecutor or the defendant's lawyer objects to the witness' testimony. The judge may also question the witness, and with the discretion of the Judge, both the prosecution and defence counsels may also examine the witness. If this discretion is not given, then it may become an appeal point. The Minister concurred that these provisions comply with article 14(e) of the ICCPR, which provides a person charged with a criminal offence has the right to cross-examine any witnesses against him or her.¹¹⁶ In closer examination, this is comparable to the rights afforded in the minimum standards of criminal procedure section embedded in the New Zealand Bill of Rights Act, s 25(f), which states:¹¹⁷

[T]he right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.

The Justice Minister was satisfied the assurances provided were detailed and specific relating to his trial.¹¹⁸ She was satisfied the monitoring of Kim's trial would be a significant deterrent to China from violating their assurances. The Minister was also satisfied that China has honoured assurances with New Zealand and other countries in the past.¹¹⁹ Finally, although Kim would not have a lawyer present during his pre-trial interrogations, she was satisfied there would be no legal repercussions for him under Chinese law if he refused to answer questions. The issue is not direct legal repercussions or punishment for not answering questions, but rather, being placed at a disadvantaged footing without legal representation. By not having a lawyer present in interrogations, there could be a risk that the requested-person might be at a disadvantage when presented with questions which he might wish to address, but in doing so without legal guidance, might be detrimental to his own defence. However, the Chinese legal system and their CPL is different to that of New Zealand's criminal justice system, and it could be argued while this would be a disadvantage during the interrogation stage in the New Zealand context (and to some extent illegal after a reasonable time), it might not be a disadvantage in China's inquisitorial system. Furthermore, as this is within the code of the CPL, it naturally assumes respect from New Zealand Courts due to the comity and mutual respect of a foreign legal system. Nonetheless, Mallon J was

¹¹⁶ At [97]-[99].

¹¹⁷ New Zealand Bill of Rights Act 1990, s 25(f). "Minimum standards of criminal procedure". Also pointed out by footnote 102 in *Kim* (Second judicial review decision).

¹¹⁸ At [81](a).

¹¹⁹ At [81](b).

satisfied that in the face of the issues from the Chinese legal system, the critical factor was the assurances.¹²⁰

e) How assurances were obtained and assessed

Assurances for Kim were obtained by the cooperation of the two main Ministries and their Ministers: the Ministry of Foreign Affairs and Trade (MFAT) and the MOJ. MFAT and its consulates act as diplomatic representatives and negotiators, obtaining relevant information on the assurances provided from the Requesting-State by using the resources of its diplomatic representatives abroad. It also operates in a unique advisory role for its fellow Ministries, routinely giving advice when appropriately needed especially when foreign affairs are not the strong points of those Ministries. The Ministry of Justice relies on MFAT by seeking advice from them on some issues; this includes relevant information from New Zealand's expert advice from its diplomats overseas.¹²¹

For Kim's judicial review, the judgment acknowledges the limits of the negotiation for assurances. It points out that the engagement and presence of a lawyer during pre-trial interrogations was unattainable as the Minister had to concede with the other assurances it was provided.¹²² The presence of a lawyer was substituted with the reliance on Fu's advice about Kim's risk of torture, his rights under the Chinese Criminal Procedure Law, the content of the assurances, the advice from MFAT and the instructions to MFAT's offshore officials to monitor Kim's conditions as per the agreements proactively.¹²³ There are fundamental problems as to why the Chinese would not agree to a lawyer for pre-trial interrogations. The Minister relied on Fu's interpretation of omitting a lawyer during pre-trial:¹²⁴

Professor Fu also explained that China practices an inquisitorial criminal justice system, although it has tried to introduce some adversarial elements into the process. The system relies on the extensive pre-trial investigation by police, prosecutors and judges. Lawyers

¹²⁰ At [95].

¹²¹ *Kim* (Second judicial review decision), above n 38, at [182].

¹²² At [57](b).

¹²³ At [57](b)&(c): "(b) "[O]n balance" the Minister was satisfied the assurances, proactive monitoring of them, Mr Kim's legal rights in China and the circumstances of his case were sufficient to protect his rights despite the absence of a lawyer during pre-trial interrogations. In reaching this view the Minister relied on Professor Fu's advice about Mr Kim's risk of torture, his advice on Mr Kim's rights under the CPL, the content of the assurances, the advice from MFAT, her instructions to MFAT officials about proactively monitoring Mr Kim and China's agreement to provide full recordings of all pre-trial interrogations within 48 hours of each interrogation taking place. (c) The Minister was confident, by MFAT's advice and her instructions to it as to when visits were to take place, which Mr Kim's treatment would be proactively monitored."

¹²⁴ At [75].

play a relatively minor role. The trial relies extensively on documents and very few witnesses testify in court.

As this statement suggests, would this not also lead to a problem during a "fair-trial" process where a lawyer could have been an additional witness in overseeing how the evidence was obtained? Having the provision allowing the unedited recordings of any pre-trial interrogations does not provide the legal safeguard for Kim. As discussed previously, the absence of a lawyer may leave Kim wide open to answering questions that may end up prejudicial to him at trial. In stark contrast to Anglo-Common Law legal systems, Fu states the prosecution relies extensively on documents and very few witnesses testify in court. Based on this statement, it is likely the presence of a lawyer would not ensure fairness for Kim due to the Chinese court system being materially different as cross-examination is not allowed.

While Fu advised that forced convictions are not admissible at trial and that a confession alone is not sufficient for a conviction,¹²⁵ there are no public court judgments that could qualify his statement. Furthermore, the Chinese courts have been known to have an extremely high conviction rate compared to those from Anglo-Commonwealth systems, and this does nothing to dispel the concerns of a proper due-process and fair-trial for Kim,¹²⁶ although in fairness, most justice systems possess a high rate of conviction. Nonetheless, Mallon J took the view that despite the absence of Kim's legal counsel during this stage, the other assurances the Minister had already obtained would mitigate any concerns for the lawyer's absence. Perhaps, the Court was also mindful that the comity and mutual respect for the Foreign-State's judiciary must prevail. No Foreign-States should be expected to have the same legal system as the Home-State, and not allowing extradition due to this reason misses the point of assurances and extradition entirely. The assurances are not there to ensure the legal systems replicate that of the Home-State, rather, they are there to ensure the requested-person would receive the fairest outcome under the justice system of the Requesting-State. The difficulty is ensuring this happens, and not criticise the disparity between the Foreign-State's legal system with the Home-State's. But that is why assurances should be negotiated. The question should then turn on whether they are sufficient while adhering to the comity rule. As Professor La Forest states, comity requires two aspects for it to function in a foreign-relations context.¹²⁷ First, there needs to be a degree of mutual respect for the

¹²⁵ At [76].

¹²⁶ Neil Connor "Chinese courts convict more than 99.9 per cent of defendants" (14 March 2016) The Telegraph <www.telegraph.co.uk>. "Only 1,039 of more than 1.2 million people were found not guilty in the country's Communist Party-controlled courts – resulting in an acquittal rate of around 0.08 per cent. China's conviction rate is commonly well above 99 per cent, with 778 acquittals and 1.184 million convictions being recorded in 2014." However, the article also states: "Chinese courts "corrected" 1,357 wrongful criminal convictions last year."

¹²⁷ La Forest, above n 91, at 98-99.

criminal proceedings of the Requesting-State since the Executive assessed this matter before entering into the extradition treaty, but in this case, an *ad hoc* agreement to surrender Kim. The requirement of a treaty should not be interpreted strictly as to exclude Kim's ex-post arrangements since it involves the consideration and negotiation between the Executive and a Foreign-State. This is comparable to the consideration within a treaty negotiation but prior to an extradition request.¹²⁸

Her second point was that the application of comity is based on the respect of the Requesting-State for the legal procedures and legal system of the Requested-State. The extradition procedure, including court proceedings or reviews should not prevent or obstruct the removal of the requested-person. The applicable aspect of comity is the recognition of differences between the preliminary proceedings in the Requesting-State and the Requested-State, and that the extradition procedure in the Requested-State should not have the effect of preventing or obstructing the removal of persons in proper cases.¹²⁹ Hence, this is why comity and mutual respect should always remain in the minds of domestic Courts when presiding over an extradition matter.

Returning to the issue of accepting the assurance of non-torture based evidence being used against a requested-person, this obstacle has been resolved post-*Othman*. The effect of having an extradition treaty or even a mutual legal assistance treaty in place as seen in the aftermath of *Othman* is to integrate treaty articles that would bind the State parties to discard any torture-based evidence.¹³⁰

f) Whether the assurances could be relied upon

Kim's second judicial review highlights several factors for which the Justice Minister could reasonably rely on assurances. The Justice Minister acknowledged that the practice of torture and ill-treatment had been used to extract confessions from detainees. United Nations Special Rapporteurs have considered this a significant problem with well-known high-risk groups, even though such practices have been reduced in urban areas.¹³¹

Overall, the Justice Minister laid down her reasons for relying on the assurances which disposed of any beliefs that Kim would be in danger of torture based on three factors, but two relevant considerations have been highlighted:¹³²

¹²⁸ At 98-99.

¹²⁹ At 98-99.

¹³⁰ Mutual Assistance treaty between Jordan and the United Kingdom, above n 90, art 27(3) & (4).

¹³¹ *Kim* (Second judicial review decision), above n 38, at [59].

¹³² At [60](a), (b), (c).

The assurances: China's assurances about Mr Kim's treatment were detailed and specific. They provide for New Zealand Consular officials to monitor Mr Kim's condition. This would act as a significant deterrent to China. The assurances would be proactively monitored promptly and supported by sufficient resources and the prompt provision of interrogation recordings. There were effective mechanisms to ensure compliance and deal with breaches.

The necessity for credibility: China needs international cooperation in criminal matters and credibility in the international community. China would wish to demonstrate its credibility in Mr Kim's case.

For the first point, part of the assurances the Minister received was the monitoring of Kim during his pre-trial detention. The Minister sought individual advice from Professor Fu, and he was confident New Zealand possessed the capability and resources to carry out the necessary monitoring of the assurances. The advice was given that the monitoring would take place every 48 hours during the investigation phase (and daily if that is needed) and no less than once every 15 days until the trial.¹³³ Interestingly, in the judgment, there was no specific reference or mention to "post-trial" monitoring mechanisms if Kim was found guilty. Only a brief mention of whether post-trial assurances were negotiable and obtainable was pointed by the Court:¹³⁴

However these matters are potentially relevant to the type of sentence imposed on Mr Kim if the ultimate outcome of his surrender is that he is tried and convicted of an offence. In that event New Zealand's monitoring should include ensuring the length of his detention is before the Court so that it can be taken into account in any sentence imposed.

It is possible a new set of assurances would likely be given to the Minister if Kim is found to be guilty in the China, however, they were never specifically addressed in detail compared to pre-sentencing assurances.

The Minister's third point "Necessity for credibility" was that China needs international cooperation in criminal matters and hence, it relies heavily on its credibility in the international community. The necessity for credibility and trustworthy reputation is also in line with the submissions made in the first judicial review by the Crown. It submitted if the Chinese Government were to breach the assurances it had given, there would be immediate consequences.¹³⁵ If China were to breach such assurances, then it would

¹³³ At [155].

¹³⁴ At [156].

¹³⁵ "Lawyer targets China's chief justice in NZ extradition case" (4 April 2017) Radio New Zealand <www.radionz.co.nz>. Mr Powell (Crown Counsel) said in his submission "It would be very difficult for China to extradite anyone from anywhere ever again."

jeopardise future cooperation with other Requested-States to extradite. However, these are effectively non-legal consequences for the Foreign-State. Instead, it would be better to entrench the legal significance of breaching diplomatic assurances within treaty articles. The proposal for a treaty to do this is discussed later in Chapter 5.

g) The *Othman* test

Throughout the review of Kim, it appeared the Minister of Justice followed the *Othman* test for Article 3 closely. To ensure the surrender of Kim would not violate any torture conventions, it had used the five guidelines or at least, attempted to as close as possible, match the threshold set out by the ECtHR. For example, one of the tests required genuine commitments to obtain assurances. If the Requesting-State has a concerning human rights' record, then genuine commitments with a clear and transparent process for obtaining assurances must be made. Another test was that the Memorandum of Understanding must carry assurances that are “specific and comprehensive”.¹³⁶ While *Othman* did not require a State to have a Memorandum of Understanding, it could be viewed that the assurances obtained by the Minister in *Kim* were detailed and specific relating to his trial.¹³⁷

As seen in *Othman*, the assurances must have been obtained from the highest level of Government. In that case, those assurances were approved and expressly supported by King Abdullah II.¹³⁸ Although Kim did not receive the same level of approval from their highest level of Government, the referral to Chinese ministers and officials throughout the review could be sufficiently viewed as a high level of Government assurance.

The European Court was of the view that the high-profile nature of *Othman*’s case would deter the Jordanian Government from violating the assurances, therefore, deterring their bilateral relationship. This could again be seen in the relationship between New Zealand and China and the circumstances of the surrender. Where the then Minister of Foreign Affairs and Trade Mr. McCully stated that “their performance in relation to the Kim case will have a critical influence on the future attitude of the New Zealand Government, and that of other governments”.¹³⁹

h) Pre-trial vs Post-sentencing assurances

¹³⁶ *Othman*, above n 82, at [194].

¹³⁷ *Kim* (Second judicial review), above n 38, at [81](a). Also at [29].

¹³⁸ *Othman*, above n 82, at [195].

¹³⁹ *Kim* (Second judicial review decision), above n 38, at [52].

Interestingly, Lai's progress and monitoring in China would have at least potentially been opened to MFAT via diplomatic communications with the Government of Canada. This meant that MFAT would have realised that post-sentencing assurances did not extend to Lai due to his non-Canadian citizenship status. The Minister did not directly pinpoint post-sentencing assurances, it was unclear whether it specified the period during pre-trial detention or post-sentencing imprisonment.¹⁴⁰

The Minister also received further advice from Fu. While his advice addressed details of pre-trial and sentencing, it did not indicate the monitoring assurances and mechanisms covered post-sentencing.¹⁴¹ The advice and the rationale only addressed the pre-trial detention of Kim, and nothing on post-sentencing monitoring.¹⁴² It can be seen from Fu and the Minister of Foreign Affairs' advice that the Minister relied on information that related specifically to pre-trial detention and not for post-sentencing assurances.¹⁴³ However, it could be assumed that the Minister directed Fu to address and advise specifically the conditions and assurances of pre-trial detention. Is there a duty for the Minister to be responsible for obtaining post-sentencing assurances for Kim? In Kim's first judicial review, the briefing paper indicated that MFAT consulate officials currently monitor those New Zealand citizens currently detained and imprisoned.¹⁴⁴

Compare this to Lai's situation, is there an associated issue of the requested person's citizenship status and the Requested-State's obligations to their citizens? Lai is not a Canadian citizen, and that had placed no obligations on the Canadian Government to monitor him post-sentencing. Therefore, did MFAT consider Kim's residency status, and negotiate post-sentencing monitoring assurances based on that? Post-sentencing assurances were vaguely mentioned in the Kim judgments with no specifics. However, had Kim been a New Zealand citizen, would the Government be obligated to ensure better monitoring mechanisms were in place? This question could only be addressed with the mechanism from public international law: the rule of nationality and diplomatic protection. They will be discussed in Chapter 6.2.

Questions would inevitably arise as to why there were no specific or detailed referrals to post-sentencing assurances. It could be argued that the point and importance of pre-

¹⁴⁰ At [60](a).

¹⁴¹ At [49](a)-(g).

¹⁴² They were: Length of detention, interrogation, right to silence, place of detention, record and interrogation, high-risk cases, and changing culture. These were all related to pre-trial arrangements and not post trial. For more, see *Kim* (Second judicial review decision) at [49](a)-(g).

¹⁴³ At [53].

¹⁴⁴ *Kim* (First judicial review decision), above n 38, at [220].

trial assurances trump post-trial because of the importance of evidence gathering from the pre-trial stage and the requested-person being at risk for ill-treatment at this critical point. Once a trial is concluded, and if Kim is found guilty, there would be no beneficial need or concerns for investigators to subject him to any potentially dangerous treatments. Perhaps, the Minister viewed pre-trial monitoring as the most at risk stage of torture and inhuman treatment. However, the case of *Othman* would disagree on this, as torture could invariable happen to convicted-persons to extract unreliable information that could affect someone else.¹⁴⁵

i) Kim's case illustrates the problem with judicial reviews:

In the second judicial review, the judgment revealed the problem that issues were not specifically addressed by the Court. Kim's counsel submitted that the comments made by a Chinese Official after his first judicial review showed the Requesting-State had already determined his guilt:¹⁴⁶

By playing up the issue of a 'just trial', [Mr] Kim and his lawyer scheme[d] to get away with the legal punishment. China will continue to cooperate with New Zealand on this case and jointly crack down on crimes.

However, MFAT justified the issue by stating it was an off the cuff comment by an official from a separate department, and promoted the negotiated mechanisms with the advice of non-compliance reputation implications.¹⁴⁷ Mallon J stated the Minister was not required to explicitly address all matters.¹⁴⁸ And that the Minister of Justice had accepted advice from the Minister of Foreign Affairs and Trade, who had a clear view the Chinese Government will live up to their assurances.¹⁴⁹ The Court held this information was reasonably open to the Minister to accept this advice despite the comments made by the Chinese Official after the first judicial review.¹⁵⁰

The Court gave an indication that its ability to assess comments submitted by the defence was limited by the scope and nature of judicial reviews. Mallon J suggests that although such comments were made by an off-department official, she was limited to assessing whether the information was open to the Minister to accept any advice. If the new Extradition Act allows the Courts to address issues of diplomatic assurances, should it also extend to relevant evidence related to the reliance of diplomatic assurances? A

¹⁴⁵ There was a substantial risk that the Jordanian prosecutors would use testimonies against Abu Qatada, which were obtained through the torture of other witnesses.

¹⁴⁶ *Kim* (Second judicial review decision), above n 38, at [102].

¹⁴⁷ At [103].

¹⁴⁸ At [105].

¹⁴⁹ At [105].

¹⁵⁰ At [105].

proposal to improve the scope of the Courts in extradition will be discussed in Chapter 6.

4. *Yan v Commissioner of Police*

*Yan v Commissioner of Police*¹⁵¹ was a mutual assistance case between New Zealand and China. William Yan was embroiled in a lengthy litigation battle with the Crown in the past decade. Yan, a former Chinese national who later gained New Zealand citizenship, settled in New Zealand in December 2001. His methods of obtaining residency and citizenship were under intense parliamentary and media scrutiny. He was suspected by the Chinese government of embezzlement and was in their wanted fugitive lists named “Operation Sky Net”. At the start of its judgment, the Court stated:¹⁵²

It was alleged that Mr Yan had accumulated a significant asset base in New Zealand and, together with some third parties, had been associated with or involved in transactions involving over \$40 million.

His case against the Commissioner of Police for his restrained funds spanned over several years. Eventually, Yan settled a civil suit with the police where \$42.5 million was forfeited.¹⁵³ He then voluntarily returned to Mainland China to face trial on embezzlement and fraud charges. The following year, he returned to New Zealand and pleaded guilty to a money laundering charge and was sentenced to five months' home detention.¹⁵⁴ Even though Yan was not extradited, he was nonetheless part of China's list of economic fugitives. The following section will assess whether his voluntary return to Mainland China, his treatment, and his return to New Zealand can be used as a benchmark of China's commitment to keeping their promises of a fair-trial and no-torture assurances.

There were two things the Yan case established:

- i) This was a mutual assistance matter, not extradition; and
- ii) there were no public records of diplomatic assurances' negotiation nor the agreements reached by the two States.

¹⁵¹ Yan, above n 40.

¹⁵² Yan, above n 40.

¹⁵³ "Controversial businessman William Yan sentenced for money laundering" *Stuff* (New Zealand, 10 May 2017).

¹⁵⁴ Jared Savage "Controversial citizen William Yan AKA Bill Liu admits money laundering of 'significant sums' *The New Zealand Herald* (online ed, New Zealand, 10 May 2017).

Yan's case was not an extradition matter but concerned the seizure of his property under the Criminal Proceeds (Recovery) Act 2009, which involved mutual assistance between the Chinese Government and the Crown under the Mutual Assistance in Criminal Matters Act.¹⁵⁵ This Act allows Foreign-States to access New Zealand's investigative resources, including a restraint of property that originated from the specific criminal activity, and ultimately, prosecution.¹⁵⁶ Although Yan was wanted in Operation Skynet as an economic fugitive and an earlier extradition request was made, his Court trials were related to the immigration fraud, forfeiture of his funds and money laundering.¹⁵⁷

The earlier request for Yan's extradition was made but his years of litigation within the mutual assistance context have inadvertently halted it. Officially, there was public record of a formal extradition request to the Justice Minister. However, his case had the potential to reach an extradition stage where China formally requests for his extradition once his civil trials were over in New Zealand. Yan later settled with the New Zealand Police and agreed to voluntarily return to China to face trial. There are several factors which make his case uniquely different to Kim's.

It is important to note that the negotiations, assurances, assessments, and discussions between the two parties were never disclosed to the public. Yan was found guilty in China, but the Chinese kept their promise and returned him to New Zealand. The problem was, the assurances Yan received were not disclosed to the public. Knowing what they were would be beneficial in understanding whether China could honour future assurances. As Yan's case did not reach the extradition stage, it is uncertain if diplomatic assurances were negotiated or not since this was a mutual assistance matter. Neither was it confirmed by the Crown whether it had negotiated or mentioned Yan's assurances during the meeting between then Foreign Affairs Minister Murray McCully and Chinese Minister Wang Yi.¹⁵⁸ Therefore, due to his unique and private circumstances, his voluntary return to China cannot be used as a benchmark of China's ability to uphold diplomatic assurances since the public has no knowledge of what happened and the negotiations that took place.

The case of Yan has very little public information available in text. Transparency is a fundamental problem for using it as legal reference and precedent. Of course, States may be secretive about their relations all the time, what matters here is the secrecy shrouded in law enforcement and that is not preferable when discussing transparency;

¹⁵⁵ See Lexis Nexis "Mutual Assistance" Dictionary of New Zealand Law.

¹⁵⁶ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 7.

¹⁵⁷ Jared Savage "Accused of \$129m fraud: Citizen William Yan, the man with many names" *The New Zealand Herald* (online ed, New Zealand, 11 October 2014).

