

Centre for Comparative and Public Law

Extradition Law and Human Rights:

Does the Hong Kong Government's Bill provide sufficient safeguard for our rights?

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Ad hoc, or ‘special’ extradition arrangements

- Bilateral or multilateral treaty arrangements signal trust and confidence in another country’s judicial and human rights protection systems.
- Invariably dependent on baseline human rights record; often ratification of international human rights treaty (EU Charter, ECHR for CoE, UDHR, ICCPR etc.).
- Ad hoc, or ‘special’ extradition arrangements serve a different purpose.
- An emergency measure for use in exceptional circumstances.
- Ministerial certification trigger.
- MoU.

Section 194 of the Extradition Act 2003

- '...(1) This section applies if the Secretary of State believes that—
- (a) arrangements have been made between the United Kingdom and another territory for the extradition of a person to the territory, and
 - (b) the territory is not a category 1 territory or a category 2 territory.
- (2) The Secretary of State may certify that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the extradition of the person.
- (3) If the Secretary of State issues a certificate under subsection (2) this Act applies in respect of the person's extradition to the territory as if the territory were a category 2 territory.
- (4) As applied by subsection (3), this Act has effect—
- (a) as if sections 71(4) , 73(5) , 74(11)(b) , 84(7) and 86(7) were omitted;
 - (b) with any other modifications specified in the certificate.
- (5) A certificate under subsection (2) in relation to a person is conclusive evidence that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the person's extradition...'

Used twice

- Vincent Bajinja & others. Rwanda. Genocide. Crimes effecting international legal order.
- Zain Taj Dean. Taiwan. Country with whom trust / confidence possible but where treaty impossible for other reasons (no state recognition).
- Never regarded as a substitute for ongoing or failed treaty negotiations.

HK extradition to China

- 1998 assurances of public consultation
- Unilateral removal of Legislative Council scrutiny
- Street kidnaping / silencing political dissent
- Political subservience
- Raises wider concerns for the rule of law generally
- BHRC shares and supports those concerns; as today's joint statement with the Institute of International Bar Associations attests.

‘The standards adopted in our SFO are in line with the common practice in juridical assistance’?

- Are ‘the rights and procedural safeguards for those to be surrendered provided in the [FOO] are in line with common international practice and regarded as a blueprint with reference value’?
- Examine one of the foundational premises of the proposed amendments.
- Take another state with dire judicial and human rights record. North Korea. Chad. Eritrea. Suriname.
- UK’s sole possible legal basis for extradition with these, and many other, countries is s.194
- Why is it acceptable for extradition arrangements with such states, which manifestly don’t respect human rights, to potentially exist at all?
- Especially where extradition arrangements have retroactive application; to offences committed whenever committed (being procedural not substantive, the general international law prohibition on retroactive criminal laws has no application: *R. v Secretary of State for the Home Department Ex p. Hill* [1999] QB 886); so long as criminal at the time of commission (*R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 3) [2000] 1 AC 147).

- And where the very act of establishing extradition relations, inc. ad hoc MoU, establishes an assumption of acceptable human rights compliance
- Gomes v Trinidad [2009] UKHL 21; [2009] 1 WLR 1038 at §36:

‘...More difficult, no doubt, are certain other category 2 territories or indeed, a country like Rwanda with whom, we are told, ad hoc extradition arrangements have recently been made pursuant to section 194 of the Act. We conclude, however, that even with regard to these countries the presumption should be that justice will be done despite the passage of time and the burden should be on the accused to establish the contrary. If there is such a likelihood of injustice, almost certainly this will be apparent from widely available international reports...The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international co-operation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad...’

Have ‘similar case-based surrender arrangements have been practiced in the United Kingdom and Canada for years’?

- Yes and no
- Most countries (and all who permit of ad hoc extradition and all who have signed treaties with China) now operate modern extradition schemes focussed on human rights and containing robust *judicial* protections against exposure to human rights violations
- Section 82: Passage of time

‘...A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—

- (a) committed the extradition offence (where he is accused of its commission), or
- (b) become unlawfully at large (where he is alleged to have been convicted of it)...’

