

# **‘Fair Trial’ As A Precondition To Rendition: An International Legal Perspective**

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# **‘FAIR TRIAL’ AS A PRECONDITION TO RENDITION: AN INTERNATIONAL LEGAL PERSPECTIVE\***

Roda Mushkat<sup>#</sup>

## I. The ‘Human Rights’ Nexus

Before examining the place of a ‘fair trial’ clause in a rendition agreement, I would like to examine the ‘human rights’ nexus in general in extradition/rendition agreements, under international law.

Let me say first that I am not concerned here with what the Government’s Security Bureau calls the ‘usual safeguards’ – that is, double criminality, speciality, protection against re-surrender to a third country, the normal exclusion in relation to political offences and political prejudice, or even the death penalty. Indeed, it is quite evident that discussions of the subject in international legal circles are now into the 3Gs of ‘safeguards.’

Generally, there is by now ample support for the notion that human rights considerations should be taken into account in the extradition process.

A well-known catalyst of scholarly writings in support of this notion has been the *Soering Case* decided by the European Court of Human Rights in 1989.

### *The Soering Case*

Soering, a West German national, murdered his girlfriend’s parents in Virginia and fled to the UK, from which his extradition was requested by the US. After the UK ordered his extradition, he petitioned the European Commission of Human Rights, which referred the case to the European Court of Human Rights. The Court held that the UK was required by Article 3 of the European Convention on Human Rights -- which prohibits torture and inhuman or degrading treatment or punishment – not to extradite Soering to the US where there was a real risk that he would be subjected to inhuman or degrading treatment by being kept on death row for a prolonged period in the state of Virginia.

The Court found that *the fact that the actual human rights violation would take place outside the territory of the requested State did not absolve it from responsibility for any foreseeable consequence of extradition suffered outside its jurisdiction.*

In other words, in such a case *the requested state incurs responsibility because it has reasonable grounds to foresee that a violation of human rights will occur in the requesting state and, despite this, extradites the fugitive.*

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\* A paper presented at a Justice Forum on *Rendition: should Fair Trial be the Bottom Line?* (Hong Kong, 17 March 2001).

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The approach of the European Court of Human Rights towards the responsibility of a State party to human rights treaty for the foreseeable violations of human rights in the requesting state in extradition proceedings was followed by the UN Human Rights Committee in another well-known case, *Ng v Canada* [(1993) 98 ILR 479]. Here the Committee held that Canada had violated its obligations under Article 7 of the ICCPR – that prohibits cruel, inhuman or degrading treatment or punishment – by extraditing Ng to the US when it could reasonably have foreseen that, if sentenced to death in California, he would be executed by gas asphyxiation, a form of punishment in violation of that prohibition.

Of considerable significance in the support given to the importance of human rights considerations in the extradition process are the pronouncements and reports issued by the *three premier non-governmental international law associations* (all of which are composed of the most distinguished international jurists), namely: *the Institute of International Law*; *the International Law Association*; and *the International Association of Penal Law*.

All three bodies have approved reports that recommended that both executive and judicial authorities should refuse extradition where there is a real risk that the fugitive's human rights will be violated in the requesting state.

## II. Which Human Rights?

A question may nonetheless arise as to which human rights may be invoked to obstruct extradition? Given the specific mandate of this seminar, I will examine to what extent the 'Right to a Fair Trial' qualifies?

There is little doubt that the right to be tried by a proper court of law and the right to a fair trial are among the most important civil and political rights. As noted very recently by Mary Robinson, the UN High Commissioner for Human Rights in her opening address at the Workshop on Punishment of Minor Crimes, held in Beijing on 26-27 February 2001:

In fact, 'the way in which justice is administered is a key benchmark of a country's commitment to human rights.'

A similar sentiment has been expressed in an Open Letter sent on 27 February 2001 to the delegates of the NPC from the NGO *Human Rights in China*. The delegates were reminded that

'the way decisions are made on how to determine whether a crime has been committed and how to punish the authors of that crime is a key element in assessing the human rights situation of a country.'

On several occasions the European Court of Human Rights has held that these rights – to be tried by a proper court of law and the right to a fair trial – hold such a prominent place in a democratic society that they cannot be sacrificed to expediency nor even in the case of very serious crimes such as terrorism [*Barbera v Spain* (1988)] or organised crime [*Kostovski v the Netherlands* (1989)]. Again, in the *Soering Case*,

the European Court of Human Rights acknowledged that extradition might be refused in circumstances where the fugitive has suffered or risk suffering a flagrant denial of a fair trial in the requesting state.