¹⁵⁸ Stacey Kirk "Auckland businessman William Yan, set to head back to China for questioning" *Stuff* (New Zealand, 23 October 2016).

this is even more so if this had been an extradition matter. It is difficult to conduct any proper research because very little has been disclosed to the public. This case cannot be used as a model for extradition since it was a mutual assistance case. Nor should it be used as a precedent for diplomatic assurances being effective since the negotiations were not released publicly.

5. Summary

This chapter asks how the Government currently obtains and assesses the assurances from the Requesting-States. It shows what information is open to the Ministry of Justice and how it evaluates those assurances. The judicial reviews of Kim also highlights the necessity of expressing steps that the Justice Minister has to undertake from the Requesting-State for her decision to be sound and reasonable. The Minister did take such steps as shown in the second judicial review. However, there were no express negotiations of post-trial assurances as the majority of the diplomatic assurances related to pre-trial and sentencing. In response to the problems shown in Kim, the Othman case and its aftermath were used as a resolute proposal to mitigate these concerns. The core assurance issues in Kim could potentially be resolved through the mechanisms of a treaty. The treaty system will be discussed later in Chapter 5.

4

THE CENTRAL AUTHORITY

1. Introduction
2. New Zealand's current extradition format
3. Attorney-General
4. Referral to the Attorney-General
5. Independence of the Solicitor-General's Office
6. Conflict representing the Requesting-State
7. Counter-measures to conflict
8. Clearer guidelines needed
9. Summary

1. Introduction

This chapter attempts to address why the Central Authority should take the helm from the Minister in extradition matters. It does not put forward any innovative proposals to who should be the Central Authority as it accepts from the outset that it should be the Attorney-General. Instead, at the chapter's core, it is focused on the types of conflicts that would exist if the Attorney-General is appointed the Central Authority and the necessity of safeguards to prevent such conflicts. This chapter examines the unique relationship between the Attorney and Solicitor-General, while also proposes that more explicit safeguards are needed to avoid conflicts and to promote public perception, due to the Attorney-General operating as a Senior Law Officer and a Cabinet Minister.

2. New Zealand's current extradition format

While the Attorney-General is the formal Central Authority for mutual assistance matters and requests under the Mutual Assistance in Criminal Matters Act 1992, there is no official Central Authority for extradition as requests are handled by different agencies.¹⁵⁹ In the standard procedure, the Ministry of Foreign Affairs and Trade receives the extradition request in practice and assists Crown Law in liaison with the requesting country. The Police, Crown Law and the Ministry of Justice play their part in the extradition process from executing arrest warrants to providing legal advice. More importantly, the Minister decides whether to allow the request and begin Court proceedings.

The Minister's position within Cabinet might create a potential bias when deciding to surrender a person. This stems from the idea that the decision to surrender could favour the Executive's stance towards the requesting country for different reasons, such as a strong bilateral trade relationship. The Minister has to decide whether or not to surrender someone, and whether the assurances that come along with the extradition are sufficient.

Naturally, it might be concluded that a conflict between the interests of the Executive's relationship aligns with the Requesting-State and the decision to surrender exists. If a Central Authority is created, its degree of autonomy and free of potential conflict of interest must be significantly greater than the current Ministerial model. The Central Authority should have three separate roles: receiving requests - accepting the extradition request and assessing whether the Foreign-State has provided sufficient evidence

¹⁵⁹ Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [NZLC IP37] at 43.

meeting the prima-facie threshold; diplomatic assurance - obtaining and assessing them, and coordinating post extradition – coordinating the monitoring of the requested-person.

3. Attorney-General

The Attorney-General stands as the most senior Law Officer of the Crown with the responsibility of being the leading principal legal adviser for Her Majesty's Government. In practice, this function is usually carried out by the Solicitor-General¹⁶⁰ since this function and authority is implemented in conjunction with the Solicitor.¹⁶¹ Second, the Attorney has a political role fulfilling Ministerial functions for the Cabinet of Her Majesty's Government.¹⁶²

The Law Commission recommended the Attorney-General should be the Central Authority for extradition requests.¹⁶³ The Commission, echoing the submissions made by Crown Law, states the key consideration for appointing the Attorney is the inter-governmental context where extradition matters take place. They focused on the context of foreign and domestic matters appropriate for a member of the Executive, as opposed to an independent official.

However, this is in some ways, shifting the authority from one cabinet member to another. By moving the responsibility from the Minister to the Attorney, who are often from the same party leading the Government, it makes the focus to reduce conflicts of interest appear redundant. The Law Society of New Zealand is of a different opinion, in that there should be an independent agency that deals specifically with extradition, but concedes the caseloads would lack a practical rationale for its formation.¹⁶⁴

4. Referral to the Attorney-General

¹⁶⁰ Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at 11.1.

¹⁶¹ Crown Law *Law Officers of the Crown* < www.crownlaw.govt.nz >.

¹⁶² Crown Law Office *Briefing to the incoming Attorney-General* (October 2017) at the constitutional roles of the attorney-general (senior law officer) and solicitor-general (junior law officer) point 7.1. and annexure: the attorney-general, solicitor-general and crown law at point 7. See also, Crown Law *Law Officers of the Crown*, above n 158.

¹⁶³ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 18.

¹⁶⁴ The volume of requests pales in comparison to other States such as the United Kingdom. A 2015 report released by House of Lords' Select Committee on Extradition stated a total of 38 extradition requests were made from non-European Union countries in 2014, and 22 were made from 1 January to 30 April 2015. However, 1355 people were sent back to European Union member states for trial in 2012, mostly involving the use of the European Arrest Warrant. The core difference between Great Britain and New Zealand's extradition volume could be attributed to the EWA and Britain's geographical connection to continental Europe. For more, see United Kingdom the Select Committee on Extradition Law "Extradition: UK Law and Practice" HL paper 126 (10 March 2015).

The Law Commission recommended that the general extradition matters should be delegated to Crown Law, with only the most important issues referred to the Attorney-General. But the delegation of making submissions should also extend to the Solicitor-General.¹⁶⁵

In extradition, most of the decisions will also be made in Crown Law by the Solicitor-General, or the relevant Deputy Solicitor-General. The Constitution Act provides a general delegation of Attorney-General functions to both the Solicitor-General and to the Deputy Solicitors-General, so it is unnecessary to repeat that ability in either of the specific bills.

This is in line with the Prosecution Guidelines.¹⁶⁶

There are numerous offences that can only be prosecuted with the consent of the Attorney-General. In practice, this function is almost always undertaken by the Solicitor-General. Often, where offences may touch on matters of security or involve foreign relations or international treaty obligations, consent is required to ensure that the circumstances of the prosecution accord with the statutory purpose of the Act.

However, the Prosecution Guidelines are silent on the topic of conflicts of interest, which might imply any conflict is dealt with by ordinary legal and professional rules. However, the lacuna of conflict still exists. Therefore, the Cabinet Manual and the article by Sir John McGrath QC are good sources to refer to. It should be noted that under the Manual, conflicts of interests relate to a Minister's personal interest and not the shared interest of the Executive.

The issue with having an Attorney-General involved in the most important matters is the lack of test or threshold for interpreting what is deemed to be an essential matter. This appears to be discretionary and could involve the Attorney when he or she sees fit. However, while the reality is that the Attorney is a busy Member of Cabinet and will rarely be involved, there has been an exception in the past where the Attorney-General decides on an extradition issue. In *Principles for sharing law officer power: The role of the New Zealand Solicitor-General*¹⁶⁷ the former Solicitor-General and later Supreme Court Justice Sir John McGrath referred to the bombing of the “Rainbow Warrior” in 1991 where the then New Zealand Government had the option to seek the extradition of Andries; a French citizen wanted in respect of the bombing.¹⁶⁸

¹⁶⁵ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 18.

¹⁶⁶ *Solicitor-General's Prosecution Guidelines*, above n 157, at 11.1.

¹⁶⁷ John McGrath QC, “Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General” (1998) 18 NZULR.

¹⁶⁸ At 211.

While this decision was bestowed on the Minister of Justice, a further decision by the Attorney-General was required on whether the outstanding charges against Andries and other French citizens involved should be stayed.¹⁶⁹ McGrath states such a decision to stay the proceedings could only be justified in the context of international obligations and broad national interests, including the future trade relationships between New Zealand and Europe.¹⁷⁰ The Attorney-General determined that his position as the Law Officer with a political mandate should instead make the decision, and proceeded to stay the outstanding charges.¹⁷¹ This example shows how the Attorney may intervene and have his or her actions justified by the context of protecting New Zealand's interests with other countries. What this chapter is concerned about is in reverse, if the Attorney should push for extradition in the context of protecting the country's interests with others.

Coming back to the functions of the Authority being performed by the Attorney, the Law Commission states the Solicitor-General should refer only the most important decisions to the Attorney-General.¹⁷²

Also, in the Crown Law Office Briefing Paper for the Attorney-General, it states:¹⁷³

In practice, it is the Solicitor-General (either directly or through Crown Counsel) who gives legal advice to the Government. But that advice is always subject to the opinion of the Attorney-General, whose opinion prevails in the event of conflict.

The theme of hierarchy was echoed strongly when the paper states the Solicitor-General's advice is always subject to the opinion of the Attorney. The concern here would be if the Attorney-General (who is also a Cabinet member) places other interests of the Executive (relationship with the Requesting-State) ahead of other concerns (fairness of trial, human rights issues) or is at least influenced by them when formulating his or her own opinion. It also allows the Attorney-General to have an opinion that appears to take precedence if a conflict arises.

The Attorney-General is, as Crown Law and the Law Commission submitted, the best person to deal with extradition issues due to his or her inter-governmental context¹⁷⁴. Equally, this discretion to involve the Attorney-General could also have its merits. The Attorney-General's position as a Cabinet member representing the Executive could also

¹⁶⁹ At 211.

¹⁷⁰ At 212.

¹⁷¹ At 212.

¹⁷² Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 18.

¹⁷³ Crown Law Office Briefing Paper for the Attorney-General (October 2017).

¹⁷⁴ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 17.

allow him or her to maintain stronger diplomatic channels with Foreign-States when negotiating for assurances. Perhaps, this adds legitimacy to the Central Authority's position if it is led by an Executive member, as submitted by the Crown:¹⁷⁵

A key consideration for our view is the inter-governmental context in which extradition takes place. That context makes it appropriate for a member of the executive, rather than an official, to be identified formally as the Central Authority.

When discussing the Attorney-General's role of combining the obligation to act independently while also having political partisanship that is associated within the Cabinet, the then Attorney-General Michael Cullen acknowledged public perception of a conflict but affirmed the legitimacy of his position:¹⁷⁶

My fundamental responsibility, when acting as Attorney, is to operate in the public interest. This inevitably gives rise to perceived conflicts of interest with respect to my other roles as a Cabinet Minister in a Labour-led government. This is managed through a clearly defined relationship with the Solicitor-General, who is a non-political law officer available to advise and assist on and, where appropriate, to discharge law officer functions.

Thus, the Solicitor-General can manage issues that might be perceived as a conflict. But there is no specific test to this, and primarily if the issue arises, that allows a Cabinet member's involvement due to the nature of the issue, such as involving foreign relations with the Requesting-State. The historical role of the Solicitor-General was given even further examination by Guy Powels,¹⁷⁷ who reviewed the appointment of the Solicitor-General as the fall-back against party-bias.

While this is the accepted position that the Solicitor-General could act as the Attorney's check, there are still issues of existing conflict, especially if the Solicitor wishes to keep the Attorney in check. Powels states while the Solicitor-General may be obliged to step in if the Attorney-General has misused his or her authority, the Solicitor is a nonetheless a subordinate of the Attorney.¹⁷⁸

The most prominent weakness of this is that the Solicitor-General's role is the junior legal officer and therefore inferior to the Attorney-General. If the Solicitor-General was required or felt obliged to keep the Attorney-General in check, this could, in fact, give

¹⁷⁵ At 17. Referencing the Crown's submissions.

¹⁷⁶ Michael Cullen "The role of the Attorney-General" (22 July 2006) Beehive <www.beehive.govt.nz>.

¹⁷⁷ Guy Powels "Why so complicated? The role and status of the Attorney-General in Pacific Island States and the case of Tonga" (2016) Vol 22. CLJP/JDCP Journals.

¹⁷⁸ At 20.

birth to a conflict of interest between his employment and whistleblowing on the Attorney-General's wrongful actions. There is currently no accountability framework appropriate for the Solicitor-General to occupy.

Powels stressed that there is no accountability framework in place that is appropriate for the Solicitor-General to act in such an event. This further promotes the necessity for guidelines and directions.

5. Independence of the Solicitor-General's Office

Sir John McGrath points out that the Solicitor's office enjoys a great degree of autonomy:¹⁷⁹

The independence the Solicitor-General enjoys is, at its heart, the freedom from the obligation to conform to the political perspective of the government in power. There is a freedom to advise as to the effect of the application of the law as the Solicitor-General sees it. There is freedom as to the way cases are argued in Court, subject to the practical constraints I have mentioned.

McGrath went further and states the arguments made by the Solicitor-General in Court necessarily addresses the public interest rather than any political Government interests.¹⁸⁰ This reduces the fear of the Solicitor's autonomy being compromised if the Attorney-General decides to make a decision influenced by party-bias. The autonomy of the Solicitor is woven into the independence of prosecutors. Prosecutors' professionalism and their independence enhance the idea of public trust in the prosecutorial system. New Zealand has a strong tradition concerning legal and procedural fairness. In John Spencer's 2011 report on the New Zealand Prosecution system, he submitted:¹⁸¹

One of the core expectations placed on prosecutors in New Zealand and throughout the Commonwealth is that they are obliged to make decisions and to present cases in a detached, impartial and fair way. This differs somewhat from the expectations placed on defence lawyers, who are obliged, as far as possible, to advocate for their clients.

Prosecutors, as he states, enjoy the ability to act impartially and detached, and does not owe the same duty as defence counsels do to their clients. The ethos of a prosecutor to act fair and impartial are echoed by Rule 13.12 of the Lawyers and Conveyancers Act

¹⁷⁹ McGrath, above n 167, at 216.

¹⁸⁰ At 216.

¹⁸¹ John Spencer "Review of Public Prosecution Services " (2011) at 139.

(Lawyers: Conduct and Client Care) Rules 2008.¹⁸² Indeed, one of the most attractive points of having the Solicitor acting in practice, as the Central Authority's day to day functions is its autonomy and the independence from political influence. Prosecutors have always enjoyed a high level of detachment and impartiality from outside pressure when performing their prosecutorial roles. The same then could be expected of the Solicitor and the Crown Prosecutors when fulfilling the functions of the Central Authority.

However, McGrath conceded the caveat to maintaining independence is the relationship between the senior and junior Law Officers. In that the Solicitor-General must willingly accept that when the Attorney elects to advise the Government on legal issues, that opinion will override any advice submitted by the Solicitor-General.¹⁸³ Interestingly, McGrath concluded that the Solicitor-General is often caught under unreasonable political pressure, through what he described as political cyclones passing through the Government. The ability for McGrath to operate freely from undue political pressure was credited to the support afforded by the Attorney-General during his tenure as Solicitor-General.¹⁸⁴ This highlights the unique relationship the Solicitor-General has with his or her senior Law Officer.

6. Conflict representing the Requesting-State

When Crown Counsels appear in extradition proceedings, are they representing the Government's position or the Requesting-State's? In *Dotcom v United States of America* [2014], the Supreme Court held:¹⁸⁵

The role of the requesting state has been addressed in a number of English cases, in which the courts have concluded that the Crown Prosecution Service (which has the carriage of extradition proceedings) acts on behalf of, and as solicitors for, the requesting state... If counsel from the Crown Law Office or the local Crown Solicitor appear, they do so as representatives acting on behalf of the requesting state.

The Supreme Court held, at least per the current extradition regime and the Act, that the Requesting-State (United States) is considered a party to the extradition proceeding.¹⁸⁶ However, it is also important to note there is a difference in context between the reasoning held by the majority of the Supreme Court and issues that might be different

¹⁸² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rules 13.12 (b)&(d). See also, John Spencer at 141.

¹⁸³ McGrath referred to the variations between Sir Francis Bell and his deputy, Sir John Salmond. For more, see Crown Law Practice in New Zealand (1961).

¹⁸⁴ McGrath, above n 167, at 218.

¹⁸⁵ *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [102].

¹⁸⁶ At [103].

in other cases. In *Kim v Attorney-General*¹⁸⁷, the Court held, with consideration to the Supreme Court judgment in *Dotcom* that there was no conflict of interest when the Crown Law Office was discharging New Zealand’s obligation under the Extradition Act “of ensuring that the appropriate legislative steps were taken to initiate the extradition process.”¹⁸⁸

This point was further examined in *Dotcom v Deputy Solicitor-General*¹⁸⁹, in the context of the Mutual Assistance in Criminal Matters Act 1992.¹⁹⁰

The plaintiffs contend that by delegating his decision-making power under s 55 to the Deputy Solicitor-General (Criminal), the Attorney-General put Mr Horsley in a position of conflict between, on the one hand, his duties under the MACMA and, on the other, the interests of and duties owed to Crown Law’s clients, the United States and the Commissioner of Police. They say that this conflict creates “at the very least” a perception of bias in relation to the s 55 Decision making process in this case.

Ellis J attempted to answer this question by setting out the appropriate test for apparent bias, and whether a reasonable observer would conclude that the decision-maker might not be impartial in the decision-making process.¹⁹¹ However, Her Honour noted the difficulty of this test within an international-obligations context.¹⁹²

But the difficulty in the present case arises (or potentially does so) because giving effect to the Crown’s international obligations on occasion may require it to act at the behest, or in the interests, of another State. It is then that a conflict with its domestic interests might, theoretically, arise.

The Court acknowledged that there were two other Deputy Solicitor-Generals who were unconnected with the Dotcom matters.¹⁹³ But in the alternative, states a clearer and transparent process needed to be drawn out:¹⁹⁴

Alternatively, it may simply be that a better understood, clearer and more transparent process around mutual assistance and extradition matters might suffice to dispel such concerns. It may well be that the necessary measures to ensure objectivity are, indeed, in place. But that is potentially a matter for evidence at the substantive hearing.

¹⁸⁷ *Kim v Attorney-General of New Zealand* [2014] NZHC 1383.

¹⁸⁸ At [75].

¹⁸⁹ *Dotcom v Deputy Solicitor-General* [2015] NZHC 1197, [2016] NZAR 229.

¹⁹⁰ At [60].

¹⁹¹ At [116].

¹⁹² At [127].

¹⁹³ At [129].

¹⁹⁴ At [129].

If a clear and transparent process for extradition matters have been laid out, it could mitigate concerns of conflicts of interests. However, the Law Commission was very clear that as opposed to the current system, the Central Authority would be acting for New Zealand's interests and not the Foreign-States. But this needs to be set out and seen in practice. The framework for preventing conflict has not been set out in the Prosecution Guidelines and the Cabinet Manual with regards to extradition and representation of Crown clients by the Attorney-General and the Solicitor-General in the role of the Attorney-General.

7. Counter-measures to conflict

These guidelines for conflict are related to the Minister's relations and interests, and not to their party. However, these two measures could also apply if the Attorney, or if public perception feels that there is a conflict, to use the following measures in consultation or with advice from the Cabinet Office if a conflict arises:¹⁹⁵

Not receiving papers: A Minister's personal interest in an issue may mean that it is inappropriate for the Minister to receive official information on the issue. In this case, the Minister should instruct the Cabinet Office (and/or other officials, as appropriate) to ensure that the Minister does not receive official papers or reports about the issue.

This could be utilised in Extradition matters where the Attorney could direct all information to the Solicitor-General or the appointment of an Acting Attorney-General.

Transferring responsibility to the department: If a conflict arises in the Minister's portfolio concerning a minor issue, the Minister may be able to handle the matter without further difficulty by passing the issue on to the department. The Minister should take care to ensure, however, that there is no attempt to influence the department inappropriately. The Minister should declare the interest if the matter is discussed at Cabinet or a Cabinet committee. The Minister should also consider whether it is appropriate to receive Cabinet or Cabinet committee papers on the issue or to remain at the meeting.¹⁹⁶

If the party to which the Attorney is under has been perceived as having great interests with maintaining or improving the relationship with the Requesting-State, the Attorney-General could use this measure of transferring his responsibility to the Solicitor-General or Crown Law. In a legal practising context, this is similar to the use of an information barrier found in rule 8.7.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁹⁵ Cabinet Office *Cabinet Manual 2017* at [2.74 (d)].

¹⁹⁶ At [2.74 (d)].

The interpretation of this measure (the transfer of responsibility) could extend to an individual appointment approach used in the Marshall Islands. As discussed by Powels,¹⁹⁷ in that jurisdiction, the Attorney-General must appoint an *ad hoc* Special Assistant Attorney-General if it has determined a conflict or an appearance of one exists when carrying out its advisory and prosecutorial functions.¹⁹⁸

It is worth mentioning the Cabinet Manual also allows the Attorney-General to seek advice from the Secretary of the Cabinet on potential conflict issues. Since the guidelines generally point to personal interests, it is uncertain whether the Secretary could advise on matters of conflict between the Attorney and the Executive.

8. Clearer guidelines needed

The Crown Law briefing paper to the Attorney-General acknowledged the dual role might cause conflict, and states:¹⁹⁹

Due to the constitutional function of their roles both Law Officers (Attorney and Solicitor-General), must not make decisions with the aim of securing any political or similar advantage.

As discussed from the beginning of this chapter, this proposal is not an attempt to reform the Law Commission's recommendation of having the Attorney-General as the Central Authority, and rather, it proposes clearer guidelines to prevent conflict from the Attorney and Solicitor-Generals.

The measures set out by the Cabinet Manual and the function of the Solicitor-General being a check on the Attorney needs to be redefined in an extradition law context. This would undoubtedly remove doubts that the Attorney-General might be party-bias when exercising his or her functions during an extradition procedure. However, it is also important to not over-constrain this discretion since it might limit the legitimacy of the Attorney-General's role. Acute interventions and guidelines need to be in place.

9. Summary

The current system of receiving extradition requests with the involvement of various actors and giving advice to the Minister before the decision to surrender is reached

¹⁹⁷ Guy Powels, above n 177.

¹⁹⁸ At 19.