Concurrent jurisdiction cases

- Section 83A: Forum

- '...(1) The extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.
- (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge—
- (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
 - (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
- (3) These are the specified matters relating to the interests of justice—
- (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
 - (b) the interests of any victims of the extradition offence;
 - (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
 - (d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
 - (e) any delay that might result from proceeding in one jurisdiction rather than another;
 - (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—
 - (i) the jurisdictions in which witnesses, co—defendants and other suspects are located, and
 - (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;
 - (g) D's connections with the United Kingdom.
- (4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 2 territory concerned.
- (5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum.
- (6) In this section "D's relevant activity" means activity which is material to the commission of the extradition offence and is alleged to have been performed by D..'

Trials in absence

- Section 85

- ‘...(1) If the judge is required to proceed under this section he must decide whether the person was convicted in his presence.
- (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 87.
- (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
- (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 87.
- (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
- (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 86.
- (7) If the judge decides that question in the negative he must order the person's discharge.
- (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—
- (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
 - (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..’

Physical or mental condition

- Section 91

- ‘...(1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
- (2) The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.
- (3) The judge must—
- (a) order the person's discharge, or
 - (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied...’

abuse of process (bad faith)

- R (Bermingham) v Director of the Serious Fraud Office [2007] QB 727
- R (Government of the United States of America) v Bow Street Magistrates' Court [2006] EWHC 2256 (Admin); [2007] 1 WLR 1157

Human rights

- Section 87

- '...(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
- (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
- (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited...'

Inhuman or degrading treatment (art. 3 ECHR)

- e.g. prison detention conditions.
- Soering v United Kingdom (1989) 11 EHRR 439; act of surrender / exposure to violation is itself a violation.
- Even with EU 'federal' system of judicial cooperation: Criminal Proceedings against Aranyosi (C-404/15 PPU) [2016] QB 921
- Mohammed v Portugal [2017] EWHC 3237 (Admin); [2018] EWHC 225 (Admin)
- Taiwan: Dean v Lord Advocate [2017] UKSC 44; [2017] 1 WLR 2721

Fair trial (art. 6 ECHR)

- Flagrancy threshold. Russia. Turkey.
- *Bajinja v Rwanda* [2009] EWHC 770 – no independent and impartial tribunal - political frame of court - defence witnesses unable attend trial due to reprisals:

‘...We have reached a firm conclusion as to the gravity of the problems that would face these appellants as regards witnesses if they were returned for trial in Rwanda. Those very problems do not promise well for the judiciary's impartiality and independence. The general evidence as to the nature of the Rwandan polity offers no better promise. When one adds all the particular evidence we have described touching the justice system, we are driven to conclude that if these appellants were returned there would be a real risk that they would suffer a flagrant denial of justice...’ (§121)

‘...We certainly cannot sanction extradition as a means of encouraging the Rwandan authorities to redouble their efforts to achieve a justice system that guarantees due process. That might serve a political aspiration, but would amount to denial of legal principle...’ (§120)

- *Government of Rwanda v Nteziryayo* [2017] EWHC 1912

‘...the arrangements for defence in Rwanda are clearly inadequate. They would be inadequate even if the remainder of the criminal justice system was acceptable and the concerns which arise were not present. In an authoritarian state, where judicial independence is institutionally weak and has been compromised in the past, where there is established fear by witnesses, not all of which can be effectively countered, the existing arrangements are quite insufficient to ensure a reasonable fairness in the proceedings...’ (§378)

A robust, human rights oriented, extradition scheme

- Art. 5 ECHR (right to liberty)
- The Government of the United States of America v Giese [2015 EWHC 2733 (Admin)]; real risk of exposure to a civil commitment order (civil detention)
- Article 8 ECHR (right to family life / proportionality)
- R (HH) v Westminster City Magistrates' Court [2012] UKSC 25; [2013] 1 AC 338

Assurances

- Bolstered by a mature and developed system for taking and assessing ‘assurances’ of human rights compliance
- Othman v United Kingdom (2012) 55 EHRR 1:

...In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human-rights situation in the receiving state excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances...’ (§188)

- Khazakstan, Tajikistan, Turkmenistan.