Strong evidence for the importance of the ‘right to fair trial’ in the extradition context can be adduced from the 1990 *UN Model Treaty on Extradition*. Article 3 – which lists the ‘mandatory grounds for refusal of extradition – clearly specifies (in subsection ‘f’) that extradition shall not be granted ‘if the person would be subjected to torture or cruel, inhuman punishment or degrading punishment OR if that person *has not or would not receive the minimum guarantees in criminal proceedings as contained in the ICCPR, Article 14.*’

It should be emphasised that the Model Treaty covers BOTH the situation of a fugitive not having received the minimum guarantees in criminal proceeding AND where the fugitive *would not* receive the minimum guarantees in criminal proceedings.

### III. The ‘domestic standards’ Argument

A common argument (favoured by ‘cultural relativists’) made in respect of implementation of rights such as ‘fair trial’ or ‘due process’ is that the applicable standards are domestic – that such concepts as fair trial and due process are broad and abstract enough to allow considerable latitude to LOCAL INTERPRETATION.

Now, it is true that the conduct of criminal proceedings is accepted as a matter falling within the *reserved domain* of States. It is also true that there are variations regarding norms of fairness in criminal trials, since criminal proceedings are essentially the products of a nation’s history, tradition, and legal culture.

At the same time, there are *MINIMUM STANDARDS* that are accepted as binding by virtually all cultures, despite differences in specifications. This is not a unique problem of the right to fair trial, and in fact there are sufficient mechanisms in international law that are designed to address this issue, most notably the mechanism of ‘margin of appreciation.’ Accordingly, the Requested State will normally allow a fairly wide margin of appreciation to the Requesting State when accusations are leveled at its standards of criminal justice. In a similar vein, the courts of the Requested State will probably refuse extradition only where there is a clear evidence of a flagrant and systematic denial of fair trial rights in the Requesting State.

Such accommodating practice should address any concerns (raised by the Secretary for Security) regarding ‘mutual respect for each other’s laws and system.’ Yet, such mutual respect need not mean the exclusion of any reference to the relevant international standards in any extradition/rendition agreement. A provision incorporating reference to the relevant international principles should not be viewed as ‘disrespect’ for others’ laws and system. Rather, such a reference serves as a reminder that the protection of the defendant’s human rights is a RELEVANT CONSIDERATION, even if it should clearly be balanced against other key interests such as the suppression of crimes and preventing criminals from escaping justice.

#### IV. 'Conditional' Extradition/Rendition

To inject some 'reality-check' -- one may note that requesting States (in particular 'sensitive' ones) are unlikely to be pleased where extradition/rendition is subjected to express condition that the extraditee/person surrendered be accorded a fair trial, as it does appear to reflect upon the quality of the criminal justice in the Requesting State.

However, there ARE illustrations from State practice that such conditions are agreed upon. For example, when the US extradited Ziad Abu Eain to Israel in 1982, the Executive secured an undertaking from Israel that he would be tried by a civilian court, not a military court, and that he would be accorded all the fair trial rights required by human rights conventions [See *GA Resolution and Notes Verbale on the Extradition of Mr Eain* (1982) 22 ILM 442].

In February 1996, the Canadian Government extradited a Canadian national, Dennis Hurley, to Mexico on the condition that Mexico agree in writing to take 'all reasonable measures' to ensure his safety while in detention there, permit his counsel and Canadian Embassy officials to visit him and communicate with him 'at any reasonable time' and 'make its best efforts' to ensure that he was brought to trial and tried 'expeditiously.' [Canada, Department of Justice, *Press Release, Minister of Justice Orders Release of Dennis Hurley to Mexico* (27 Feb. 1996)].

In 1994 the Swiss Federal Supreme Court ordered the extradition of a convicted person to Turkey subject to the conditions that he would not be imprisoned for longer than the period of his sentence; that Turkey would respect the guarantees contained in the European Convention on Human Rights; that the Swiss Embassy in Turkey would be informed of the place of detention; that a member of the Swiss Embassy might visit the extraditee at any time without supervision; that the Swiss Embassy would be kept informed about his health and allowed to have him visited by a doctor of its choice; and that the extraditee could contact the Swiss Embassy at any time. [Cited in John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights* (1998) 92 *American Journal of International Law* 207.]