¹⁹⁹ Crown Law Office Briefing Paper for the Attorney-General (October 2017).

creates a convoluted landscape for what could be a far more streamlined process. Aside from this, there is the potential for political conflict to interfere with the decision to allow the surrender of requested persons. So, will the future inception of a Central Authority improve this? If it is the Attorney-General who is appointed the gatekeeper of the extradition regime, the system and public perception would benefit with more explicit safeguards which prevent its dual-roles from conflicting with each other. On appearance, its dual functions of being a Senior Law Officer and Minister place the Attorney in conflicting situations. Yet, this might prove to be advantageous as its position in an inter-governmental perspective springs legitimacy when conducting extradition affairs with a Foreign Government. While acknowledging in practice, it is mostly the Solicitor-General who exercises the Attorney's functions; it is where the Attorney might wish to be involved in the decision of a "most important" extradition matter that might be due to a party-bias and its influence over the subordinate Solicitor-General that might cause concerns.

This chapter concedes it is difficult to construct a test for conflicts with the Cabinet, and whether the Attorney should be involved in the most critical matters even when the perception of bias exists. The reality is that Cabinet simply does not interfere with criminal cases in New Zealand, and only in the most exceptional of circumstances would the Attorney-General be involved. However, it would benefit the Cabinet, prosecutions and the public if clear guidelines were in place to mitigate concerns of conflict between the Attorney's Cabinet and any Crown clients, such as the Requesting-State.²⁰⁰ This could be achieved by including an amended Prosecution Guidelines, Cabinet Manual, the Crown Law Office Briefing Paper, or an independent Extradition Manual once the Central Authority is created. This new framework would not only improve transparency, therefore, the public perception, but show what safeguards are in place if there are potential conflicts.

However, even without concrete safeguards, Sir John McGrath referred to the unique relationship between the Solicitor-General and the Attorney-General, that in most circumstances, the decisions made by the Solicitor is respected by the Attorney. It appears, at least from his report, that the fear of conflict is negated by the professionalism of both the Solicitor and Attorney-General's Offices. The Attorney-General has always exercised his dual functions appropriately, separating the legal and Ministerial functions.²⁰¹

Nevertheless, the shift from the Ministerial model to a Central Authority which is overseen mainly by the Solicitor-General is already on the path to improve public

²⁰⁰ *Dotcom*, above n 189, at [129].

²⁰¹ McGrath, above n 167, at 219.

confidence. The faith in Crown Prosecutors is also relevant as they conduct their practices in apolitical and professional manner. If the decision-making role is removed from the Minister of Justice and instilled into the Solicitor-General, the extradition procedure would be processed comparable to what professional prosecutors do. This is the New Zealand tradition concerning legal and procedural fairness. What counts is the justice system here is effective because of the professionalism and understanding of the independent Crown Prosecutors. This places the Central Authority role into a prosecutorial one rather than a Ministerial.

5

THE ROLE OF THE TREATY SYTEM

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1. Introduction

This thesis asks whether the Central Authority, judiciary and the treaty alternatives are preferable over the ministerial model and the Extradition Act for the assessment of diplomatic assurances and the decision to surrender in extradition requests. The chapter addresses whether having a treaty system in place would provide guidelines and thresholds for what is required to satisfy the Requested-State when obtaining diplomatic assurances. Having a treaty with another country does not guarantee extradition. A treaty also holds an onus and responsibility on the Requesting-State to ensure the assurances and conditions provided have been honoured. Otherwise, it would be a breach of the treaty between the States. But, if the Requesting-State breaches the treaty obligations by violating the assurances they have given, what would the consequences be?

2. The role the Treaty system could have

This section deals with whether a treaty could address the concerns of assurances being breached and the framework for future extraditions, shifting *ad hoc* extradition with Requesting-States to treaty-bound Requesting-States. The purpose of a treaty between countries is to set out the terms the States must abide by to which they have formally ratified. It sets out the mechanism of how to process and adhere to those terms. Currently, extradition with a non-treaty State can already be carried out under the Extradition Act. However, there are benefits to having a treaty. For one, if there were a breach of diplomatic assurances under an extradition exchange within an extradition treaty, the State parties would have the right to resolve this dispute on an international forum, namely the International Court of Justice. The existence of a treaty does not expel the requirement of having assurances but binds them under the treaty footing. Compare this with *ad hoc* extraditions, where it is questionable whether it binds the Requesting-State or not, and to prove those assurances are binding, the Requested-State must prove the agreement amounts to a unilateral declaration.

The other benefit a treaty could afford the Requested-State is the right to suspend or terminate the treaty if there is a material breach. If there is a material breach, the Requested-State could, in theory, be able to execute the principle of *rebus sic standibus*.²⁰² This principle dictates under the customary international law that if any fundamental changes of the treaty articles or circumstances with regards to the

²⁰² This doctrine exists within Article 62(1)(b) of the Vienna Convention on the Law of Treaties. The Convention states: (b) the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

functioning of the treaty has been significantly altered, then the requesting or Requested-State has the right to terminate the treaty.²⁰³

Currently, no Anglo Commonwealth country shares an extradition treaty with The People's Republic of China (with exception to Hong Kong, a Special Administrative Region). However, countries like Canada have returned people to China due to the assurances provided, while New Zealand's decision to surrender to China is still being reviewed by the Courts. The indirect assurance would be the consequences imposed on China if they violate and do not honour the assurances given. That is, it would dent their reputation and ability to negotiate for future surrenders from Requested-States. Even if the Requested-States' respective officials do agree on the surrender, the Courts would likely be inclined to allow a surrender if there is already precedence in a diplomatic assurance being breached. The advocacy for a less time-consuming extradition process lies with the potential creation of a Centralised Authority, not a new treaty. A new treaty also does not negate the importance of obtaining and assessing any assurances the Requested-State receives but creates a template for the States to follow in the future of what needs to be satisfied before a surrender happens, such as diplomatic assurances. If any breaches of safeguards are to happen, a victim State could terminate the treaty, and that would set a strong deterrence against any States failing to keep assurances after extradition when a treaty is in place.

3. What is the purpose of an extradition treaty?

The purpose of an extradition treaty must have strong incentives and benefits for the requested-State and, if possible, the requested person with protective clauses from breaches. Referring to the Vienna Convention on the Law of Treaties,²⁰⁴ the Law Commission states treaties create binding obligations on the Requesting and Requested-States who are a party to the very treaty they sign.²⁰⁵ Substantially, this solidifies the diplomatic assurances provided by the Requesting-State must be honoured by them. It also allows the victim to bring an action if the justiciability allows it. If the Requesting-State violates or breaches any of the assurances, it would be breaching a binding obligation on them. Without such a treaty existing between the States, it might appear

²⁰³ *Laws of New Zealand Extradition from New Zealand: Termination of Treaties* (online ed) at 87 referencing M Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 855.

²⁰⁴ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 29 April 1970, entered into force 27 January 1980).

²⁰⁵ Law Commission *International Law and the Law of New Zealand* (NZLC R34, 1996). "Treaties create binding obligations only as between signatory parties. Those states which have not signed such a treaty, but which wish to become a party to it, may have the right accorded under the treaty to accede or adhere to the text and thereby become bound by it. A state becoming a party to a multilateral convention may also be able to file reservations, indicating that it will not be bound by one or other of the provisions."

the assurances - if violated - would be without consequences. While that might hold true, there are special circumstances on the case-by-case basis, and the Requesting-State New Zealand is cooperating with.

In Kim's first judicial review, the Crown submitted if China were to breach the assurances it had guaranteed, then there would be grave consequences. The severe consequences relate directly to how China would continue its cooperation with Foreign-States when tackling the issue of retrieving its fugitives overseas. If an assurance is breached, then it would deter other States from accepting extradition requests so willingly.

In general, extradition treaties facilitate and create a general duty to extradite.²⁰⁶ The objective of these treaties, as viewed by the Law Commission and the International Law Commission is not only to develop and impose an obligation to extradite when the circumstances arise,²⁰⁷ but also be used to impose obligations on the Requesting-State. The exception as the International Law Commission states would most likely be the Requested-State's right to obtain assurances against torture and the death penalty. The extradition of nationals could be prohibited unless it was subject to the specified safeguards. Necessarily, this indicates the safeguards are diplomatic assurances obtained explicitly for the person sought.

What if a State actor, a Requesting-State, breaches the diplomatic assurances? Would a party to extradition treaty carry severe consequences for the Requesting-State's violation or breach? Article 60 of the Vienna Convention on Treaties states that the affected State who is a victim of the breach may suspend or terminate the extradition treaty. The threshold for suspending or terminating the treaty requires a material breach.²⁰⁸

4. Law Commission's position

In their report, the Law Commission preceded on the basis that extradition treaties would often not exist. Instead, the new Extradition Act would provide countries with the procedure and process for requesting extradition, regardless of their existing treaty relationship.²⁰⁹ While this research has no objections to that, it does have one concern

²⁰⁶ Final Report of the International Law Commission on the obligation to extradite or prosecute (aut dedere aut judicare) [2014] A/69/10 at 4.

²⁰⁷ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 26.

²⁰⁸ John K. Setear "Responses to Breach of a Treaty and Rationalist IR Theory: The Rules of Release and Remediation in the Law of Treaties and of State Responsibility" (1997) Virginia L Rev.

²⁰⁹ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 21.

with regards *ad hoc* extraditions (no treaty, with only the new Act to follow) compared to ex-ante (with treaty) when the legality of diplomatic assurances is involved.

The *ad hoc* extradition requests would give the Crown flexibility whether to hold the Requesting-State liable for a breach under public international law. As discussed earlier in Chapter 2, there exists the public international law principle of a unilateral declaration. For different reasons, the Crown might not want to have language within their *ad hoc* extraditions with the Requesting-State that would bind them under international law.

5. State to State dispute resolution procedure

It is commonplace for investment treaties to include dispute resolution related clauses,²¹⁰ where it would bring in state-to-state dispute resolution procedures to resolve a potential breach. But in extradition law, this procedure does not exist as a clause within extradition treaties. For example, there is no specific or implicit wording in the extradition treaty between the Government of Hong Kong and New Zealand that allows for such a procedure, although this is embedded in Article 66 of the Vienna Convention on the Law of Treaties. Unlike extradition, investment treaties allow domestic courts to adjudicate over investment-related issues since the parties to these treaties permit this.

This is unlike an extradition matter which involves the Foreign-States on an international level, where domestic courts would feel it would lack jurisdiction or is constrained by their domestic legislation. Instead, the ICJ would be an authority having jurisdiction over matters involving the Foreign-States. The proposal to resolve issues within a dispute resolution in the context of extradition was not supported by a report from the Institute of International Law which states that disputes concerning or arising from an extradition treaty should be submitted to for arbitration or judicial settlement, but the report said in particular, it should be referred to the International Court of Justice.²¹¹

When referring to the resolution within investment treaties, Professor McLachlan states:²¹²

[I]t will be the dispute resolution clause in the treaty itself which will delimit the extent of the matters which the tribunal is competent to decide.

²¹⁰ E.g. Office of the United States Trade Representative "U.S. Model Bilateral Investment Treaty" (2012) <<https://ustr.gov>>.

²¹¹ Karl Doehring "New Problems of Extradition" (1983) *The Institute of International Law* at 3.

²¹² Campbell McLachlan "Investment Treaties and General International Law" (2008) 57 *International and Comparative Law Quarterly* pp 361-401 at 370.

Could a similar approach to investment treaties help resolve state-to-state disputes, without having both parties resolving the matter in public before the International Court of Justice? A private dispute mechanism between the States could help preserve the comity of both States without disclosing issues that perhaps the offending State would feel uncomfortable to be disclosed publicly, although both States would have to agree to this. This might undermine the integrity of a treaty. Shifting from a private dispute resolution to a public one, if a violation occurs and requires the involvement of the ICJ, it would cause whatever violations to be publicly reported in the form of a judgment. Consequently, the judgment of the ICJ would not only hold the offending State accountable but reveal to the other States what has been breached by the Requesting-State. The submissions provided by the States would also be publicly available, which allows other States to view the perspective of the violating-State. This would undoubtedly have adverse impact on future extradition transactions with the offending State. The case analysis of *LaGrand (Germany v United States of America)*²¹³ demonstrates how the International Court adjourned over a State's breach of a Vienna Convention, albeit a Convention on Consular Relations and not the Law on Treaties.

6. How a breach of the Vienna Convention was mitigated

So far, there has yet to be a matter of extradition-treaty breach before the ICJ. However, since this section and the overarching concern of the research are relevant to a breach of treaty conventions, and specifically, diplomatic assurances, then the closest example of a breach of diplomatic assurances would be the breach of consular relations under the Vienna Convention on Consular Relations. The issue in *LaGrand* revolves around the failure by the US to issue effective consular communications with Germany prior to the execution of two German-nationals in Arizona, and therefore, in breach of Article 36 of the Vienna Convention of Consular Relations which requires the State who has arrested the foreign nationals, to inform the consular officials of their arrest. Germany submitted that had Article 36 been exercised properly, then it would have intervened in time to provide a persuasive mitigating case that would have likely prevented their executions.²¹⁴

LaGrand has three core issues relevant to the context of extradition treaties. First, the Court held it had jurisdiction to resolve disputes arising from the interpretation of the Vienna Convention of Consular Relations.²¹⁵ Second, the Court held a formal apology from the offending State is not appropriate in such circumstances (here, it was the breach

²¹³ *LaGrand (Germany v. United States of America)* (Judgement) [2001] ICJ Rep 466.

²¹⁴ At [71].

²¹⁵ Vienna Convention on the Law of Consular Relations 596 UNTS 261 (opened for signature 24 April 1963, entered into force 19 March 1967).

of Article 36).²¹⁶ The third issue is outside of the judgment of this case. While the Court was of the opinion that the US had violated Article 36 of the Convention, the US had a conflicting opinion on its application, particularly when applied by their domestic courts.²¹⁷

The Court also held it had jurisdiction to resolve disputes with regards to the interpretation of the Convention (Consular Relations). Therefore, it would be appropriate to assume that this Court also has jurisdiction over the resolution of disputes with regards to interpretations within the Vienna Convention of Treaties.²¹⁸

The second issue is that the Court held the issue of a formal apology from the US would not be sufficient if the victims had been subjected to prolonged detention, convicted and sentenced with severe sentences.²¹⁹ However, the Court went on to accept that steps taken by the US to ensure compliance of Article 36 on all levels, from federal, state to local would instead be accepted.²²⁰ The Court considered information provided by the offending State that showed “express commitment” to compliance in the future as a proper remedy instead of a formal State apology.²²¹

In relation to a breach of an extradition treaty, the ICJ, depending on the severity of the issue, could accept expressed commitments by the offending State to improve on the compliance of a certain treaty article. Ex-post extradition agreements, without the footnote of a treaty, might not be able to afford the victim State the same level of commitment to comply with the previously breached Article in the future.

The third issue is the ICJ’s interpretation of a treaty article is not considered as authority by domestic courts of the United States. John Quigley in *LaGrand: A Challenge to the U.S. Judiciary* states the Courts in the US have been reluctant to show deference to the ICJ, especially when it comes to reversing convictions where Federal Circuit Courts have rejected Article 36 claims. Furthermore, Article 36 does not require a judicial remedy even if an individual's right has been infringed upon, and if a remedy is available, it would only be required if the foreign national has been acquitted and he or she has received proper notification of Article 36.²²²

Although the Court directed the US to improve their compliance with Article 36, and accepted that the issue was a "procedural default rule" within the criminal procedure in

²¹⁶ At [63].

²¹⁷ John Quigley "LaGrand: A Challenge to the U.S. Judiciary" (2002) 27 Yale J. Int'l L. 435 at 436.

²¹⁸ *LaGrand*, above n 213, at [48].

²¹⁹ At [125].

²²⁰ At [123] & [124].

²²¹ At [124].

²²² John Quigley, above n 217, at 436.

the domestic courts, it does raise concerns whether the rulings of the ICJ and its interpretation of treaty articles are respected by the State Parties' Courts.

The substance of the correct application of Article 36 is not relevant to this research. Instead, the concern is the treatment by domestic Courts and therefore, the reference from such precedents that affect the decision of their Governments. If the US Courts have openly disagreed with the interpretation of the application of said articles, would this also be a likely scenario that courts in New Zealand or China might ignore the ICJ's principles and guidelines of applying articles within an extradition treaty?

7. Material breach

This chapter considers what constitutes a material breach of a treaty. Article 60(3)(b) of the Vienna Convention on the Law of Treaties states that a material breach is “The violation of a provision essential to the accomplishment of the object or purpose of the treaty.”²²³

Article 62 states what a fundamental change of circumstances is. It also frames what a change of circumstances may not invoke if the treaty establishes a boundary or the change is a result of a breach by a party invoking either an obligation to the treaty or an obligation owed to another treaty.²²⁴ Article 62 further reflects the doctrine of *rebus sic standibus*, Shaw states:²²⁵

The doctrine of *rebus sic standibus* is a principle in customary international law providing that where there has been a fundamental change of circumstances since an agreement was concluded, a party to that agreement may withdraw from or terminate it.

In *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction Phase)*, the International Court of Justice states with regards to fundamental change:²²⁶

International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.

In *Gabcíkovo-Nagymaros Danube Dam Project (Hungary v Slovakia)*, the Court further interpreted the application of Article 62, stating the fundamental change that resulted in

²²³ Vienna Convention on the Law of Treaties, above n 204, art 60(3)(b).

²²⁴ Article 62(1).

²²⁵ M Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 950.

²²⁶ *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction Phase)* [1973] ICJ Rep 3 at [36].

a material breach must have been unforeseen and the plea should only be applied in exceptional cases.²²⁷

Setear distinguishes the difference between material breach in both bilateral and multilateral treaties:²²⁸

With respect to bilateral treaties, a material breach is both necessary and sufficient to give the victim of that breach the option to release itself from all of its obligations under the breached treaty.

A material breach requires a significantly high threshold for a State to meet; this is to avoid any negligible or minor breaches that would undermine the foreign-diplomatic relationships. States could not function properly if they were to terminate a treaty based on minor breaches. However, there has been no established test as to what exactly constitutes a material breach. For example, could a series of the minor violations amount to a single material breach? Would one material breach resonate a termination of a treaty or would the victim State opt to consider the material breach could be rectified while continuing the treaty?

8. Suspension of the treaty

Before the termination of a treaty, the victim State would preferably look at suspending it first, giving the offending State an opportunity to rectify and mitigate its breach. Setear refers to Chinkin's statement in that if there is a material breach between parties to a treaty, then the party who has suffered may issue a suspension of performances until that breach has been rectified.²²⁹

[A]llows the injured party to suspend its own performance, presumably for the duration of the breach or of its consequences, upon a material breach by the other party. Suspension may be chosen as a method of persuading the other party to recommence or improve its own performance if the breaching party is deprived of the values it expected to achieve from the performance of the agreement, it may conclude that its own actions have become too costly.

This could be used as an instrument to allow the offending State to improve before the victim State resumes the treaty's performances. Perhaps, this could be the first available remedy the victim State could use if the offending State fails to rectify its material

²²⁷ *Gabcíkovo-Nagymaros Danube Dam Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7 at [104].

²²⁸ Setear, above n 208.

²²⁹ Setear, above n 208 referred to Christine Chinkin "Nonperformance of International Agreements" (1982) 17(3) *Tex Intl LJ* 387 at 482.

breach. The treaty could place a time-limit on the days the breach must be remedied before the victim State decides either to proceed the performances of the treaty or to terminate it entirely.

The option to terminate a treaty requires a material breach. If the Requesting-State such as China breaches the assurances it has given to New Zealand, then as the “victim” of this breach, namely New Zealand, can terminate its extradition treaty with China. But what are the actual consequences?

9. Adjudication by the International Court of Justice

First, in reference to the Responsibility of States for Internationally Wrongful Acts 2001, articles 40 and 41 makes reference to the consequences of breaching an obligation. The articles, as noted by Crawford in the Articles on Responsibility of States for Internationally Wrongful Acts when referring to Article 1, makes no specific distinction between *ad hoc* and treaty obligations, nor is the distinction made between bilateral and multilateral obligations.²³⁰ Therefore, this framework would apply to all treaty and non-treaty obligations.

Going back to the articles that apply to a breach, Article 40 involves the international responsibility that it is a serious breach by a State of it is related to an obligation from the peremptory norm of general international law. Human rights could be considered a subject of this norm under general international law. Article 40(2) defines the seriousness of this obligation if it involves a gross or systematic failure by the responsible State to fulfil the requirement. An example of this breach would be a State failing to adhere to the diplomatic assurances that would guarantee the monitoring of a person's human rights, or the failure of the Requesting-State to prevent the requested-person from being tortured.

Article 30 also obligates the offending State to cease the act of the breach:²³¹

[I]f the breach is continuing, the responsible State is under an obligation to cease its conduct (article 30, paragraph a) and, if circumstances so require, to offer appropriate assurances and guarantees of non-repetition (article 30, paragraph b). In addition, the internationally wrongful act entails for the responsible State the duty to make full reparation for the injury caused (article 31).

²³⁰ James Crawford *Draft Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, UN GAOR, LVI A/56/10 (2001) at 3.

²³¹ At 5.

Not only does the offending State have to cease the breach, but it must also take steps to mitigate it and offer full reparation for the injury. The last part is a compensation clause which effectively obligates the offending State to compensate the victim State. However, the wording is unclear as to whether the reparation would go to the State or to the actual victim (requested-person). It might be wise then, for the victim State to seek compensation from the offending State at this stage, rather than risk the victim to bring a claim against the Requested-State for compensation due to the breach of the Requesting-State. If reparation has already been sought between the States, the Crown could portion the compensation already awarded from the reparation claim to the victim.

The Requesting-State is also required to end any serious breaches under Article 41:²³²

Particular consequences of a serious breach of an obligation under this chapter 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

If the offending State refuses to mitigate these breaches, and if it is under the footing of breaching an agreement within an extradition treaty (human rights violation and a violation against the diplomatic assurances afforded), then the victim State could use these grounds to take a claim to the ICJ against the offending State.

Second, the termination of a treaty would mean any benefits open to the Chinese, such as any “streamlined” approach New Zealand has offered to a Requesting-State would be closed. If a backed-warrant procedure is part of the treaty, this option would no longer be available since it is only given to a treaty party. One of the advantages of a backed-warrant process reserved for treaty-bound designated countries as opposed to *ad hoc* requests is that it removes the evidential inquiry, allowing the process to be more straightforward.²³³ Under the Extradition Act,²³⁴ if China becomes a treaty-partner and a designated country, they may proceed in extradition proceedings without referral to the Minister of Justice.²³⁵ If a treaty is terminated because of a breach, then China will have to revert to providing the decision-maker sufficient evidence to make a case for surrender.