More usually

‘...the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state’s practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:

- (1) whether the terms of the assurances have been disclosed to the Court;
- (2) whether the assurances are specific or are general and vague;
- (3) who has given the assurances and whether that person can bind the receiving state;
- (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
- (5) whether the assurances concerns treatment which is legal or illegal in the receiving state;
- (6) whether they have been given by a Contracting State;
- (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state’s record in abiding by similar assurances;
- (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant’s lawyers;
- (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
- (10) whether the applicant has previously been ill-treated in the receiving state; and
- (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State...’
(Othman, §189)

- Monitoring mechanisms crucial. *Shmatko v The Russian Federation* [2018] EWHC 3534 (Admin): Russian assurances rejected as untrustworthy, especially in view of efforts to reduce monitoring.

ad hoc arrangements *can* survive a robust human rights analysis

- Dean v Lord Advocate [2017] UKSC 44; [2017] 1 WLR 2721 at §36:

‘...I proceed on the basis that the judicial authorities of Taiwan are acting in good faith in entering into the memorandum of understanding and in giving the assurances which they have. I also agree with the judges of the Appeal Court in so far as they proceeded on the assumption that the Taiwanese authorities responsible for the management of Taipei prison would make every effort to fulfil those undertakings. As Lord Drummond Young observed in his dissenting opinion, extradition assists in maintaining the rule of law both nationally and internationally. The United Kingdom Government has chosen to enter into extradition treaties with friendly foreign states or territories giving rise to mutual obligations in international law. In *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038, Lord Brown stated, at para 36: “The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations.”. The Lord Advocate acknowledges that the memorandum of understanding does not have the status of a treaty enforceable in international law. That notwithstanding, there remains a strong public interest in promoting and maintaining the rule of law by means of extradition...’

Hong Kong's Fugitive Offenders Act

- Court monitors only dual criminality, prima facie case (s.10(6)(b)), convictions in absence (s.5(1)(b)), political motivation (s.5(1)(c)-(d)), double jeopardy (s.5(1)(e)), specialty (s.5(2)).
- The product of previous age.
- 'Political offence' exception (s.5(1)(a) FOO) is redundant. Hollow. No persecuting state really requests extradition for espionage or treason etc. Not a provision of modern extradition treaties.
- The FOO possesses none of the fundamental human rights protections now vested in a UK extradition court.
- Even any ICCPR or HK Bill of Rights compliance threshold.
- Load-bearing capacity of FOO's 'human rights protections' not likely to have been tested in view of limited number of treaties HK has signed, and with whom.
- But, in context of a requesting state with dire judicial and human rights records, such as China, ad hoc arrangements being 'substantially in conformity' with FOO (s.3(9)) are little comfort

- Increased punishability threshold (3 or 7 years) not a substantial protection: shoplifting
- Additional treaty protections deriving from arrangement?
- Section 3(1) FOO: e.g Fugitive Offenders (Netherlands) Order: Cap. 503 Laws of Hong Kong. Article 7:
 - ‘...The surrender of a fugitive offender may also be refused if the requested Party considers that:
 - (a) the offence is, having regard to all the circumstances, not sufficiently serious to warrant the surrender; or
 - (b) there has been excessive delay, for reasons which cannot be imputed to the fugitive offender, in bringing charges against him, in bringing his case to trial or in making him serve his sentence or the remainder thereof; or
 - (c) the surrender of the fugitive offender may place that Party in breach of its obligations under international treaties; or
 - (d) in the circumstances of the case, the surrender of the fugitive offender would be incompatible with humanitarian considerations in view of age, health or other personal circumstances.
- ‘Obligations under international treaties’ presumably implies ICCPR compliance.
- Happenstance. HK law does not *require* extradition arrangements to contain such clauses (or indeed any beyond those on the FOO itself).

New clause 3A / 31.5.19 Security Panel proposals

- Unless written into law, no political incentive to agree, or power to compel Chief Executive to agree, or review any failure to agree, necessary basic human rights protections.
- In any event, even if agreed in an arrangement, compliance will be determined / assessed by executive not judiciary.
- Even in situations where requesting state plays no part in the appointment of the executive of the requested state, executive (rather than judicial) supervision of such matters is fundamentally at odds with modern human rights standards: Regina (Kashamu) v Governor of Brixton Prison [2001] EWHC 980 (Admin); [2002] QB 887

‘...Having regard, as this court must, to the Strasbourg jurisprudence, it seems to me to be clear that a court and not the Secretary of State is the appropriate forum for a decision as to the lawfulness of a fugitive's detention...’ (§29)

Conclusion

- Even leaving aside the broader rule of law implications of the proposals, HK's current extradition system is not nearly robust enough to carry burden of ad hoc extradition.
- BHRC stands alongside the HK Bar Association and the HK Law Society in calling for immediate suspension of these proposals pending (at a minimum) radical overhaul of of HK's extradition laws.