Admittedly, the examples I cited are of the practice known as 'conditional extradition.' Unfortunately, this kind of practice does not seem to work with all countries. A case in point is that of *Wang Jianye*, who was extradited by Thailand to China for a capital offence, subject to the conditions that he would not be executed or sentenced to a term of imprisonment exceeding 15 years. He was executed one year after the extradition request was granted. [(1997) 13 *Int'l Enforcement Law Reporter* 146, 149]

It is therefore again suggested that a better approach is to incorporate a clause in any rendition agreement with the Mainland, stipulating that rendition would be refused if a person would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil Rights, Article 14.

## V. Why should China be receptive to the inclusion of a 'fair trial' clause in a rendition agreement?

- a) China has signed the ICCPR and hence accepted the standards as laid down in Article 14. [I should note perhaps that even though the PRC has not ratified the treaty yet, it does not detract from the fact that it is internationally under a legal obligation]
- b) In fact, under PRC practice, treaties have direct application – imposing respective obligations on all government organs, including the executive and judiciary, without the need for any additional enactments to transform them into domestic law [Wang Tieya, *The Status of Treaties in the Chinese Legal System* (1995) 1 *Journal of Chinese & Comparative Law* 1, 16]. Indeed, several laws that had passed since the early 1980s contain provisions that affirm the superior status of treaties.
- c) As I noted earlier, respect for rights pertaining to the administration of justice is considered 'a key benchmark' of a country's commitment to human rights.
- d) There are serious concerns about human rights protections under China's Criminal Procedure Law. Unfortunately, expectations raised by revisions of the Law in 1996 – which by the way, still falls far short of international human rights standards (e.g., does not fully recognize the presumption of innocence; does not provide adequate safeguards against the use of evidence gathered through torture and other illegal means) -- have not materialised. Indeed, according to a STUDY released this month by *Human Rights in China*, entitled: *Empty Promises: Human Rights Protections and China's Criminal Procedure Law in Practice* – the implementation of the CPL has departed substantially from both the letter and the spirit of the law.

More specifically, the Study notes, CPL provisions aimed at safeguarding rights have been either watered down by interpretative rules issued by law enforcement agencies, or violated outright without the authors of the violations suffering any consequences. Loopholes and ambiguities in the CPL have been exploited to the full by law enforcement authorities. In certain areas, the CPL has actually resulted in greater limitations of key rights, such as regarding defence lawyers' access to prosecution evidence.

It is observed in the Study that Chinese lawyers have encountered a great deal of difficulty in practicing law. They have been often denied access to their clients during the pre-trial state, despite the CPL's stipulation that lawyers should be able to represent crime suspects. Also, lawyers' communication with clients has not been kept confidential. Meetings between lawyers and defendants or suspects are closely watched by law enforcement officers, who also listen in. Before trial, lawyers are not able to have access to all officially-collected evidence, and therefore are not able to prepare a meaningful defence. At the trial stage, lawyers are denied the chance to cross-examine witnesses, since most prosecution witnesses are not called to be present at trial. Moreover, some lawyers have been harassed, detained and even convicted of crimes for nothing but vigorously defending their clients.

And of course, there are the endemic problems that plague the judicial system in China. Most notably, China has not yet established an independent and impartial judiciary. The Chinese Communist Party and government departments are said to be routinely interfering in the work of the judiciary, a practice which has often resulted in miscarriages of justice.

The Study also found that there is a clear discriminatory practice in the implementation of the CPL. In dealing with politically-sensitive cases, time and again China's law implementation agencies (the police, prosecution, the courts) have actually ignored the rules of the CPL. Especially in trying political dissidents, China's judiciary is said to often blatantly violate procedural rules and deprive defendants of their due process rights. The rights of dissident defendants are said to be violated at almost every stage of the criminal process. As noted by the Study, this violates not only the prescriptions of the CPL, but also the equal protection clause in the PRC Constitution.

### Conclusion

It is evident that, like in other areas of the law, international human rights have impacted on the issue of surrender of fugitives. The governments of the PRC and the HKSAR should accept this reality and take note of expert opinion that 'the enforcement of international criminal law is better served by extradition law that expressly accommodates the interests of human rights than by one that fails to acknowledge the extent to which human rights law has reshaped this branch of international cooperation'. [Dugard & Van den Wyngaert, 212]



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