10. Legality of assurances

²³² *Responsibility of States for Internationally Wrongful Acts* GA Res 56/83, A/56/49 (2001).

²³³ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 14. See footnote 28 of the Commission’s report.

²³⁴ Extradition Act 1999, ss 13–16.

²³⁵ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 51.

A conflict exists between the Government's desire to want to use non-strict legal assurances with the Requesting-State and the desire of the Courts, but also, conflict with this thesis' view that undertakings can be legally enforceable.

This cannot necessarily be resolved, because the very nature of diplomatic assurances do not fit the norm of international instruments (e.g. treaties and unilateral declarations) because they are not intended to be binding. Obviously, this has some effect on the public international law level but perhaps, more importantly, the legal effect that the domestic Courts might give to them. There could be a contradiction in the Court being asked to give effect to something that is not legal against the precedence and norm set out by public international law, or for that matter, its domestic laws.

The Courts could look at the reality of the statuses of diplomatic assurances, and that reality might be more effective than having legal issues adjudicated by the ICJ. However, the option of having the ICJ adjudicate over an assurance breach under a treaty, therefore, involving the Vienna Convention, would appear to be a far more attractive judicial forum to resolve such breaches. It not only allows the States' opinions on the nature of assurances to be available publicly but also allows the continued development of extradition or deportation related laws in the context of treaty breached assurances.

11. Summary

An extradition treaty might be able to hold both the Requesting and Requested-State accountable, instead of *ad hoc* agreements that gamble on whether it would be considered a binding unilateral declaration. While a unilateral declaration is possible, it is not entirely clear how enforceable it is. It would depend much on the position the States have taken, and whether they meet the guiding principles. A treaty, on the other hand, might allow the adjudication on an international platform, such as the ICJ, be made available to resolve issues of treaty breaches and give directions leading to resolutions.

6

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1. Introduction

If the Attorney-General replaces the Minister of Justice as the decision-maker for extradition surrenders, how will this play out? Will changing the decision-maker improve the quality of obtaining diplomatic assurances, assessment of it and the decision of surrendering the requested-persons? Are Crown Counsel adequately equipped and experienced to negotiate with Foreign-States? What are the other potential problems the central authority might face and are there any solutions to counter them? The second part of the chapter discusses the current role of the judiciary and the impact the treaty system might have in addressing these concerns. This relates to whether New Zealand should use diplomatic assurances. Whether the judiciary should be involved when evaluating the fitness of the Requesting-State for human rights assurances and whether a treaty would mitigate concerns of breaching assurances will be discussed. The theory and practicality of the role of the Courts having a more central role in evaluating the fitness of the requesting country before extradition. This chapter is essential as it analyses how the decision-making by the Central Authority and Judiciary can be carried out and enforced in practice both ex-ante and ex-post in a decision to surrender. The thesis continues to use Mainland China as an example of a Requesting-State.

2. Central Authority

In its administrative function, a Central Authority should continue to coordinate its experts when deciding whether or not to accept the diplomatic assurances. Currently, the Crown can rely on research conducted by MFAT with the conditions of the nine New Zealand citizens currently detained in China.²³⁶ It should act not just as a coordinator but also function as an administrative body to assess whether the assurances provided by the Requesting-State can legitimately be carried out. To properly analyse the suitability and role of the Central Authority, it is essential for the Authority to perform functions both before and after a request for surrender, and when.

How would the Central Authority evaluate the Requesting-State's assurances?

3. Assessing diplomatic assurances (pre-extradition)

²³⁶ *Kim* (First judicial review decision), above n 38, at [220]. “MFAT has advised that there are currently nine NZ citizens detained in Chinese prisons or detention facilities. NZ provides active consular assistance, which includes monitoring of health and well-being, liaising with family members and ensuring access to legal advice. NZ officials also monitor detainees through visits, and by attending hearings at key times.”

How can the Central Authority improve its evaluations before the decision to order a surrender? Investigations by the Authority would need to deal directly with how the requesting country meets the fitness and criteria to adhere to the monitoring and due process. The Central Authority would need to see and evaluate what is happening for example in the Chinese legal system and the human rights' issues surrounding prisoners and especially post-extradited prisoners first. If that is properly established, then the negotiations of assurances would be based on the Central Authority's reports and evaluations instead of relying on third-party reports. Potentially, there will be an issue of the Requesting-State masking any existing problems with deception. However, the purpose is to ensure the third-party reports, and the assurances given by the Chinese are honoured. This also allows the Central-Authority to view the problems of a previous surrender (such as Lai), and see the improvement it needs and whether such monitoring mechanisms work.

In the post-deportation matter of *Lai*²³⁷, the Canadian Government rejected continuing their responsibility to monitor him after his trial in China:²³⁸

Ottawa has argued that its responsibility ended in May, 2012, when Mr. Lai was sentenced to life in prison. In an e-mail sent to the family in 2013, the Canadian embassy in Beijing said it had only been given the right to monitor Mr. Lai before he went to trial.

Would this information that Lai's monitoring mechanisms were no longer a responsibility of Canada, have been available to MFAT or MOJ when recommending assurance mechanisms to the Minister of Justice? Why was there no specific mention of assurances obtained by the Ministry post-trial in Kim's judicial reviews? After the public revelation of Lai's post-trial conditions, the decision-maker must ensure that the monitoring procedures would continue after the trial or sentencing of the requested person. The current set of assurances for *Kim*²³⁹ lacks post-sentencing monitoring:²⁴⁰

If the ultimate outcome is that Mr Kim is tried, convicted, and sentenced to imprisonment in China, New Zealand consular and diplomatic staff monitoring would extend to seeing that the authorities appropriately consider parole or commutation of his sentence at the earliest opportunity.

While the above quote does not ignore the issue directly, the summary by Mallon J is vague about specific and detailed post-monitoring assurances. The language suggests

²³⁷ *Lai v. Canada (Citizenship and Immigration)*, [2013] 2 F.C.R. 56, 2011 FC 915, [2013] 2 R.C.F. 56, [2011] F.C.J. No. 1086, [2011] A.C.F. no 1086.

²³⁸ Nathan Vanderklippe, above n 42.

²³⁹ *Kim* (Second judicial review decision), above n 38.

²⁴⁰ At [152].

the monitoring staff would extend their work into ensuring the Chinese authorities appropriately consider parole or commutation of his sentence, and not extend to proactively monitoring Kim’s post-sentence treatments.²⁴¹

Monitoring should also continue to the conclusion of the matter including, if necessary, ensuring that Mr Kim is considered for release at the first appropriate opportunity. If the outcome is that Mr Kim is not required to stand trial or he is found not guilty, it can be expected that New Zealand will ensure his early return.

The reference to monitoring post-sentencing seems opaque after the conclusion to the matter; it is unclear whether the Courts implied the sentencing was the conclusion of the matter or the end of his imprisonment and did not explicitly state the monitoring mechanisms for post-sentencing. Specifically, post-sentencing monitoring is assumed to be reduced after the trial:²⁴²

[M]onitoring take place no less than every 48 hours during the investigation phase (and daily if that is needed) and no less than once every 15 days until the trial.

However, a reasonable conclusion could be drawn that MFAT will continue to provide some monitoring and consular support to Kim even after his trial, as suggested by the briefing paper provided in the first judicial review of Kim.²⁴³ The issue here is that there appears to lack specific reference to monitoring mechanisms post-sentencing in the judgments referral to the briefing notes. If Kim’s post-trial monitoring are similar to those provided to the other nine citizens detained in China, would it be considered an effective monitoring mechanism, especially when one of the detainees previously complained about his treatment?²⁴⁴

Despite the monitoring provided by New Zealand officials, it seems that in one case a complaint was made only following the detainee’s return from the PRC. It is not known from the information provided whether that complaint had validity. It is also not clear if the assistance referred to in the briefing paper is proactively provided or whether it depends on a request from the detainee.²⁴⁵ ... In one case, a NZer made a complaint of mistreatment and forced labour to the media following release and return to NZ. A formal complaint was not made to consular officials.²⁴⁶

²⁴¹ At [156].

²⁴² At [155].

²⁴³ At [220].

²⁴⁴ “In one case, a NZer made a complaint of mistreatment and forced labour to the media following release and return to NZ. A formal complaint was not made to consular officials.” *Kim* (First judicial review decision), above n 38, at [220].

²⁴⁵ At [221].

²⁴⁶ Referring to the briefing paper from *Kim* (First judicial review decision), above n 38, at [220].

First, there is the issue of the safeguards that were in place for monitoring the previously detained New Zealand citizen who complained about mistreatment and forced labour. Can it be certain that monitoring mechanisms would prevent this or would be an upgrade from the current monitoring mechanisms over the current nine New Zealand citizens detained in China? In fairness, it would be reasonable to conclude that Kim's assurances have been negotiated carefully due to the significance of his case being held as the first extradition matter between the two States. Second, what were the reasons behind the formal complaint not being laid? Was it due to fear of adverse repercussions? That means if there was a legitimate issue to complain, even if there was an avenue for the detainee to file a formal complaint, the mechanism is pointless because the person is afraid that reporting would result in undesirable repercussions. However, Kim's case is of a much more high-profile nature and if we follow the guiding principles in *Othman* (discussed in Chapter 2.13) then this concern should be mitigated.

A reference to the briefing paper about bilateral relationships between the two States was made:²⁴⁷

MFAT advises that NZ and the PRC have a long-standing diplomatic relationship (since 1972) and frequent contact between leaders, ministers and officials across the spectrum of government affairs, complemented by strong and fast growing people-to-people links. NZ and the PRC have had a number of world "first", including NZ being the first developed country to conclude a Free Trade Agreement with the PRC.

Hence, going by the briefing paper provided to the Minister, it is also relevant that if there is a material breach in the extradition treaty between the States, it could affect other agreements the States already have.

4. Coordinating (post-extradition):

As it is proposed in Chapter 2, the Central Authority needs the involvement and cooperation of different branches and individuals to assist in the monitoring of the requested person post-extradition. Annual reporting will help update the Solicitor-General as to whether the Requested-State, such as China, has continued to honour the diplomatic assurances. If there are breaches, then this would be highlighted both to the public and to the Central Authority, affecting future extradition agreements with the Chinese Government. The Solicitor-General's office alone cannot undertake all the tasks of monitoring and maintaining continuous evaluations and reports of the requested person's conditions after extradition and post-trial and sentencing. That requires the strengths and experience of other public branches and individuals for post-extradition

²⁴⁷

At [227].

monitoring and reporting. This will also assist pre-extradition negotiations in future extradition requests with the Chinese or other States.

a. Appointing a Special Counsel (During the extradition Court stage)

Should a special counsel be appointed to review the evidence? In the United Kingdom, special counsel are appointed to act independently from both sides and would maintain their independence and privacy of the evidence.²⁴⁸ This would ensure the principles of comity and mutual respect between the States be kept intact but should only be used as a last resort. The reason for not allowing defence counsel to review such evidence is likely because it would place them in an awkward position. They might be conflicted concerning legal-ethics with the sensitive information they examine if the material turns out to be favourable to their client's case. The scope and use of special counsel were discussed in *Bahmanzadeh v. The United Kingdom*²⁴⁹ under the grounds of national security.

Although the special counsel would be seen as being appointed for the particular individual, the Court noted he or she should not be responsible for that individual under any client-lawyer rules.²⁵⁰ The obligation to keep confidential information which cannot be disclosed ties strongly with the principle of comity between States. However, if special counsel or closed courts are permitted, this could return to the issue of lacking transparency. At least, the examination of evidence has been open to another third party which should heighten the legitimacy of it.

b. Ombudsman investigators (post-extradition)

As proposed in Chapter 2, there needs to be an independent monitoring body outside the Ministerial departments, who has the autonomy to conduct its own reporting process and has the experience to investigate.

²⁴⁸ See also the judgment from the European Court of Human Rights - Applications nos 6610/09 and 326/12 Salajuddin AMIN against the United Kingdom and Rangzieb AHMED against the United Kingdom lodged on 21 January 2009 and 21 December 2011 respectively. At point number 4 "Special Counsel" on pg 15. The judgment also referred to the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") and the Northern Ireland Act 1998 ("the 1998 Act") and the case of Jasper v The United Kingdom. *Bahmanzadeh v. The United Kingdom* - 35752/13 - Communicated Case [2014] ECHR 1050 (22 September 2014). Also cited from <www.bailii.org/eu/cases/ECHR/2014/1050.html>

²⁴⁹ *Bahmanzadeh v The United Kingdom* (2014) ECHR 1050.

²⁵⁰ See also *R v H (Appellant)* (2003) (On Appeal from the Court of Appeal (Criminal Division)) *Regina v. C (Appellant)* (On Appeal from the Court of Appeal (Criminal Division))(Conjoined Appeals) at 22. <www.bailii.org/uk/cases/UKHL/2004/3.html>.

One body that already carries out an investigative role in New Zealand prisons is the Office of the Ombudsman. The Ombudsman investigators have a part to investigate New Zealand prisons under the Crimes of Torture Act 1989.²⁵¹ It is also fitting that the Crimes of Torture Act binds New Zealand's human rights obligations under the ratified Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.²⁵²

The idea of appointing Ombudsman investigators offshore is not a complete novelty from the proposal of appointing NGOs to monitor the conditions of the requested-person. In the Anderson and Walker's [2017] Report presented to the UK Parliament,²⁵³ it advanced the proposal that independent monitoring would be necessary if the requested-person's exposure to ill-treatment would be high, especially if the verification process was not robust enough to satisfy the legal tests. The report suggested in such circumstances, the ideal monitoring body would be a reputable international NGO.²⁵⁴ However, NGOs, in general, are unwilling to be involved, and the report proposed the best body would be a national NGO with a reputation for independence and impartiality, while not overly reliant on the finances of the Requested-State.²⁵⁵ The Ombudsman fits into the lacuna of a monitoring body from the Requested-State that is independent to ensure ongoing compliance with the assurances while also remaining impartial.²⁵⁶

Could the Ombudsman use their same investigative expertise for foreign prisoners, as they have done so for domestic prisons? The investigators can conduct a yearly report and submit it to Cabinet for review. With experience investigating domestic prisons, the Ombudsman investigators would prove beneficial for assessing overseas prisons. The issue should not be about whether off-shore prisons should be examined differently with a different threshold and criteria compared to domestic prisons. Instead, it should be about the conditions in which the surrendered-person is kept in. Conditions of the off-shore prisons should not be drastically different because of the assurances the States agreed on. In Kim's extradition assurances, the Justice Minister negotiated that he would receive monitoring, proper medical treatment if necessary and would not be tortured and

²⁵¹ E.g. Peter Boshier *Report on an unannounced inspection of Corrections Service Rolleston Prison Under the Crimes of Torture Act 1989* (Office of the Ombudsman, April 2016). See also Crimes of Torture Act 1989 and Craig McCulloch "Corrections breached torture conventions - Ombudsman" (1 March 2017) Radio New Zealand <www.radionz.co.nz>.

²⁵² Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (opened for signature 18 December 2002, entered into force 22 June 2006).

²⁵³ David Anderson QC and Clive Walker QC "Deportation with Assurances" (July 2017) United Kingdom Government Publications <www.gov.uk/government/publications> at 39.

²⁵⁴ At 39.

²⁵⁵ At 39.

²⁵⁶ United Kingdom the Select Committee on Extradition Law "Extradition: UK Law and Practice" HL paper 126 (10 March 2015) at 78.

given the death penalty. Essentially, these guidelines should not make any prison-condition investigations different from New Zealand's prisons.

The key differences are:

- 1) the reports would focus on one person (the surrendered person) specifically instead of a whole prison;²⁵⁷
- 2) they are investigating off-shore and would have restricted access to prisons to conduct their investigation;²⁵⁸ and
- 3) the Crimes of Torture Act does not extend to overseas prisons, but the investigators would be utilising their skill set and experience in investigating inhuman treatment, ill-treatment and torture for the extradited-person. They will also be following the mandate set by the OHCHR.

If the negotiations between the States allow this, the Ombudsman would be able to carry out their tasks by having a hybrid system, combining monitoring and investigative into one, but only if the Foreign-State would allow it. This needs to be negotiated firmly by the Crown and even better, in the treaty negotiation stage. Primarily, their investigative reports would help frame a better picture as to whether the post-extradition assurances have been honoured. The primary concern is timing. How often should the investigators conduct their investigations? If the person sought receives a life sentence, would this mean an inquiry every year?

Although the Ombudsman investigators would act in an independent capacity when conducting their investigation and report, it would be preferable if they liaise with the Solicitor-General on their findings. This is because they will function as investigators, not within a domestic prison, but an offshore facility which has imprisoned a person that New Zealand has agreed to surrender. Hence, it is essential that they communicate their findings effectively to the Central Authority. There might be a more concrete case for the Ombudsman to be involved if the imprisoned person is a resident or citizen of New Zealand. In the past and even to this day, the Ombudsman continues to be a specialist reporting-investigator of New Zealand prisons.²⁵⁹ This has inevitably placed the

²⁵⁷ The Ombudsman has investigated prisons throughout New Zealand and continues to do so under the Crimes of Torture Act 1989, reporting their findings to Parliament and the public.

²⁵⁸ Although an agreement could be made in the assurances that the Ombudsman be given wider flexibility to visit the sought-after person freely without being restricted by "reasonableness". The word "reasonable" is often used in diplomatic assurances. The danger is that it gives the Requesting-State discretion to delay any requests for whatever reason potentially. See the assurances in *Lai v Canada*, above n 234.

²⁵⁹ One of the key advantages of the Ombudsman's investigative functions is the element of surprise in unannounced visits.

Government in some form of accountability to improve on the human rights issues they are currently facing.

Although MFAT already has consulate officials that provide regular visits,²⁶⁰ the inclusion of investigators with experience in fact-finding and reporting to the Parliament, adds an extra layer of assurance-monitoring that the consulate officials might have missed. Alternatively, it could be a solution for MFAT to appoint ex-Ombudsman officials to be their consulates for off-shore prison visits. However, this would limit the effectiveness of what the Ombudsman brings.

The cost of involving a body such as the Ombudsman would be expensive, and that is why both States will need to address how the costs will be portioned, especially if the monitoring involves life-imprisonment terms and would require continuous reportings. This could be negotiated in the treaty formation stage.

i. How would the foreign-State (Requesting-State) accept the Ombudsman?

The Ombudsman only has jurisdiction on conducting investigations domestically within New Zealand. Only through the assistance of the Central Authority and Ministry of Foreign Affairs and Trade during the diplomatic negotiation stage, might the Ombudsman be included as part of a monitoring mechanism and party. This is perhaps one of the most crucial aspects since the overseas Government would likely oppose such an investigative body operating on their soil. Therefore, the Central Authority must ensure the negotiations to inclusion of the Ombudsman are successful. If the Requesting-State refuses to allow the Ombudsman to visit after it has been accepted as part of the assurances, then it may amount to a breach.

While investigating domestic prison facilities might give them an unannounced visitation advantage, preventing prison wardens from “preparing” for an official visit, an international prison facility visit would not give the Ombudsman such an advantage. Any visits would notify the Chinese Immigration authorities, and it would be customary as per international state-to-state relationship to notify the Foreign-State of a visit from a New Zealand representative.

The Ombudsmen can report straight to Parliament of their findings. This allows great transparency especially in a parliamentary debate where the Government and the opposition parties may find new grounds to allow or disallow extraditions to a particular

²⁶⁰ *Kim* (First judicial review decision), above n 38, at [220]. “NZ provides active consular assistance, which includes monitoring of health and well-being, liaising with family members and ensuring access to legal advice. NZ officials also monitor detainees through visits, and by attending hearings at key times.”

Foreign-State when the topic is publicly available for parliamentary debate. Diplomatically, it would be difficult for China to allow the Ombudsman to conduct their work, with reports highlighting the problems of the requested-person's conditions. Beijing has in the past rejected the negative findings of Special Rapporteurs²⁶¹ and a similar report made by the Ombudsman might damage the relationship between the two States especially when their reports are known to be candid, in conflict with the Crown, and not abridged with diplomacy in mind. That is why the Ombudsman works so well in New Zealand. However, it might very well be that the Ombudsman's report could help shape future extraditions with China if their reports of the requested persons' conditions are favourable and that the Requesting-State has kept their assurances.

c. Involvement of United Nation's Special Rapporteurs

The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was created by the United Nations Commission on Human Rights. The Commission decided to appoint an independent expert to investigate, examine and assess issues with regards to torture. Their investigations covered prison facilities, government detention facilities, refugee camps, and areas where torture or inhumane treatment is prevalent. A solution to additional monitoring could be to submit requests to the Special Rapporteurs to visit the extradited person's imprisonment conditions aside from their general investigative visits on torture and inhumane treatment:²⁶²

Special Rapporteurs have various functions. For example, they undertake official country visits, intervene with governments on cases of human rights violations and carry out studies. Some are mandated to focus on a particular country, while others have a thematic brief, for example, the Working Group on arbitrary detention, or the Special Rapporteur on torture.

However, the possibility of having a particular monitoring arrangement would be difficult if it is not under a multilateral approach. Alternatively, as suggested previously, employing former United Nations Special Rapporteurs on visits for extradited persons' imprisonment conditions. In essence, they will be a third-party investigator employed by the New Zealand Government to conduct reports for monitoring purposes. In reality, Special Rapporteurs act as international Ombudsman who possess an investigative and reporting function.

However, even if the Requesting-State (China) agrees to visitations by the Special Rapporteurs or former Rapporteurs, it does not mean they will not be critical of the

²⁶¹ Stephanie Nebehay "China accuses U.N. rights envoy of 'meddling' in its judiciary" (9 June 2017) Reuters <www.reuters.com>.

²⁶² "We the Peoples" [2006] NZLJ 50.

Rapporteurs' findings. In a recent visit by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Alston] made a plea for the release of a Chinese lawyer Jiang Tianyong. The Chinese Government was highly critical of his report and states he was overstepping into China's judicial sovereignty.²⁶³ Although it was understandable how any Government would be dissatisfied with an investigator being critical of their State's judiciary. Criticisms from States against rapporteurs' reports are not uncommon, but visitations by the Rapporteur would help report on any inconsistency with the assurances promised by the Requesting-State to the requested. It still acts as an extra layer of protection. If regular visits by former or current Rapporteurs can be included as part of the assurances, then this would efficiently fulfill any human rights obligation New Zealand has as a Requested-State.

This is a problematic addition to supplement into the monitoring-assurances.²⁶⁴ International monitoring bodies are not allowed access to prisons in China.²⁶⁵ It was not disclosed in *Kim* whether the Minister had accepted the blockade of experienced international monitors without challenge, or had pushed for the addition of international monitors but had failed. Ultimately, the Foreign-States have to decide whether to accept these assurances. However, it is up to diplomatic discussions whether the Requesting-State should allow such assurances in order to have the requested person extradited. With regards to allowing international monitors, the Court points out this information was open to the Minister and she accepted the assurances provided was already sufficient. Therefore, if the Central Authority is to become the decision-maker, it is uncertain whether they would push for such an assurance or if it is deemed necessary. While China does not ban Rapporteurs from providing investigative visits, it is uncertain if they will allow visits by ex-Rapporteurs as they are no longer officials of the UN. If the New Zealand Government employs former Rapporteurs for monitoring, they should not be considered an international body, but instead, a representative of the Requested-State.

5. Domestic v Foreign expectations

There are differences between domestic and foreign expectations. For example, the concept of an Ombudsman is relatively new to Mainland China.²⁶⁶ However, it does exist in Hong Kong where the Office of the Ombudsman was established under the

²⁶³ Stephanie Nebehay "China accuses U.N. rights envoy of 'meddling' in its judiciary" (9 June 2017) Reuters <www.reuters.com>.

²⁶⁴ "The fact that experienced international monitors are not allowed to access prisons in China..." This did not imply that UN Special Rapporteurs were not allowed, but rather, other non-official delegates. *Kim* (Second judicial review decision) above n 38, at [63].

²⁶⁵ *Kim* (Second judicial review decision) above n 38, at [63].

²⁶⁶ Although a financial Ombudsman was proposed in 2013 by the China Securities Regulatory Commission (CSRC).

Common Law system in 1989 and continues to operate after the Chinese handover.²⁶⁷ For other issues, such as fair-trial and due process, it might not be realistic to have an observer present during the trial and have unrestricted access to every part of the trial and sentencing. Realistically, a foreign Government might not accept these conditions unless set out by an agreed treaty.

There is only so much the laws and recommendations of the Requested-State could make, but ultimately, many of these negotiations and decisions bend to the essence of diplomatic necessity and the benefit of both States.

6. Summary

The above proposals would greatly help the Central Authority in evaluating the Requesting-State's fitness for fair trials and keeping their assurances. Each of the proposed personnel with their designated tasks helps to formulate an independent report that would assist the Authority in making their decision. The Central Authority is supposed to have unbiased reports based on facts before deciding to surrender someone, and the above proposals provide a reliable safeguard for that.

6.2 Can the Courts play a more central role?

7. The limited scope of judicial reviews

The problem with judicial reviews being used to review Ministerial decisions to surrender is that they are constrained. They do not touch upon the issues of human rights effectively, nor evaluate the fitness of the Requesting-State's human rights record. Essentially, judicial reviews only allow the Courts to review whether or not the decision-maker exercises their statutory-function correctly before making a decision. If the Courts are satisfied that the decision-maker did take the appropriate steps in coming to his or her conclusion, then that is effectively the end of an appeal.

In Kim's first judicial review, Mallon J stressed that although human rights cases were important, judicial reviews were simply too limited in scope to assess those issues, but instead focuses on how the Minister exercised her power.²⁶⁸ That is because,

²⁶⁷ The Office of Ombudsman in Hong Kong (S.A.R) was established under the Ombudsman Ordinance in 1989, under Hong Kong (U.K).

²⁶⁸ *Kim* (First judicial review decision), above n 38, at [7].

jurisdictionally, a judicial review is different in scope compared to an appeal in the point of law:²⁶⁹

An appeal exists when a statute provides that a decision can be appealed to a court. In an appeal a judge will more clearly review the merits of the earlier decision... Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

In her first judicial review decision, Mallon J stated the limits of her jurisdiction in judicial review.²⁷⁰ She states judicial review is an area where the Courts are required to closely scrutinise the Minister's exercise of power when reaching her decision to surrender.²⁷¹ Deference should still be shown when reviewing the Minister's decision but in the context of extradition where human rights issues are involved, the Court is required to ensure the decision has been reached with sufficient evidence and has been fully justified.²⁷² Comparing this to an appeal, where deference does not need to be shown of a lower Court's decision.²⁷³

In Kim's second judicial review, the Court states the unreasonableness ground of review is a backstop check on the lawful exercise of power by the Minister.²⁷⁴ However, this backstop check is limited to assessing the proper process the Minister went through if a reasonable decision-maker would not have made the decision. That is because "different reasonable minds can make different reasonable decisions" and states the Court could not substitute its conclusion for the Minister.²⁷⁵ The scope of the judiciary's check on the Minister's decision is limited to a backstop check. The reality is that the High Court would not be willing to undertake a *de novo* evaluation of human rights if it does not have the jurisdiction to do so. Perhaps the Court could do better in being entrusted with a role that allows them to see and examine the merits of whether the assurances should be accepted, and not be limited to assessing if the decision-maker exercised his or her

²⁶⁹ New Zealand Law Society Continuing Legal Education "What is Judicial Review?" <www.lawyerseducation.co.nz> at 2. The PDF can be viewed at: www.lawyerseducation.co.nz/site/nzlaw/files/2010%20Courses/JRW10%20Book%20Introduction.pdf

²⁷⁰ *Kim* [First judicial review decision], above n 38, at [7].

²⁷¹ At [7].

²⁷² At [7].

²⁷³ "There is usually no "deference" accorded to the decision being appealed from." See New Zealand Law Society Continuing Legal Education "What is Judicial Review?" <www.lawyerseducation.co.nz>, above n 269, at 2 referring to *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

²⁷⁴ *Kim* (Second judicial review decision) above n 38, at [19].

²⁷⁵ At [20].

powers lawfully with the information that was reasonably open before a decision is made.

Mallon J stated:²⁷⁶

It is a decision for the Minister, not the court, whether New Zealand's commitment to international obligations is better served by seeking assurances and ensuring they are adhered to, or by declining to extradite a person until China's commitment to the prohibition on torture is demonstrated.

Mallon J's comments highlights that the judiciary's scope is limited in allowing the seeking of assurances to be accepted, since Parliament entrusts this duty to the Minister²⁷⁷ and taking on a *de novo* approach would be outside her prerogative. However, if Courts are allowed to evaluate the fitness of the Requesting-State's human rights record and whether the assurances are indeed reliable, it would shift the judiciary into a more decision-making role. The Courts can take into consideration the application of international conventions New Zealand is a party to in the evaluation of the extradition request. In the United Kingdom, the Courts have this jurisdiction under the Category Two extradition model.²⁷⁸

At the extradition hearing, the judge must decide a number of issues: ... whether the extradition would be compatible with the person's rights under the European Convention on Human Rights.

More often than not, when the Court finally addresses such issues, it is under the platform of a judicial review hearing where the Courts do not take on the same approach of considering whether the extradition would be compatible with the person's rights under these conventions and legislation. By that stage, a judicial review would be an ineffective avenue to target the issues of whether the assurances provided are indeed realisable paired with the human rights record of the Requesting-State.

The new Extradition Act should afford the High Court a particular function of evaluating whether the Requesting-State's extradition request would be compatible with the human rights conventions and the Bill of Rights Act.

The Law Commission proposed that the Courts need to be satisfied that the assurances it gets are reliable and efficient. The evidence related to diplomatic assurances must both be from the Government and the requested person as to why will and will not be

²⁷⁶ At [25].

²⁷⁷ *Kim* (First judicial review decision), above n 38, at [7].

²⁷⁸ Crown Prosecution Service "Extradition" <www.cps.gov.uk>.

functional. The evidence must be presented directly in the Courts and will not be under the realm of a judicial review. Currently, one can only judicially review the Minister's decision and examine why the Minister was persuaded to accept the assurances before allowing the extradition request to proceed. This will be different to judicial reviews because it will not be restricted to whether the information was reasonably open to the decision-maker before a decision is made, but rather if the assurances themselves are sufficient despite the legal climate of the Requesting-State.

a) Quality of the Challenge

One of the problems with extradition is that there is the quality of challenging an extradition request. The problem, as seen with *Kim*, is that the quality of the challenge in judicial review is substantially weak from an appeals point of view. The Courts are limited to review the procedural steps taken before the decision-maker makes their decision. Therefore, it would be inherently more useful and significant to look at the nature of the actual diplomatic-assurance related evidence. Such as the evidence as to why the Crown and the Courts should trust and rely on the assurances of the Requesting-State.

Perhaps, it would be more appropriate for a Court to be given statutory jurisdiction to allow the evidence related to diplomatic assurances to be tested. For example, how were the assurances obtained, why was the decision maker satisfied that the assurances are reliable instead of addressing whether the information was open to the Minister before reaching a decision²⁷⁹, what other human rights violations had occurred in the State and what effect did that have on the decision-makers final decision to surrender. But is this compatible with the way Courts interpret their role in foreign relations law? Here, the relevant comparison is with judicial assessments of foreign legal systems in forum stay applications in civil cases.

b) Disclosure of diplomatic assurance-related evidence

Disclosure of evidence in an extradition related review or hearing is in principle, contrary to expediting an extradition procedure as it is not designed to determine a

²⁷⁹ See *Kim* (Second judicial review decision), above n 38, at [20]. "The Court cannot substitute its own view of the conclusion which should have been drawn from those matters where the conclusion reached by the decision maker is one that is reasonably open to her." It is the nature of judicial review to assess what information was available or "open" to the decision-maker, not that the decision-maker should have come to a different conclusion. Therefore, it is challenging for any defendant to make a case that the assurances are unreliable or insufficient if the Court is, justifiably and within their jurisdiction of a judicial review, only concerned about what information was open to the decision-maker.

person's guilt or innocence.²⁸⁰ However, the disclosure of diplomatic assurance-related evidence needs to be differentiated from evidence pertaining to the requested-person having a case to answer. These are two entirely different disclosures and should be kept separate. That is not to say that testing evidence related to diplomatic assurances will not bring its own delay to the proceedings.

Therefore, procedures to allow disclosure of evidence should only be allowed if it is limited to how the diplomatic assurances have been negotiated and the reliability of the Requesting-State from carrying them out. The difficulty is, how is the Court going to determine what evidence should be disclosed for examining? In practice, a Court's review of the diplomatic assurances the Central Authority had accepted would place officials in a difficult situation. Officials are unlikely to want to testify what assurances they feel are reliable and would likely label any cross-examination by defence counsel as fishing expeditions. Evidence related to the requested person's offence committed offshore should have no bearing here as it would turn the extradition hearing into a full substantial hearing. If the new Court format of allowing diplomatic assurance-related evidence to be tested is not permitted, then the requested person may still cross-examine expert witnesses in judicial review, provided the tests have been met.

In the case of *Charter Holdings Ltd v Commissioner of Inland Revenue*,²⁸¹ the issue was whether cross-examination was permitted in a judicial review. Charter Holdings Limited wished to cross-examine an Inland Revenue staff member with regards to the affidavit of her decision. Moore J in the High Court dismissed the application and reaffirmed three tests that a cross-examination application in a judicial review must meet:²⁸²

- 1) The first test is that the Court must be satisfied that the evidence from cross-examination will be essential to resolve the matter before the Court.²⁸³
- 2) The second test is that cross-examination will only be permitted where there is a potential for prejudice if the evidence is not tested.²⁸⁴

²⁸⁰ Law Commission *Extradition* (NZLC IP37, 2016), above n 7.

²⁸¹ *Charter Holdings Ltd v Commissioner of Inland Revenue* [2015] NZHC 1506, [2015] NZAR 1506.

²⁸² *Charter Holdings Ltd*, above n 281.

²⁸³ *Charter Holdings Ltd*, at [15] & [16]; and *Geary v Psychologists Board* [2009] NZCA 134, [2009] NZAR 338.

²⁸⁴ *Charter Holdings Ltd*, at [15] & [20]; and *Wilson v White* [2005] 1 NZLR 189 (CA).

- 3) The final test is that elements of a fishing expedition within the process of any cross-examination are forbidden.²⁸⁵ Therefore, the requested person must know precisely what to look for before an application.²⁸⁶

The tests to allow cross-examinations in judicial review, at least from the principles reaffirmed by *Charter*²⁸⁷ is that without the cross-examination, the proceedings would lack fairness in its disposition and materially affect the outcome. If the requested-person could establish the three tests have been met that the evidence given under cross-examination would have changed the result of the surrender based on the satisfaction of the assurances, then there could be a narrow scope for the Minister's officials to provide assurance related evidence in judicial review proceedings. However, *Charter Holdings* is a case that deals with domestic matters and not issues relating to assurances provided by a Foreign-State. Whether the Courts are likely to apply the same tests for an extradition related review proceedings are yet to be seen.

Should the new Act have a section that allows the Court to decide whether or not, under discretion, to enable assurance-related evidence to be tested? The Court would also have the discretion to set the range and limit of the evidence that should be tested to balance the time and the seriousness of the case due to natural justice. The Law Commission noted in extradition proceedings; that evidence should only be produced in summary.²⁸⁸ However, clear exceptions for diplomatic-assurance related evidence should be made and differentiated from trial-related evidence, which should be dealt with by the court of the Requesting-State.

8. Who can claim a treaty breach?

What roles and jurisdiction do domestic courts have when adjudicating a treaty breach? The principle within the constitutional law dictates that an individual cannot file a claim that an offending State has breached a treaty article. Under the Vienna Convention on the Law of Treaties, it must be the sovereign (Requested-State) which files a formal complaint on the treaty breach. Thus, the cornerstone decision of United States Federal Court of Appeals decision of *Matta-Ballesteros v Henman*²⁸⁹ is important because it is one of the earlier cases that established whether individuals could challenge another sovereign for violating an international treaty. The Court states individuals have no standing to challenge violations of international treaties in the absence of their home

²⁸⁵ *Charter Holdings Ltd*, above n 281, at [28].

²⁸⁶ *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA).

²⁸⁷ *Charter Holdings Ltd*, above n 281.

²⁸⁸ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 30.

²⁸⁹ *Matta-Ballesteros v Henman* 896 F 2d 255 (7th Cir 1990).

sovereign's protest, since it is traditionally held that the rights stemming from treaty provisions are reserved for the victim State under international law, and not the State's private individuals.²⁹⁰

In the context of New Zealand, the primary concern here is that the victim (requested person) or families of the victim would not be able to formally complain if there is violation of the relevant assurances, therefore, amounting to a treaty breach. There is also a consideration of the requirements of the international law of diplomatic protection, but that will be discussed later on. While the individual might feel there is a breach, the Crown might have a different opinion or threshold, that the "violation" would not amount to a material breach of the treaty. Breach of treaties must be addressed by the violated State²⁹¹ (in this case, the Requested-State), and there are no specific rules as to whether the victim or families of the victim could lodge their complaint about a breach.

However, could the United Nations Committee Against Torture be an effective platform for complaints of torture-related breaches? There is a difference between a Committee stating New Zealand has breached its human rights obligations under the Convention Against Torture²⁹² and the New Zealand Government itself recognising a material breach in a treaty because of the torture. Furthermore, the Committee can only issue a compensation against a State that has ratified Article 14 of the Convention and New Zealand reserves the discretion for compensation to the Attorney-General:²⁹³

The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand.

Hence, this is why laying out the provisions to allow the victims or their families to bring a claim against the Crown for the breach (of surrendering a person who then has his or her assurances violated in the Requesting-State) is necessary for the Courts to interpret the Crown's degree of liability. However, it is unsure if Article 14 applies to the Crown in an extradition matter. Article 14(1) states:

²⁹⁰ *Matta-Ballesteros* referred to "United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.), cert. denied, 421 U.S. 1001, 95 S. Ct. 2400, 44 L. Ed. 2d 668 (1975) (quoting Restatement (Second) of the Foreign Relations Law of the United States Sec. 115, comment e(1965))."

²⁹¹ Referred to the "Argument section" presented in *Matta-Ballesteros v Henman* 896 F 2d 255 (7th Cir 1990): "Treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *United States v. Zabaneh* 837 F 2d 1249 (5th Cir 1988).

²⁹² 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).

²⁹³ Human Rights Commission "Periodic Review of New Zealand's compliance with the Convention Against Torture" <www.hrc.co.nz>.

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

Article 14 does not specify if the Requested-State (Crown) could be held liable for the actions of a Requesting-State (China) if it has breached those assurances by committing torture. The Court might have to decide the degree of Crown's liability for allowing the surrender that leads to the requested-person's torture. Necessarily, New Zealand needs to have provisions laid out in the treaty to enable victims to seek redress in the event of breaches by the Requesting-State. However, will the Crown allow a treaty provision to address a breach and redress to exist given its current un-ratified position of Article 14?

9. Suing the Crown instead of the Foreign-State

If the requested-person or the family of the requested-person could not sue the Foreign-State, then could the Crown be sued by the requested-person, on the premise that he would not have been tortured if the Crown had not agreed to surrender him or her to the Foreign-State where the violations occurred? *Jones v Saudi Arabia*²⁹⁴ established that Article 14 does not have any extraterritorial effect, meaning the requested-person cannot sue the foreign-State for a breach of assurances. Furthermore, a direct claim against the Requesting-State in domestic courts would face insuperable difficulties of sovereign immunities as shown in *Fang v Jiang*²⁹⁵ and *Li and Others v Zhou and Another*.²⁹⁶ However, the theory of allowing a compensation claim against a breach is not directed at the Foreign State, but at the Home-State.²⁹⁷ The issues could range from the Crown not negotiating for better assurances and allowing the surrender anyway to holding the Government accountable for failing to provide diplomatic protection.

Assuming the victims are nationals of the Requested-State (New Zealanders), could they bring a claim against the Requested-State (Crown) for allowing an extradition that leads to a breach by the Foreign-State (China)? While Article 14 of the Convention Against Torture reserves the right of awarding compensation to the Attorney-General, it does not bar the claimant from pursuing compensation under domestic legislations in

²⁹⁴ *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] 1 AC 270 (HL).

²⁹⁵ *Fang v Jiang* [2007] NZAR 420 (HC).

²⁹⁶ *Li and Others v Zhou and Another* (2014) 310 ALR 66. See also Geoff McLay "The Problem with Suing Sovereigns" (2010) 41 VUWLawRw 403.

²⁹⁷ For non-extradition or foreign relations related compensation, see Nicola Southall "Looking Backwards and Forwards: A Critique of New Zealand's System for Compensating the Wrongly Convicted" (LLB (Hons) Dissertation, University of Otago, 2008).

domestic courts.²⁹⁸ For the sake of focusing on the core topic, this chapter will not analyse examples in which the Crown could be liable under tort.

10. Nationals vs Non-nationals

Would the degree of liability for the Crown be different if the requested-person is a New Zealand national as opposed to a foreigner who is in New Zealand at the time of his surrender? This section will not attempt to address the jurisprudence of non-nationals having the same rights as nationals when suing the Crown for damages, but rather, whether nationals would have a better chance to bring a claim against the Crown. Assuming the requested-person is a New Zealand citizen, would the principle of equality mean he would be in a better position to bring a claim against the Crown than a non-New Zealand citizen? Under the principle of equality, it is likely they would be put it in a more favourable position than a non-national. The Law Commission states:²⁹⁹

The equality principle is already recognised by ss 3 and 6 of the Crown Proceedings Act 1950, which provide that the citizen has the right to sue the Crown, effectively as an equal, in claims for damages in tort and certain other causes of action.

Hence, as the Law Commission points out, the Crown Proceedings Act entrenches the right of citizens to sue the Crown for claims for damages in tort. However, to successfully bring a claim against the Crown would depend on the context and facts of the post-extradition assurance breach as to whether the requested-person or his family could bring a tortious action against the Crown. The Act is silent as to whether a non-national could bring a claim against the Crown if there were a breach.

The complexity is differentiating the rights afforded to a person holding a New Zealand Citizenship as opposed to a permanent residency visa. Citizenship and residency are covered by different legislations respectively,³⁰⁰ and within residency class visas, the rights afforded to permanent-residents might be different for residents. However, both legislations are silent as to whether the Crown would owe a greater degree of care and liability to one class over the other. The report from the Law Commission and the Civil Proceedings Act did not specify any obligation by the Crown to residents or non-nationals. While it is unclear if the Requested-State would owe the same duty to a resident than with a citizen, it was established in the House of Lords case of *Johnstone*

²⁹⁸ E.g. Crown Proceedings Act 1950 s 6, Human Rights Act 1993, and New Zealand Bill of Rights Act 1990.

²⁹⁹ Law Commission *Crown Liability and Judicial Immunity A response to Baigent's case and Harvey v Derrick* (NZLC IP37, 1997) [NZLC IP37] at 32.

³⁰⁰ Citizenship Act 1977, Immigration Act 2009.

*v Pedlar*³⁰¹ where it held that an alien (American national) residing in a British territory (Ireland, when it was still part of Great Britain) was considered a British subject by virtue of local allegiance.³⁰² Lord Atkinson was of the view that a Home-State has no reason not to treat a national of the Foreign-State residing in the Home-State with the same position as a British subject.³⁰³ However, it is unclear whether the same principle could apply to a foreign national who is a resident of the Home-State requesting diplomatic protection from the Government.

a) Diplomatic protection

This thesis previously asked if diplomatic protection could be afforded to improve on the consequences of the Requesting-State breaching its diplomatic assurances. More importantly, would this protection only be provided to the Requested-State's nationals and not foreign nationals residing in the Requested-State? The issue of diplomatic protection was never raised in *Kim*'s judicial review hearing. But should the Court be allowed to direct the decision-maker to consider whether to offer this protection to the requested-person, if a breach occurred? While a treaty is not necessary for the Home-State to state their national has been subjected to grievous treatment in your prisons, the nationality requirements for affording diplomatic protection in the first place are strict. These requirements have been embedded in the Draft Articles on Diplomatic Protection [2006]³⁰⁴, which codifies that only nationals can be afforded this protection, while refugees of the State will only receive it under discretion from the Government.

In *Foreign Relations Law*, Professor McLachlan defines diplomatic protection as:³⁰⁵

[T]he redress which the individual may lawfully seek from his home state, but in respect of wrongs done to him not by that state directly, but by a foreign state from which he seeks protection.

Diplomatic protection, therefore, allows the requested-person to seek reparation if his or her protection is violated by the Requesting-State if his or her diplomatic assurances have been breached:³⁰⁶

³⁰¹ *Johnstone v Pedlar* (1921) 2 AC 262, 1 ILR 231 (HL).

³⁰² *Johnstone v Pedlar*: "An alien friend resident in British territory is a subject of His Majesty by local allegiance and is normally regarded as a British subject for the time being." See also Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014) at [7.12]-[7.14].

³⁰³ Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014) at [7.13].

³⁰⁴ *Draft Articles on Diplomatic Protection* Supplement No 10, A/61/10 (2006).

³⁰⁵ McLachlan, above n 303, at [9.01].

³⁰⁶ *Draft Articles on Diplomatic Protection*, above n 304, art 1.

[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Protection should be exercised, at least according to the proposal of Professor John Dugard: “if the individual's human rights were violated abroad by a Foreign-State the individual's national State might intervene to protect him or to claim reparation for the injuries that he had suffered.”³⁰⁷ Dugard advanced his draft proposal during his appointment by the International Law Commission in 1999. However, his view of imposing a state duty to the Executive to exercise the use of diplomatic protection on behalf of the injured-person was not recognised by the United Kingdom,³⁰⁸ while the Commission was of the view that this discretion should remain the prerogative of the Sovereign and not a human right remedy.³⁰⁹ The proposals never materialised into the final Draft Articles adopted by the Commission in 2006.³¹⁰ Article 2 differentiates the right for the Executive to exercise this protection but no duty exists to exercise it.³¹¹ However, caveat limitations in ignoring the rights of an injured person from the Sovereign was embedded in Article 19. To summarise, Article 19 frames a recommended practice for the Executive to consider when deciding to exercise diplomatic protection or not, even though this practice remains largely at the discretion of the Sovereign.

In the context of intervention from domestic Courts to review whether the injured person should be afforded this protection, Professor McLachlan states:³¹²

The Commonwealth jurisprudence which has developed over the past decade lends at least support to the proposition that the courts will take jurisdiction to consider the legality of a decision whether to exercise diplomatic protection.

This thesis submits that while the discretion to exercise diplomatic protection should be reserved for the Executive, Courts need to have a judicial responsibility to step in when considering the legality of the decision to exercise diplomatic protection in post-extradition matters, especially if the injured-person is a national of the Sovereign-State.

³⁰⁷ *Diplomatic Protection – First report on diplomatic protection, by Mr John R Dugard, Special Rapporteur* [2000] vol 2, pt 1 YILC 205 at [11].

³⁰⁸ McLachlan, above n 303, at [9.78]. See also *Diplomatic Protection – First report on diplomatic protection*, above n 304 at [79] & [84].

³⁰⁹ See also *Diplomatic protection* [2000] Vol 2(2) YBILC 72, at [451].

³¹⁰ *Draft Articles on Diplomatic Protection*, above n 304, art 2.

³¹¹ McLachlan, above n 303, at [9.79].

³¹² At [9.81].

b) Responsibility of the Home-State

Professor McLachlan states that the boundaries of the contemporary common law to protect its citizens abroad is inevitably determined by the development of public international law, but maintains the executive must retain the discretion to issue this protection:³¹³

Moreover, it follows from the essential character of a diplomatic protection claim as the claim of the state, and not of the individual, that the state retains the right to assess for itself whether the claim is sufficiently well founded to warrant espousal and whether and if so how best to pursue it. In reaching the decision, the executive must retain discretion.

However, following on from the discretion of the Crown, could the Crown be held responsible for the diplomatic protection of its nationals abroad? Professor McLachlan states that the Crown could be liable for the fate of the requested-person if:³¹⁴

[T]he home state has itself been party to breach of the applicant's human rights, either (a) by reason of its own involvement or complicity in those breaches (Khadr); or (b) because it may exercise control in fact over the applicant held in another state (Hicks).

The Court of Appeal decision in *Abbasi*³¹⁵ gave significant consideration to this question. *Abbasi* was a British national held abroad at the United States naval detention facility in Guantanamo. The Court was asked whether the British Government, specifically the Foreign Secretary, owed him a duty of protection under English public law since he was exposed to human rights violations by the United States Government.³¹⁶ The Court was asked if the Foreign Secretary was duty bound to redress his situation or at least provide a reasoned response to his request for diplomatic assistance.³¹⁷

The Government argued that relief was unavailable as it was outside the jurisdiction of the Court to examine actions taken by a Foreign-State. Furthermore, a domestic Court could not decide on actions taken by the Government in Foreign State affairs.³¹⁸ Although the Court of Appeal held that *Abbasi* had a legitimate expectation to be afforded of diplomatic protection,³¹⁹ it dismissed the appeal. While the Court accepted

³¹³ At [9.82]-[9.86].

³¹⁴ At [9.82](1)-(2).

³¹⁵ *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] 3 LRC 297 at [80].

³¹⁶ At [22] & [25]. See also McLachlan *Foreign Relations Law*, above n 303, at [9.33]-[9.39].

³¹⁷ *Abbasi*, above n 310, at [22] & [25].

³¹⁸ McLachlan *Foreign Relations Law*, above n 303, at [9.36]-[9.39].

³¹⁹ *Abbasi*, above n 315, at [99] & [107].

the face of the case appeared to be a clear breach of fundamental human rights, the Court could not interfere on issues that would impact the conduct of foreign policy by the Executive at such a delicate time. The Court also points out that Abbasi's request for assistance was considered by the Foreign and Commonwealth Office, and that he could not reasonably expect more than the ongoing diplomatic dialogue between the United States and Great Britain. The Court did not want its decision to undermine the discussions between the Foreign and Commonwealth Office and the US officials if they were to provide any statement as to its view of the legality of its subjects detained overseas. Finally, the Court viewed it would not be appropriate to order the Secretary of State to make any specific representations to the United States, as this would be adjudicating the conduct of the Executive when conducting matters of foreign affairs and might even undermine current state-to-state negotiations between the two Governments.³²⁰

Interestingly, the judgment also provided a test of how the decision to grant diplomatic protection to a citizen could be judicially reviewed, especially if the protection is related to the violation of fundamental human rights by the Foreign-State.³²¹ The Court laid out three considerations for this test: first, the Court referred to the doctrine of legitimate expectation,³²² where in a judicial review context, it “provides a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion.”³²³ New Zealand Courts have yet to apply the first consideration in a case similar to *Abbasi*, namely, the treatment of a national who is currently detained overseas. Flanagan addressed the treatment of legitimate expectation in New Zealand, acknowledging that the examination of this principle by the domestic courts has been limited.³²⁴ However, the Court of Appeal in *Ashby v Minister of Immigration*³²⁵ touched briefly on this matter when it showed hesitance in adjudicating over sensitive issues such as immigration policies, stating:³²⁶

Immigration policy is a sensitive and often controversial political issue. The national interest does not readily lend itself to compartmentalisation of the amalgam of considerations involved, and the isolation of particular aspects of foreign and/or domestic policies as obligatory considerations which must be weighed in the balance

³²⁰ At [107]. See also McLachlan *Foreign Relations Law*, above n 303, at [9.41].

³²¹ McLachlan, above n 303, at [9.37]–[9.39].

³²² This is an administrative law principle, See Richard Flanagan "Legitimate Expectation and Applications - An Outdated and Unneeded Distinction" (2011) 17 *CanterLawRw* 283. “In its simplest sense, the concept of legitimate expectation derives from the administrative law principle that governments and public authorities must act fairly and reasonably.” See also *New Zealand Association for Migration and Investments Inc v A-G* [2006] NZAR 45 (HC).

³²³ At [82].

³²⁴ Richard Flanagan "Legitimate Expectation and Applications - An Outdated and Unneeded Distinction" (2011) 17 *CanterLawRw* 283.

³²⁵ *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

³²⁶ At 231.

as distinct from permissible considerations which may properly but need not be taken into account.

The keywords in this paragraph are "foreign and/or domestic policies". The assumption is that the Court of Appeal's hesitance to adjudicate over the decisions of the Executive on domestic policies would affect the application of legitimate expectation for the grant of diplomatic protection from the Executive in extradition related matters, since it is, in essence, a policy by the Executive in addressing a safeguard against a Foreign-State. However, these are two different issues. *Ashby* is an immigration matter with regards to the Minister of Immigration's exercise of his discretionary power under the old Immigration Act. Compare this to a hypothetical situation of a New Zealand citizen suffering from the *Abbasi* scenario, where the Foreign-State has violated his human rights. It remains to be seen if the Court today would take on the same approach as *Ashby*, not wanting to interfere with the Executive's exercise on foreign or domestic policy when the human rights interests of a New Zealand citizen are at stake.

The second consideration asked if the laws put into effect by the policy of the Foreign & Commonwealth Affairs Office that was capable of giving rise to a legitimate expectation.³²⁷ However, is this the same for New Zealand as it is for the United Kingdom? The British Government states in their manifesto presented to the United Nations General Assembly, that the decision to offer diplomatic protection "is a matter 'falling within the prerogative of the Crown' and that 'there is no general legislation or case law governing this area in domestic law'".³²⁸ Therefore, for this argument to be met with merit in New Zealand, the New Zealand Government must also state an intention that diplomatic protection falls within the prerogative of the Crown.

The third consideration is the expectation that Her Majesty's Government should protect a subject of the Crown.³²⁹

[Diplomatic protection is] a 'normal expectation of every citizen' that, if subjected abroad to a violation of a fundamental right, the British government will not simply wash their hands of the matter and abandon him to his fate.

The third consideration should not be so dissimilar to New Zealand's position where the Crown will not abandon its citizens to their fate in a Foreign-State. New Zealand's common law system is closely related to Great Britain. As Professor McLachlan points out, the common law "enshrines a much more robust duty on the part of the state to

³²⁷ *Abbasi*, above n 315, at [87].

³²⁸ At [88].

³²⁹ At [98].

protect the citizen abroad than international law yet imposes."³³⁰ New Zealand would, therefore, be expected to provide diplomatic protection to its citizens in extradition circumstances.

In concluding the considerations from *Abbasi*, the Court held that while the decision-maker (the Secretary of State) must be free to give full weight to foreign policy considerations that are not justiciable, it does not mean the process of the decision-maker is immune from judicial scrutiny.³³¹ Moreover, the Court points to the reasoning for this is that there is a legitimate expectation for the subjects of the Crown that any requests will be considered in good faith with the relevant factors being balanced before reaching a decision.³³²

There are two requirements the requested-person must meet before the Crown considers diplomatic protection: they must be a national of the Home-State and must have exhausted all local remedies first.³³³ This chapter will now address the latter. In *Pirbhai*,³³⁴ the plaintiffs had their property expropriated by the Uganda Government. They sought relief from the British Government to pursue a claim of confiscation for the property on their behalf. However, the Court found there was a local remedy available for compensation in Uganda which the plaintiffs failed to exhaust. The Court held the Foreign Secretary had not acted unreasonably not to pursue negotiations but declined due to the availability of a local remedy.³³⁵ However, as logical and vital as this rule may seem, it seems redundant for the plaintiff to exhaust a local claim where the local mechanisms would either be unfavourable to the plaintiff or the remedy would be grossly insufficient in contrast to the injury caused. Another issue that would arise is if a requested-person is still imprisoned overseas, would the local remedies be readily available to him or her, or must he or she wait until the imprisonment term is finished?

In *Butt*,³³⁶ the plaintiff sought an order compelling the Foreign Office to make representations to Yemen Officials to halt the trial of her brother, who was tortured and would, therefore, face an unfair trial. The Secretary of State accepted that there lay a common law duty to protect its citizens abroad but refused to intervene based on the constraints of Public International Law. The relief sought would have interfered with the judicial system of a Foreign-State, therefore, interfering in the internal mechanisms

³³⁰ McLachlan *Foreign Relations Law*, above n 303, at [9.83].

³³¹ At [99].

³³² At [99].

³³³ *Draft Articles on Diplomatic Protection* Supplement No 10, A/61/10 (2006) art 14.

³³⁴ *R v Secretary of State for Foreign & Commonwealth Affairs, ex p Pirbhai* (1985) 107 ILR 461 (CA).

³³⁵ McLachlan, above n 303, at [9.31].

³³⁶ *R v Secretary of State for Foreign & Commonwealth Affairs, ex p Butt* [1999] EWCA Civ 1803, 116 ILR 607.

of a Foreign-State. McLachlan points out that although the State does owe a common law duty to protect its citizens, this exercise of this duty is constrained by Public International Law.³³⁷

How then could the judiciary be improved to address matters of affording diplomatic protection? While the offer of diplomatic protection is discretionary from the Crown, the Court should nonetheless be given leeway to address whether such protections could be attached to ensure that if the requested-person's assurances were to be breached, the Crown would pursue the appropriate redress for the violation. Understandably, while this is a discretionary right for the Crown and the Central Authority to decide whether to grant this protection, it should be reviewable if the protection is related to the violation of fundamental human rights by the Foreign-State, as it has been held in *Abbasi*.³³⁸

Furthermore, the tests seen in *Pirbhai* and *Butt* would not fit the same framework for a claim for protection in a post-extradition matter. Theoretically speaking, if *Kim* fulfilled the New Zealand nationality requirement (even though he is a New Zealand resident and not a citizen, but see the explanation above from Lord Atkinson in *Johnstone v Pedlar*³³⁹), and the consular assistance fail to ensure his protection post-sentencing, how could he pursue a claim of diplomatic protection if he is to serve a long prison term? What local remedies would be available to an imprisoned person and would he be able to access them fairly, or are the consulate officials expected to make representations on his behalf? The requirement of exhausting local remedies would not fit an extradited person in most circumstances because of this.

Second, the test of *Butt* where the Government would not intervene even if torture-obtained evidence is used in a trial. The Crown will not intervene based on this test where it would place it in a position of intervening with a Foreign-State's judicial affairs. This seems to make any diplomatic assurances for a fair-trial appear redundant if they have been breached, at least for pursuing a cause of diplomatic protection. The decision in *Butt* effectively protects the Crown from intervening.

Finally, post extradition matters are different because, even though the reviews of *Kim* did not specifically detail the post-sentencing monitoring, it did state consular assistance from the Ministry of Foreign Affairs and Trade would continuously be available. This creates a paradoxical problem. Can the requested-person still claim diplomatic protection when the Crown is still offering him or her consulate assistance if the person argues the assistance is not sufficient? In international law, consulate assistance is

³³⁷ McLachlan, above n 303, at [9.32]-[9.33].

³³⁸ At [9.38].

³³⁹ *Johnstone v Pedlar*, above n 301.

considered a remedy for the Home-State in itself. McLachlan distinguishes consulate assistance and diplomatic protection as two sets of remedies available for the Home-State. Even if consulate assistance is carried out, it "cannot redress an international wrong perpetrated by a Foreign State on a national of the Home-State, whether by denial of justice or breach of fundamental human rights, for which all pursuit of local remedies by the individual has been exhausted."³⁴⁰ This is where diplomatic protection becomes the ultimate backdrop for the Home-State. The problem here is, in an extradition context, is if the Home-State could argue that the consulate assistance is already a sufficient remedy and does not necessitate diplomatic protection.

If *Kim* is to pursue a claim for diplomatic protection, the Courts would need to develop and establish new case laws due to the unique circumstances. The Courts would need to separate the issues and carefully examine whether consulate assistance already provided is sufficient or not. It remains to be seen whether the review of assistance offered by MFAT is possible, especially in a review for diplomatic protection. It further remains to be seen whether New Zealand Courts would likely follow suit of other Anglo-Commonwealth Courts, as Professor McLachlan states: "to balance their recognition that the diplomatic espousal of an individual's claim may be an important means of securing his human rights with the foreign relations implications of imposing such a duty on the Home-State".³⁴¹

11. Justiciability of a treaty breach

If Courts can review the justiciability of a treaty breach, then this would help set out the responsibilities the requested and Requesting-States have to their private citizens. Justiciability could be one of the most substantial benefits available to the victim of an assurance breach. One of the purposes of a treaty is to add clarity to an agreement between States, but it can also insert a degree of public confidence for private citizens. A treaty that allows justiciability of a breach also ensures that the States involved can be held responsible by the victims (such as the requested persons or their families) suffering from the consequences of a treaty breach. Therefore, a Requested-State cannot willingly accept a surrender tied with frail assurances and expect to be absolved from the responsibilities of a violation by the Requesting-State.³⁴²

Should Parliament attach what constitutes a breach of conditions to a treaty and allow this to be a justiciable action to the Courts? If the Crown or the Cabinet refuses to acknowledge that there is a material breach by the Requesting-State, can a third party

³⁴⁰ McLachlan, above n 303, at [9.16].

³⁴¹ At [9.35].

³⁴² Parliament would have to decide how much the justiciability of a treaty breach would overlap the Crown Proceedings Act 1950.

instigate a proceeding against the Requested-State for the breach of the Requesting-State? If so, parliament needs to consider whether any future treaty breaches would have a justiciable action against the Crown in the Courts.

As Campbell McLachlan states in *Foreign Relations Law*:³⁴³

[N]on-justiciability cannot apply where Parliament has specifically provided that the action is to be justiciable in court.

Can justiciability of an assurance breach exist outside of a treaty, for example, in *ad hoc* transactions? In the post-deportation of Lai between Canada and China, Lai's counsel filed submissions to the Canadian Federal Court to compel the Canadian Government to request Beijing access to Lai. The Court might determine whether it has justiciability on a Government's *ad hoc* agreement with a Foreign-State.³⁴⁴ If it does, it would demonstrate that justiciability of an assurance breach may exist outside of a treaty. Although Lai's counsel said his submissions to the Federal Court would mainly revolve on the interpretation of assurances, it would be interesting to see whether the Courts would give any indication on the justiciability of deportation, extradition assurances, and *ad hoc* agreements if a material breach occurred. However, if his counsel tries to bring an argument that closely resembles diplomatic protection (as discussed earlier in this Chapter), obligating the Canadian to continue monitoring Lai, then he must first meet the strict nationality rule, which he does not. Therefore, Lai's case to compel Ottawa to be involved during his imprisonment in China must fail because he is not a citizen or resident of Canada.

There may be various reasons for the Requested-State to not pursue a case of a treaty breach, as it might impair the relationship with the Requesting-State. Assuming there is a treaty breach and it is a legal issue, the Cabinet would be responsible for deciding whether or not the violation of the particular assurance or assurances, amounted to a material breach. However, if the Requested-State (New Zealand) refuses to acknowledge that there has been a violation resulting in a material breach, and Cabinet's conclusion was not favourable to the victim, could the failure to acknowledge of a breach reviewed by the Courts?

In *Council of Civil Service Unions v Minister for the Civil Service*³⁴⁵ the issue was whether the Executive had the duty to consult the parties involved in reaching a

³⁴³ McLachlan *Foreign Relations Law*, above n 303, at [6.40].

³⁴⁴ "Mr. Matas plans to submit a federal court filing in the next few days. He expects to ask the court to compel Ottawa to ask Beijing for access to Mr. Lai." Nathan Vanderklippe, above n 42.

³⁴⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935.

decision.³⁴⁶ In obiter, the House of Lords states while the decisions of the Ministers under the royal prerogative were reviewable by the Courts, decisions related to national security were strictly reserved for the Executive.³⁴⁷ Lord Diplock stressed the Judiciary was totally inept to deal with the problems involved with national security.³⁴⁸ Lord Roskill also expressed the view that certain foreign affairs powers may not be open to judicial review due to their subject matter.³⁴⁹

If the approach of *CCSU* is followed, any decision related to why the Requesting-State's violation of the assurances is not a material breach would be open to the Courts to review, as long as it does not relate to national security. The exception to this dictum that Courts should have a non-intervention rule due to high-policy matters and national security issues lies in the decision of *R v Secretary of State for Foreign & Commonwealth Affairs, ex p Everett*.³⁵⁰

In *Everett*, the Court of Appeal held that the justiciability of subject matter sits on a scale, from 'matters of high policy', such as making treaties or making war, at one end, to 'matter[s] of administrative decision affecting the rights of individuals', at the other. In the latter case, the courts will be much more likely to intervene, whether or not the source of the impugned power is the prerogative.

However, in reference to the latter statement of the intervention of the Courts, there must always be a breach of a right within domestic law for which the Crown can be held accountable. Prohibiting the Courts intervention from the justiciability of the subject matter is too wide. Therefore, applying the rule in *Everett*, if the treaty breach intruded and affected the rights of the requested person, the Courts would be open to weighing in whether the affected persons' rights requires their intervention. However, *Everett* is an English case, and it is unclear whether New Zealand Courts would be open to the same intervention of foreign-related issues. Issues of not claiming an extradition treaty breach by the Requested-State has not yet reached the Courts both in New Zealand and abroad.

12. Court's interpretation of human rights within treaty provisions

In Kim's first judicial review, the Court wanted to address the human rights provisions New Zealand was a party to. It had a grand scheme to keep the Government in check

³⁴⁶ McLachlan, above n 303, at [6.25].

³⁴⁷ At [6.28].

³⁴⁸ *Council of Civil Service Unions*, above n 345, at 952. See also McLachlan, above n 310, at [6.28].

³⁴⁹ McLachlan, above n 303, at [4.31].

³⁵⁰ At [4.30]-[4.35]. See also *R v Secretary of State for Foreign & Commonwealth Affairs, ex p Everett* [1989] 1 QB 811, 820, (1988) 84 ILR 713 (CA).

that these provisions were followed. However, the second judicial review showed the Court was limited in scope when the Minister of Justice made a new decision to surrender based on the new assurances and the justified decision to accepting the assurances. However, would the inclusion of human rights within treaty provisions improve the Courts ability and attitude to review the process? To understand the outlook of what a treaty with China would look like for New Zealand, such as a Foreign-State that has a different legal system to New Zealand, it would be essential to look at Australia's extradition relationship with other countries, such as Indonesia. The Republic of Indonesia has a different legal system to Australia's common law system with a questionable human rights record. How do their Courts interpret their treaty obligations when examining a Minister's decision to extradite, along with the Australian extradition Act?³⁵¹

In *Commonwealth Minister for Justice v Adamas and Another*,³⁵² the High Court of Australia held that the lower Courts³⁵³ erred in applying "Australian standards"³⁵⁴ in an extradition between Australia and Indonesia. The Australian standard was the application of Australian law by the Minister in considering whether Adamas would receive fair treatment, especially after his trial in absentia in Indonesia. The Federal Court states he would unlikely receive a new re-trial or a proper appeal against his life-sentence.³⁵⁵ The Full Court further found that the Australian standard should have been applied by the Minister when making a decision:³⁵⁶

The majority, agreeing in substance with the primary judge, held that whether surrender would be unjust, oppressive or incompatible with humanitarian considerations "must be assessed from an Australian perspective against Australian standards, not by any other perspective or standards that do not form part of Australian law.

However, the High Court reversed both the lower Courts' decisions and found the Minister's decision to surrender did not have to be restricted to "Australian standards" when deciding if surrendering Adamas would be against his humanitarian interests. Whether the application of Australian standards should be applied when determining if

³⁵¹ Extradition Act 1988 (AU).

³⁵² *Minister for Justice v Adamas* (2013) 253 CLR 43, [2013] HCA 59.

³⁵³ *Adamas v O'Connor (No 2)* (2012) 291 ALR 77; [2012] FCA 227 (Adamas); and *O'Connor v Adamas* (2013) 210 FCR 364; 295 ALR 502; [2013] FCAFC 14 (O'Connor).

³⁵⁴ The Federal Court of Australia held the sentence of life imprisonment was excessive by Australian standards. *Adamas v O'Connor (No 2)* (2012) 291 ALR 77; [2012] FCA 227 (Adamas) at [81] and *Commonwealth Minister for Justice v Adamas and Another* (2013) 304 ALR 305 at [19]. Also at [23]: "The primary judge did not elaborate on what he saw as the content of the obligation to apply "Australian standards" but appeared to equate it to a requirement that the minister "apply Australian law", the relevant law being "case law relating to a fair trial".

³⁵⁵ At [22].

³⁵⁶ At [25].

extradition to Indonesia would not be unjust, oppressive or incompatible with humanitarian considerations.³⁵⁷ If this principle is substituted in the context of New Zealand, the Courts here cannot bar a Minister for surrendering a person to a treaty-State because the Minister does not apply New Zealand law when deciding if the requested-person would receive a fair-trial, similar to New Zealand laws.

Under s 11 of the Act³⁵⁸, Article 9(2)(b) of the treaty engages s 22(3)(ii) and (iv) of the Act.³⁵⁹ Article 9(2)(b) provides that a surrender may be refused if:³⁶⁰

[W]here the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is requested, the extradition of that person would be unjust, oppressive or incompatible with humanitarian considerations.

However, that decision was entirely up to the Minister. Furthermore, although submissions were provided to the Minister that Adamas would be given a limited form of appeal afforded by Article 263 of the Indonesian Criminal Procedure Code against his conviction, it was not contradictory to the fair trial rights under Article 14 of the International Covenant on Civil and Political Rights.³⁶¹ While this was a limited review with statistically low appellate decisions favourable to the appellant in Indonesia, the Court held the Minister was not bound to consider the impact of such a limited review as affecting his human rights in Indonesia.

The Court interpreted Article 9(2)(b) of the treaty with the decision-maker's decision to surrender:³⁶²

The Attorney-General or other Minister of State must be satisfied that, in all the circumstances of the case and taking into account the nature of the offence and the interests of the Republic of Indonesia, surrender of the person to the Republic of Indonesia would not be "unjust, oppressive or incompatible with humanitarian considerations" within the meaning of Art 9(2)(b) of the treaty.

If the Courts were given the discretion to assess how the Minister came to that conclusion, whether the decision had properly taken into account that the Indonesian Government would not place the requested-person in conditions incompatible with

³⁵⁷ *Commonwealth Minister for Justice v Adamas and Another* (2013) 304 ALR 305 at [9].

³⁵⁸ "Modification of Act in relation to certain countries."

³⁵⁹ *Adamas* (2013), above n 357, at [9].

³⁶⁰ At [9].

³⁶¹ At [19].

³⁶² At [30].

humanitarian considerations, it would violate s 11 of the Act and act against the Schedule to the Regulations³⁶³ agreed upon by the States when according to the terms of the treaty.³⁶⁴

Section 11 of the Act gives force to the treaty only to the extent of the text set out in the Schedule to the Regulations. Article 9(2)(b) of the treaty as given force by s 11 of the Act, for that reason, could not be affected by any subsequent agreement or practice of Australia and the Republic of Indonesia.

Therefore, an amendment would be required to give Australian Courts jurisdiction to review the precise evidence of why the Minister should consider a surrender not a breach of humanitarian considerations.

The Court held:³⁶⁵

In assessing whether extradition of a person is “unjust, oppressive or incompatible with humanitarian considerations” within the meaning of Art 9(2)(b) of the treaty, Australian standards are appropriate to be taken into account. Australian standards cannot, however, be determinative of that assessment.

This was a confusing aspect of the judgment. Essentially, the High Court of Australia held the Minister can use Australian standards within reason but cannot make it a determinative of the decision to extradite. Hitherto, it is unclear as to what percentage of a decision making would be considered an appropriate portion of using Australian standards.

Taking on the Australian approach when interpreting their extradition treaty with Indonesia, if New Zealand is to have an extradition treaty with China, it would require a new Act to allow the Courts to have jurisdiction over the assessment of the evidence the Minister is accepting, the negotiations that had taken place and whether the assurances are reliable. The Australian Courts are restricted from changing their current practice to review and assess these evidence as it would contravene s 11 of their Extradition Act and their treaty. Therefore, although human rights of the Requesting-State are a concern, signing of a treaty with that State would restrict the Courts from ensuring the decision-maker applies a standard in accordance to a New Zealand standard unless the treaty and the new Act allows the Courts explicitly to do so. The new extradition Act and future treaties must afford the Courts this flexibility of assessing evidence related to human rights concerns.

³⁶³ At [29].

³⁶⁴ At [31].

³⁶⁵ At [37].

13. Judicial assessments of foreign legal systems

The decision of whether domestic courts should review the fitness of foreign legal systems have been applied in civil cases. In *Foreign Relations Law*, Professor McLachlan states about jurisdiction and availability of a foreign forum:³⁶⁶

Nor does the language of enjoining a court from sitting in judgment of the acts of a foreign state in its own territory apply when the forum's rules of private international law actually require such a judgment to be exercised. That is exactly what is required when the court has to decide whether it should assume or decline jurisdiction in favour of a foreign forum and the claimant contends that he is unable to secure substantial justice there.

Professor McLachlan goes on to direct his point to the judgment of the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*,³⁶⁷ per Lord Collins:³⁶⁸

The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes Gas & Oil Co v Hammer*, is the basis of Lord Diplock's dictum in *The Abidin Daver* and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it.

The Privy Council held domestic courts are not restricted to interpret their role when examining whether issues relating to a foreign court or system would detrimentally affect the applicant, albeit in a civil proceeding. By following the assertions presented by the Privy Council, New Zealand Courts could in effect, address findings detrimental to the Requesting-State's legal system or by extension, dismiss the diplomatic assurance that the legal system of the Requesting-State would guarantee a fair trial. However, Lord Diplock states this challenge had a high threshold and the in the case of the requested-person, would be required to produce clear and cogent evidence that the "foreign court would fall below the minimum acceptable standards of doing what justice

³⁶⁶ McLachlan *Foreign Relations Law*, above n 303, at [12.141].

³⁶⁷ *AK Investments CJSC v Kyrgyz Mobil Ltd* [2011] UKPC 7, [2011] 4 All ER 1027. See also McLachlan, above n 303, referred to *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559–60, followed in *Mokbel v Attorney General for the Commonwealth of Australia* [2007] FCA 1536, 162 FCR 278, [58]–[59].

³⁶⁸ McLachlan, above n 303, cited *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [101]; approving *Al-Koronky v Time-Life Entertainment Group Ltd*.

would require: it would not be sufficient to asperse the foreign court in general terms, or hint at criticism which was not made openly and candidly.”³⁶⁹ He also drew differences between challenging a stay of proceeding with the rationale that the foreign court is inexperienced or overworked as opposed to an impartial or corrupt one.³⁷⁰

In *Dotcom*,³⁷¹ the majority of the Supreme Court held that ss 24 and 25 of the Bill of Rights Act 1990,³⁷² were framed to protect the rights of persons undergoing a criminal trial procedure and not extradition since it has a different limited purpose.³⁷³ In its previous report, the Law Commission states that the Courts should not obligate the requesting country to disclose any evidence as it would undermine the principles of comity and mutual respect between governments.³⁷⁴ By the same token, the Commission recommended an exception in the form of adjournment, but with restrictions. Since the Requesting-State is not a party to the extradition proceeding under the Extradition Bill and is outside of New Zealand’s jurisdiction, it would be inappropriate for domestic Courts to make a disclosure order against the Requesting-State.³⁷⁵

However, the Commission notes that the Requesting-State might very well be in possession of evidence that the Courts consider critical in an extradition proceeding. Instead of ordering the Requesting-State or by representation, the Crown, to disclose the particular evidence, the Court could adjourn the proceeding for the Central Authority to discuss this with the Requesting-State.³⁷⁶ The power of adjournment to allow the Central Authority to consult with the Requesting-State would be beneficial and significant in this instance.³⁷⁷ If the Requesting-State refuses to disclose the particular evidence the Court deemed critical to the proceeding, then the Requesting-State would have the option to end the extradition proceedings. The Law Commission concludes

³⁶⁹ Lord Collins and Jonathan Harris (eds) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2017) at 561.

³⁷⁰ At 528.

³⁷¹ *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 [Dotcom (Extradition)] at [115]. The Court said: “We see no sound basis in human rights jurisprudence or otherwise for an interpretation of the criminal process rights protections in the BORA that would apply them to an extradition hearing. Their application would change the preliminary nature of the hearing and give it an altogether different character.”

³⁷² New Zealand Bill of Rights Act 1990. Section 24 deals with the rights of persons charged while s 25 deals with the minimum standards of criminal procedure.

³⁷³ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 29.

³⁷⁴ Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [NZLC IP37] at 119. “The court should not be able to order the requesting country to make a disclosure. Such orders would not sit comfortably with the principles of comity and mutual respect between governments, and it is inappropriate for New Zealand courts to make disclosure orders against requesting countries. There are other ways of ensuring that the person sought is fairly informed of the case against them.”

³⁷⁵ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 207.

³⁷⁶ At 207.

³⁷⁷ At 207.

that the use of adjournment in such instances should be restricted for situations where the missing pieces of information are truly vital to the proceeding.³⁷⁸ This proposal from the Law Commission comes in the form of “Record of the case” where it is designed to disclose to the requested-person a summary of evidence from the Requesting-State:³⁷⁹

However, the judge will have the power to adjourn the case if, in the judge’s view, the Central Authority should be given the opportunity to obtain further information or evidence from the requesting country. It is worth making the point that we are talking here about information or evidence that is necessary in order to understand the Record of the Case and to determine whether it proves that there is a case to answer. We consider that this adjournment process appropriately recognises that the Central Authority is the applicant in the proceedings, and should be responsible for communicating with the requesting country.

While this proposal would continue to keep the purview of domestic courts out of the direct jurisdiction of the Foreign-States and allow the Central Authority to communicate directly with the Requesting-State with regards with supplying evidence, the problem lies with putting the Requesting-State in an awkward position. For example, while it is accepted here that extradition hearings are different from criminal or civil proceedings,³⁸⁰ if the Requesting-State has a legitimate case but because of the Court's view that it must present the "missing" vital evidence, would it not unfairly force the Requesting-State into a position of revealing information favourable to the requested-person's fishing expedition or intention to delay proceedings? If the Central Authority can present the new evidence that is critical in the view of the Court, would it be beneficial to present this evidence to an independent special counsel appointed by the Court? The special counsel would be able to validate whether this evidence is vital to support the requested-person's fight against his extradition, without disclosing any specific details or important information that could later be used in a fishing expedition by the requested-person's defence counsel. This would also help preserve any issues of national security from the public or requested-person. Therefore, the proposal to allow the Court to adjourn the hearing could also add a subsection for additional:

Clause 88 Court may indicate further information required from requesting country

³⁷⁸ At 207.

³⁷⁹ Law Commission *Extradition* (NZLC IP37, 2016), above n 7, at 63.

³⁸⁰ At 63.

(2) If the court makes such an indication, the Central Authority may apply for the hearing to be adjourned to allow time for it to consult with the requesting country.³⁸¹

(i) The information may only be disclosed to the presiding Judge; or

(ii) the Court may appoint a special independent counsel to review the evidence without disclosing it to the requested-person.

This would arguably be met with criticism from defence counsel, therefore, it would require proper attention from the presiding judge to decide whether to allow such evidence to be revealed in open court or not.

However, in light of the discussions, do Courts want to be involved in Foreign-Affairs?

Parliament has entrusted the Minister (not the courts) to undertake adequate enquiries and to exercise her judgment on whether surrender should be ordered.³⁸²

The most important issue is that Courts do not have the right authority to exercise the same decision-making powers vested with the Minister. Involving domestic Courts in affairs of international law is not something the Courts have been equipped with. Domestic Courts do not have the same mandate to make decisions in place of Government Officials when dealing with a foreign power. Only a specialist Court in theory, such as an extradition Court, with the authority entrusted by Parliament to explicitly handle issues of extradition with Foreign-States, could the Courts finally feel jurisdictionally-comfortable to exercise the powers of Officials. However, it is unlikely that Parliament would create such a specialist-Court for this specific purpose of appointing the Courts to decide on extradition-matters instead of the Minister.

The other possible problem with leaving the decision-making to the Courts instead of the Minister is that, unless barred by Statute, the defendant can choose to either object to the Court's decision in either an appeal with the issue of law or a judicial review. With the Minister's decision, it can only be appealed by way of judicial review, not with issues of law. If it is the former and an appeal against the Court's decision is made, the importance of deference would be discarded as opposed to a judicial review of the Minister's decision.³⁸³

³⁸¹ At 207.

³⁸² "There is usually no "deference" accorded to the decision being appealed from." See New Zealand Law Society Continuing Legal Education "What is Judicial Review?" <www.lawyerseducation.co.nz> at 2 referring to *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

³⁸³ McLachlan *Foreign Relations Law*, above n 303, at [6.41].

[T]he courts have described as ‘non-justiciable’ claims which are outside the jurisdiction of the municipal courts not because of any rule allocating competence to the executive. Rather, the claims are excluded because the plaintiff has not pleaded a cause of action which is cognisable within the municipal legal system. Instead, the plaintiff seeks to found his action on a norm which sounds exclusively within the international legal system and which regulates exclusively inter-state relations. In these cases, it is submitted that it is the determination of the scope of the relevant norm which determines the justiciability of the case, and not the fact that the obligation in question was incurred as a result of the exercise of the executive's foreign affairs power.

While it is the right of the Executive branch to conduct negotiations, and make decisions with foreign Governments, the Court should have some degree of oversight when the decisions involve the rights of a private citizen. Therefore, because of the involvement of an individual's human rights, the Court should intervene if the assurances are not sufficient.

Currently, no Court has the statutory authority to compel the Crown to disclose evidence related to diplomatic assurances. The judicial reviews of *Kim* did not disclose how the Minister was satisfied with the assurances given to her. The mechanics behind her justification were not revealed openly to the Courts. The nature of judicial reviews only addresses whether the decision-maker had considered the information before him or her, and had taken steps to appropriately consider the information available before making their decision. Judicial reviews do not equate to the transparency of decisions, primarily by Government and Crown entities. The Law Commission, however, proposes that the Court should be given jurisdiction to review the evidence of diplomatic assurances outside of the judicial reviewing Courts. Legitimately, how realistic can the proposal be for Courts to examine the diplomatic assurance related evidence? Courts must formulate a set of distinctions when to assess assurances but not derogate entirely from the rule of comity and the norms of public international law.

14. Resources available to the requested-person

A new problem that would exist after this proposal of a Court being allowed by statute to review assurance-related evidence would be the resources available to the defendant. The defendant or the requested party would have difficulty finding supporting evidence that would benefit their case against accepting diplomatic assurances. The Central Authority or the Minister of Justice would be able to explore and evaluate whether guarantees are acceptable due to their resources. For example, conducting offshore reports on the imprisonment conditions, appointing expert witnesses to produce statements in favour of accepting assurances, and so forth. However, the resources

open to the defendant might be insufficient depending on his or her financial resources. Therefore, if there exists a court procedure that allows the examination of assurance-related evidence, it will disadvantage the avenue of resources for a defendant. How is the defence team going to afford the resources to research? The providence of legal aid is designed to cover minimum legal costs for the defendant, and it would not extend nor be sufficient to cover the primary research needed to fight an extradition hearing. The Ministry of Foreign Affairs and Trade might be in a better position to gather evidence from off-shore than the defendant, but would be in potential conflict since the Ministry is under the Crown, who is cooperating with the decision-maker in negotiating for his or her diplomatic assurances.

15. Summary

Currently, the Courts' ability to review a decision-maker's decision to surrender is quite narrow. It is restricted to judicial reviews and does not allow substantive hearings. The latter prevents the requested person from slowing down the extradition procedure and breaching comity and mutual trust between States. Mallon J's first review of Kim directed the Minister to improve on the safeguards before a new decision to surrender was made. To Her Honour's credit, this is the best outcome an extradition-related review could achieve and should be seen as a watershed decision for reviews in this area of law. Despite this, Courts need to be given more statutory powers to review specific diplomatic assurance related evidence when necessary without turning into a committal trial of assurances. Courts are also reluctant to differentiate issues when foreign affairs are involved. That is not to say a specialist Court is needed but there needs to be an expansion as to what the Courts could examine, at the same time there should be an introduction to roles that could make the Courts' assessment less differential. If the Courts are satisfied with the diplomatic assurances after the appeals of the requested person, then this at least provides some surety that the decision to accept the negotiated assurances have been checked not just by the decision-maker but also the judiciary beyond the scope of a judicial review.

Conclusion

This thesis starts with the question “Could the Central Authority, Treaty, or Judiciary alleviate extradition issues amongst non-traditional treaty partners?” The answer is that the extradition system in New Zealand needs reforming in providing monitoring mechanisms if diplomatic assurances are ever to work. It also needs to set out more explicit guidelines to prevent conflict if the decision-making is shifted to the Central Authority. If the Government revivifies the consideration of an extradition treaty with China, then it might further safeguard the fundamental human rights protections for the requested-persons. While this thesis harbours the view that a treaty with China is preferable because of the benefits the treaty system offers in the protection of diplomatic assurances, it is also aware that New Zealand should not be over-reliant on treaty mechanisms if they require automatic surrender. It is essential for the Crown to keep the discretion to refuse a surrender when the assurances are not satisfactory. The Crown needs to be placed in a position of accountability both legally and politically if the assurances of the requested-persons have been breached. The extradition system and proposals could only function so well, as long as all the mechanisms involved, from the Central Authority, Diplomatic Assurances and Treaty, all work together towards a productive outcome.

The current situation is that the New Zealand Government does not have an effective monitoring body that could monitor the requested-persons’ conditions indefinitely. Also, the Crown accepts the reliability of assurances that are not attached to any binding instruments. If they are breached then there are no concrete measures to hold the Foreign-State accountable.

The first issue is with monitoring. This thesis is concerned about the reliability of monitoring mechanisms for requested-persons once they have been surrendered to the Requesting-State. This is especially important for post-sentencing assurances, as the New Zealand Government should not abandon the requested-persons to their own fates as the Canadian Government did in the *Lai* case. To mitigate this concern, the proposal is made that the Ombudsman should be included in the monitoring of off-shore requested-persons especially post-sentencing. This proposal is not too far off from the monitoring bodies the Walker report suggested was necessary. Domestically at least, it is a reputable monitoring body even though its implementation and exercise of its functions overseas would be challenging. The thesis points out while this proposal might make the Foreign-State feel acrimonious, if the reports are favourable to the requested-person’s conditions, it would only reinforce the legitimacy of the trust in the Requesting-State when it comes to extradition. This monitoring mechanism should extend to post-

sentencing as long as the requested-person is incarcerated offshore. Should the Foreign-State refuse the post-monitoring mechanism, the Requesting-State could discontinue the extradition procedure or refer to the extradition treaty the States might have between them and allow the International Court of Justice to adjudicate over the treaty breach. But a treaty is needed to make this effective.

Second, there is a concern with the legitimacy of the diplomatic assurances due to their non-binding nature. The possibility of whether diplomatic assurances would be considered a unilateral declaration has been examined. The thesis shows that repeated comments made by the New Zealand Government that the assurances are not binding only added more to cementing its non-unilateral declaration position. This would disqualify the assurances, for instance, from being a unilateral declaration under the guiding principles set out by the ICJ. Assurances are operated extra-legally and the Courts have to assess them as such. As a result, the dilemma the Courts end up with is interpreting the legality of what is outside of their scope. Instead, assurances under the treaty framework would make its functions legitimised and recognised by the Courts. The proposal for a treaty has been looked into. A treaty can at a minimum, give a mechanism to work through issues of human rights concerns for the Requested-State. A treaty can hold the offending State accountable for breaches within the Vienna Convention on the Law of Treaties but also provides an international adjudicator for the resolution of conflicts arising from a violation of an article. The public adjudicator that could address the breach and implement the reparations of treaty breach would be the International Court of Justice. The treaty system would also set the framework for monitoring mechanisms instead of new negotiations for States in *ad hoc* extraditions while also giving Courts legal issues to address.

Third, this thesis examines the problems with the Minister of Justice being the decision-maker of extradition affairs. Especially when the Minister is a Cabinet member and could make decisions based on party-bias positions towards the Requesting-State. The Law Commission favours the Attorney-General as the Central Authority. This links into New Zealand's long-standing tradition that prosecutors generally have a high standard of trust and legitimacy when handling prosecutions. Perhaps, continuing this system and having the Attorney-General as their head of the Authority, is the best model to proceed in extradition. The Attorney-General has two roles: one as a Cabinet Minister serving Her Majesty's Government, and the other, being Her Majesty's principal legal adviser (therefore, lead prosecutor). The thesis accepts the benefits of the Attorney-General having two roles that would aid in inter-governmental contexts whilst most of the functions exercised by the Attorney would in practice be carried out by the Solicitor-General. However, it is also concerned if the discretion is used for the Attorney-General to step in during an extradition proceeding as a result of party bias. The assumption of

paternalism could be curbed not just by referral to the Crown Law Manuals to the Attorney-General but could benefit from a set out guideline that the public could place trust and confidence in. Therefore, the thesis recommends stronger guidelines to prevent conflict if the Attorney-General is involved in the extradition proceedings.

Fourth, the limits to judicial reviews in extradition procedures are addressed. The Judiciary is limited in its role in assessing the reliability of the assurances, and also, in allowing cross-examination of Crown witnesses when giving evidence concerning the credibility of assurances. It concedes the importance of comity and mutual respect but also suggests extreme examples of allowing evidence to be tested if they meet the threshold or have been viewed by a special counsel as sufficient. The Courts should also be able to review if diplomatic protection could be afforded to the requested-person in their extradition hearing if the protection would have an effect on the person's fundamental human rights. This will be a particularly tricky area of law for the Courts to be involved, especially since New Zealand Courts have never faced a claim for diplomatic protection in an extradition context. It would require the Courts to examine and assess whether the consulate assistance from MFAT is indeed insufficient and how the requested-person could not access any local remedies.

Finally, could the Crown be held liable for a surrender that leads to a violation by a Foreign-State? The liabilities for the Crown are discussed and examined. Since the Home-State is responsible for allowing the surrender and satisfaction of diplomatic assurances, it should not be freed from its responsibilities and liabilities when it has advocated throughout the extradition proceedings, that the safeguards were adequate but later turned out to be inadequate or are breached. Especially if the requested-person argues through the procedures that the assurances are insufficient or unreliable, but the Crown insist otherwise. While compensation might offer some relief for the families of the victims, the difficulty is not holding the Crown liable in the first place, but that compensation and any liability would be of limited comfort to the requested-person and their families.

This thesis proposes different monitoring mechanisms while acknowledging that ultimately, these undertakings do not work without a treaty. The monitoring mechanisms do not function as well in *ad hoc* arrangements as seen with Kim, because they are not binding compared to monitoring arrangements set up within a treaty framework. It does not mean a treaty is not needed if the Government takes on the Law Commission's recommendations and model, but a treaty model will be able to legitimise the diplomatic assurances undertaken by the Requesting-State as seen post-*Othman*.

Taking human rights seriously means figuring out methods of preserving them before the inevitable extradition requests are received, such as framing assurance requirements within a treaty rather than dealing with them on an *ad hoc* basis once the requests are made. Oppositions against the formation of an extradition treaty with China due to human rights concerns fail to see the irony that it is the same instrument which protects it.

Bibliography

A. Cases

1. *New Zealand*

Yan v Commissioner of Police [2015] NZCA 576, [2016] 2 NZLR 593.

Kim v Minister of Justice [2016] NZHC 1490, 3 NZLR 425 (First judicial review decision).

Kim v Minister of Justice [2017] NZHC 2109, [2017] 3 NZLR 823 (Second judicial review decision).

Dotcom v United States of America [2012] DCR 661.

Bujak v Republic of Poland [2007] NZCA 392.

Police v Radhi [2015] NZDC 7576.

Radhi v District Court at Manukau [2015] NZHC 3347.

Radhi v District Court at Manukau [2017] NZCA 157; [2017] NZAR 692 [Radhi (CA)].

Radhi v District Court at Manukau [2017] NZSC 198.

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

Ortmann v USA [2017] NZHC 189.

Humane Society International Inc v Kyodo Senpaku Kaisha [2005] FCA 664.

Humane Society International Inc v Kyodo Senpaku Kaisha (2006) 232 ALR 478.

Dotcom v Crown Law Office [2018] NZHRRT 7.

Dotcom v United States of America [2014] NZSC 24, [2014] 1 NZLR 355 [Dotcom (Extradition)].

Zaoui v Attorney-General (No 2) [2005] NZSC 38, [2006] 1 NZLR 289.

Charter Holdings Ltd v Commissioner of Inland Revenue [2015] NZHC 1506, [2015] NZAR 1506.

Geary v Psychologists Board [2009] NZCA 134, [2009] NZAR 338.

Wilson v White [2005] 1 NZLR 189 (CA).

Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd [1997] 1 NZLR 650 (CA).

Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA).

Association for Migration and Investments Inc v A-G [2006] NZAR 45 (HC).

New Zealand Association for Migration and Investments Inc v A-G [2006] NZAR 45 (HC).

Fang v Jiang [2007] NZAR 420 (HC).

Austin, Nichols & Co Inc v Stichting Lodestar [2008] 2 NZLR 141 (SC).

2. Australia

Li and Others v Zhou and Another (2014) 310 ALR 66.

Minister for Justice v Adamas (2013) 253 CLR 43, [2013] HCA 59.

Adamas v O'Connor (No 2) (2012) 291 ALR 77; [2012] FCA 227 (Adamas); and *O'Connor v Adamas* (2013) 210 FCR 364; 295 ALR 502 ; [2013] FCAFC 14 (O'Connor).

Adamas v O'Connor (No 2) (2012) 291 ALR 77; [2012] FCA 227 (Adamas).

Commonwealth Minister for Justice v Adamas and Another (2013) 304 ALR 305.

Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, (1990) 97 ALR 124.

Mokbel v Attorney General for the Commonwealth of Australia (2007) 162 FCR 278, (2007) 244 ALR 517.

3. United Kingdom

R v Evans ex p Pinochet Ugarte [1998] 38 ILM 68 (QB).

R v Governor of Brixton Prison ex p Sobben [1963] QB 243.

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935.

R v Secretary of State for Foreign & Commonwealth Affairs, ex p Everett [1989] 1 QB 811, 820, (1988) 84 ILR 713 (CA).

Johnstone v Pedlar [1921] 2 AC 262, [1921] All ER Rep 176 (HL).

R v Secretary of State for Foreign & Commonwealth Affairs, ex p Butt [1999] EWCA Civ 1803, 116 ILR 607.

R v Secretary of State for Foreign & Commonwealth Affairs, ex p Pirbhai (1985) 107 ILR 461 (CA).

R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs [2002] EWCA Civ 1598, [2003] 3 LRC 297.

AK Investments CJSC v Kyrgyz Mobil Ltd [2011] UKPC 7, [2011] 4 All ER 1027.

Al-Koronky v Time-Life Entertainment Group [2006] EWCA Civ 1123.

Jones v Ministry of Interior of the Kingdom of Saudi Arabia [2006] 1 AC 270 (HL).

4. Canada

United States v Burns [2001] 1 SCR 283.

Lai v Canada (Minister of Citizenship and Immigration) 2007 FC 361; [2008] 2 F.C.R. 3.

Lai v Canada (Citizenship and Immigration) 2011 FC 915; [2013] 2 F.C.R. 56.

Lai v. Canada (Citizenship and Immigration), [2013] 2 F.C.R. 56, 2011 FC 915, [2013] 2 R.C.F. 56, [2011] F.C.J. No. 1086, [2011] A.C.F. no 1086.

5. United States of America

Matta-Ballesteros v. Henman 896 F 2d 255 (7th Cir 1990).

United States ex rel. Lujan v. Gengler 510 F 2d 62 (2d Cir).

United States v. Zabaneh 837 F 2d 1249 (5th Cir 1988).

United States v. Cadena, 585 F 2d 1252 (5th Cir 1979).

United States v. Davis 767 F 2d 1025 (2nd Cir 1985).

United States v. Cordero 668 F 2d 32 (1st Cir 1981).

Xiao v. Reno (Wang I) 837 F Supp 1506 (ND Cal 1993).

Wang v. Reno 81 F 3d 808 (9th Cir 1996).

United States v. Valot 625 F 2d 308 (9th Cir 1980).

6. International Bodies

Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction Phase) [1973] ICJ Rep 3.

LaGrand (Germany v. United States of America) (Judgement) [2001] ICJ Rep 466.

Gabcikovo-Nagymaros Danube Dam Project (Hungary v Slovakia) (Merits) (1997) ICJ Rep 7; 37 ILM 162.

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

Chahal v The United Kingdom (1996) 23 EHRR 413 (ECHR).

Bahmanzadeh v The United Kingdom (2014) ECHR 1050.

Frontier Dispute (Burkina Faso v. Republic of Mali) [1986] ICJ Rep 573.

Nuclear Tests Case (New Zealand v France) [1974] ICJ Rep 457.

Agiza v Sweden CAT/C/34/0/233/2003 Committee Against Torture (20 May 2005).

Alzery v Sweden CCPR/C/88/D/1416/2005 UN Human Rights Committee (10 November 2006).

Srai v Kazakhstan CCPR/C/103/D/2024/2011 UN Human Rights Committee (1 December 2011).

Valetov v Kazakhstan CCPR/C/110/D/2104/2011 UN Human Rights Committee (28 April 2014).

B. Treaties and agreements

United Nations 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).

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (opened for signature 18 December 2002, entered into force 22 June 2006).

European Convention on Human Rights 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

Model Treaty on Extradition, G.A. res. 45/116, annexe, 45 U.N. GAOR Supp. (No. 49A) at 212, U.N. Doc. A/45/49 (1990).

Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 29 April 1970, entered into force 27 January 1980).

Vienna Convention on the Law of Consular Relations 596 UNTS 261 (opened for signature 24 April 1963, entered into force 19 March 1967).

Agreement between the Government of New Zealand and the Government of the Hong Kong Special Administrative Region of the People's Republic of China

Concerning Mutual Legal Assistance in Criminal Matters 2132 UNTS 129 (signed 3 April 1998, entered into force 1 March 1999).

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).

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

Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, Jordan United Kingdom of Great Britain and Northern Ireland-Jordan 2950 UNTS (24 March 2013).

C. Other international materials

Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations GA Res 61/34, LVIII A/Res/CN4/577 (2006).

United Nations High Commissioner for Refugees *Note on Diplomatic Assurances and International Refugee Protection (Protection Operations and Legal Advice Section Division of International Protection Services)* (2006).

Draft Articles on Diplomatic Protection Supplement No 10, A/61/10 (2006).

James Crawford *Draft Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, UN GAOR, LVI A/56/10 (2001).

Responsibility of States for Internationally Wrongful Acts GA Res 56/83, A/Res/56/49 (2001).

Diplomatic protection [2000] Vol 2(2) YBILC 72.

Diplomatic Protection – First report on diplomatic protection, by Mr John R Dugard, Special Rapporteur [2000] vol 2, pt 1 YILC 205.

D. Legislation

7. *New Zealand*

Extradition Act 1999.

Immigration Act 2009.

Crimes of Torture Act 1989.

New Zealand Bill of Rights Act 1990.

Crown Proceedings Act 1950.

Ombudsmen Act 1975.

Citizenship Act 1977.

Crown Proceedings Act 1950.

Constitution Act 1986.

Human Rights Act 1993.

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Judicial Review Procedure Act 2016.

8. *United Kingdom*

Extradition Act 2003 (UK).

9. *Australia*

Extradition Act 1988 (Australia).

10. *Hong Kong*

Ombudsman Ordinance (Cap. 397) (HK).

E. Law Commission Reports

Law Commission *Crown Liability and Judicial Immunity A response to Baigent's case and Harvey v Derrick* (NZLC IP37, 1997) [NZLC IP37].

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

Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP137, 2016) [NZLC IP137].

Law Commission *International Law and the Law of New Zealand* (NZLC R34, 1996).

F. New Zealand Government Materials

Crown Law Office *Briefing to the incoming Attorney-General* (October 2017).

Cabinet Office *Cabinet Manual 2017*.

Crown Law *Crown Law Practice in New Zealand* (1961).

Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013).

G. New Zealand Government Reports

John Spencer *Review of Public Prosecution Services* (Ministry of Justice, September 2011).

Rodney Hansen “Report for Minister of Justice on Compensation Claim by Teina Anthony Pora” (23 March 2016).

David McGee *Report on an unannounced follow-up inspection of Department of Corrections’ Waikeria Prison’s West North & West South Units Under the Crimes of Torture Act 1989* (Office of the Ombudsman, September 2011).

Peter Boshier *Report on an unannounced inspection of Corrections Service Rolleston Prison Under the Crimes of Torture Act 1989* (Office of the Ombudsman, April 2016).

Beverley Wakem *Report on an unannounced follow-up visit to Department of Corrections’ Auckland Prison Directed segregation facilities Under the Crimes of Torture Act 1989* (Office of the Ombudsman, April 2012).

Beverley Wakem *Report on an unannounced follow-up visit to Department of Corrections’ Auckland Men’s Prison 10 August 2011 under the Crimes of Torture Act 1989* (Office of the Ombudsman, August 2011).

Beverley Wakem *Report on an unannounced inspection of Department of Corrections’ Rimutaka Prison (Upper Prison – Units three and four) Under the Crimes of Torture Act 1989* (Office of the Ombudsman, September 2012).

Beverley Wakem *Report on an unannounced inspection of Department of Corrections’ Arohata Prison Under the Crimes of Torture Act 1989* (Office of the Ombudsman, January 2012).

Beverley Wakem *Report on an unannounced follow-up visit to Department of Corrections’ Auckland Prison Directed segregation facilities Under the Crimes of Torture Act 1989* (Office of the Ombudsman, April 2012).

H. United Kingdom Reports

David Anderson QC and Clive Walker QC “Deportation With Assurances” Cm 9462 (Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, July 2017).

United Kingdom the Select Committee on Extradition Law “Extradition: UK Law and Practice” HL paper 126 (10 March 2015).

I. Secondary sources

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

Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014).

Lord Collins and Jonathan Harris (eds) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2017).

Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012).

M Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008).

FA Mann *Foreign Affairs in English Courts* (Oxford University Press, Oxford, 1986).

J. Journals (Law reviews and papers)

Richard Flanagan "Legitimate Expectation and Applications - An Outdated and Unneeded Distinction" (2011) 17 *CanterLawRw* 283.

Geoff McLay "The Problem with Suing Sovereigns" (2010) 41 *VUWLawRw* 403.

John K. Setear "Responses to Breach of a Treaty and Rationalist International relations Theory: The Rules of Release and Remediation in the Law of Treaties and the law of State Responsibility" (1997) 83 *Va L Rev* 1819.

John Quigley "LaGrand: A Challenge to the U.S. Judiciary" (2002) 27 *Yale J. Int'l L.* 435.

Guy Powels "Why so complicated? The role and status of the Attorney-General in Pacific Island States and the case of Tonga" (2016) Vol 22. *CLJP/JDCP Journals*.

La Forest, Anne Warner "The balance between liberty and comity in the evidentiary requirements applicable to extradition proceedings." (2002) 28(1) *Queen's Law Journal* 95.

Campbell McLachlan "Investment Treaties and General International Law" (2008) 57 *International and Comparative Law Quarterly* pp 361-401.

John K. Setear "Responses to Breach of a Treaty and Rationalist International relations Theory: The Rules of Release and Remediation in the Law of Treaties and the law of State Responsibility" (1997) 83 *Va L Rev* 1819.

John McGrath QC, "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 *NZULR* at 197.

Nicola Southall "Looking Backwards and Forwards: A Critique of New Zealand's System for Compensating the Wrongly Convicted" (LLB (Hons) Dissertation, University of Otago, 2008).

Joanna Judge "Modernising New Zealand's Extradition Law: A Critique of the Law Commission's proposal" (LLB (Hons), Victoria University of Wellington, 2016).

Gennadiy Sergiy Bogutskiy "Improving Extradition Procedure through Strengthening the Legal Status of an Individual and Transferring the Decision Making Right from the Executive to Judiciary Branch of Power" (LLM Thesis, University of Toronto, 2012).

Professor Manfred Nowak "The Principles of Non-Refoulement" in Catarina Krause, Martin Scheinin, Åbo akademi *International protection of human rights: a textbook* (2nd ed, Åbo Akademi University, Institute for Human Rights, Finland, 2012).

Zelins'ka, N. A., International crimes and international criminality, Monographic research (Odesa, Ukraine: Yurydychna literatura, 2006).

Anna MacCormack "The United States, China, and extradition: ready for the next step?" (2009) 12(2) Rev 445.

Michael R. Wing "Extradition Treaties - International Law - The United States Supreme Court Approves Extraterritorial Abduction of Foreign Criminals - United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992)" (1993) 23 Ga. J. Int'l & Comp. L Rev 435.

"We the Peoples" [2006] NZLJ 50 New Zealand Law Journal.

Peter D. Sutherland "The Development of International Law of Extradition" (1984) 28 St. Louis U. L.J. 33.

Johannes Silvis, Judge at the European Court of Human Rights "Extradition and Human Rights Diplomatic assurances and Human Rights in the Extradition Context" (Strasbourg Lecture 2014, The Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters, Strasbourg, 20 May 2014).

K. Online sources

David Anderson QC and Clive Walker QC "Deportation with Assurances" (July 2017) United Kingdom Government Publications <www.gov.uk/government/publications>.

Amnesty International "China: Torture and forced confessions rampant amid systematic trampling of lawyers' rights" (12 November 2015) <www.amnesty.org>.

Office of the United States Trade Representative "U.S. Model Bilateral Investment Treaty" (2012) <<https://ustr.gov>>.

Dr. Conor McCarthy "Diplomatic Assurances, Torture and Extradition: The Case of Othman (Abu Qatada) v. the United Kingdom" (18 January 2012) European Journal of International Law: Talk <www.ejiltalk.org>.

United Nations Human Rights Office of the High Commissioner "Special Procedures of the Human Rights Council" <www.ohchr.com>.

Amnesty International European Institutions Office "Dangerous deals: Europe's reliance on "diplomatic assurances" against torture" <www.amnesty.eu>.

"Dangerous deals: Europe's reliance on "diplomatic assurances" against torture" Amnesty International European Institutions Office <www.amnesty.eu>.

Ministry of Foreign Affairs and Trade "New Zealand Treaties Online" <www.treaties.mfat.govt.nz>.

Amnesty International "Diplomatic assurances - no protection against torture or ill-treatment" <www.amnesty.org>.

"Letter to the Swiss Government Regarding Diplomatic Assurances" (14 December 2006) Human Rights Watch <www.hrw.org>.

Laws of New Zealand Extradition from New Zealand: Termination of Treaties (online ed).

Refworld "Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture" (15 April 2005) <www.refworld.org>.

Max Planck Encyclopedia of Public International Law (2006, online ed) Treaties, Amendment and Revision.

International Justice Resource Center "UN Human Rights Treaty Bodies" <www.ijrcenter.org/un-treaty-bodies>.

Crown Prosecution Service "Extradition" <www.cps.gov.uk>.

Human Rights Watch "VII. From Stockholm to Cairo: Ahmad `Agiza and Muhammad Al-Zari" <www.hrw.org>.

Crown Law "Extradition" <www.crownlaw.govt.nz>.

Human Rights Commission "Periodic Review of New Zealand's compliance with the Convention Against Torture" <www.hrc.co.nz>

National Crime Agency "European Arrest Warrant statistics" <<http://www.nationalcrimeagency.gov.uk>>.

Michael Cullen "The role of the Attorney-General" (22 July 2006) Beehive <www.beehive.govt.nz>.

Crown Law "Law Officers of the Crown" <www.crownlaw.govt.nz>.

New Zealand Law Society Continuing Legal Education "What is Judicial Review?" <www.lawyerseducation.co.nz>.

Amnesty International "Diplomatic Assurances Against Torture - Inherently Wrong, Inherently Unreliable" <www.amnesty.org>.

Lexis PSL "Extradition and mutual legal assistance requests in corporate crime cases" (20 July 2016) Lexis Nexis.

"Mutual Assistance" Dictionary of New Zealand Law, Lexis Nexis.

L. Others

Letter from Edrick Child (Deputy Chief Legal Counsel of the Ministry of Justice) to Jack Wong regarding assessments of Diplomatic Assurances in Extradition (13 September 2017).

Email from Alison Todd (Counsel of the Crown Law Office) to Jack Wong regarding Kyung Yup Kim's diplomatic assurance disclosure to his counsel (14 September 2017).

M. Other sources

Hiren Mohini "Chinese detain man over Auckland taxi driver murder" (19 June 2010) Stuff <www.stuff.co.nz>.

Human Rights Watch "Diplomatic Assurances" against Torture Questions and Answers (10 November 2006) <www.hrw.org>.

Law Teacher "Othman (Abu Qatada) v The United Kingdom (2012) 55 EHRR 1, 189" <www.lawteacher.net>.

"China says Sino-British Joint Declaration on Hong Kong no longer has meaning" (30 June 2017) Reuters <www.reuters.com>.

Neil Connor "Chinese courts convict more than 99.9 per cent of defendants" (14 March 2016) The Telegraph <www.telegraph.co.uk>.

"Lawyer targets China's chief justice in NZ extradition case" (4 April 2017) Radio New Zealand <www.radionz.co.nz>.

Stacey Kirk "Auckland businessman William Yan, set to head back to China for questioning" *Stuff* (New Zealand, 23 October 2016) <www.stuff.co.nz>.

Craig McCulloch "Corrections breached torture conventions - Ombudsman" (1 March 2017) Radio New Zealand <www.radionz.co.nz>.

"Controversial businessman William Yan sentenced for money laundering" (10 May 2017) *Stuff* <www.stuff.co.nz>.

"Taxi murder suspect could get China trial" *The New Zealand Herald* (online ed, New Zealand, 16 June 2010).

Jared Savage "Controversial citizen William Yan AKA Bill Liu admits money laundering of 'significant sums'" *The New Zealand Herald* (online ed, New Zealand, 10 May 2017).

Jared Savage "William Yan's aka Bill Liu's secret deal with China in \$43 million money laundering case" *The New Zealand Herald* (online ed, New Zealand, 10 May 2017).

Stephen Dziedzic "Australia-China extradition treaty pulled by Federal Government after backbench rebellion" (28 March 2017) ABC news <www.abc.com.au>.

Hiren Mohini "Chinese detain man over Auckland taxi driver murder" (19 June 2010) Stuff <www.stuff.co.nz>.

Catherine Hutton "Extradition bill for murder-accused tops \$1.2m" (13 March 2018) Radio New Zealand <www.rnz.co.nz>.

"China Hails First Fugitive Extradition From U.S. Under Trump" (1 June 2017) Reuters <www.reuters.com>.

Nathan Vanderklippe "Family of imprisoned smuggler wants Ottawa to pressure Beijing for medical care" *The Globe and Mail* (online ed, Ontario, 14 April 2017).

Stephanie Nebehay "China accuses U.N. rights envoy of 'meddling' in its judiciary" (9 June 2017) Reuters <www.reuters.com>.

Kinling Lo "China extradites escaped American armed robber to the U.S." (25 August 2017) *South China Morning Post* <www.scmp.com>.

