Human rights and extradition law in Australia

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Introduction

Since the end of World War II, human rights have become one of the most potent concepts in international relations and domestic legal systems, affecting the way in which laws are promulgated, trade is conducted, and war is waged. Recently, human rights have begun to extend into areas of policy and law which had previously been undisturbed by their influence. One such area is extradition law, which has seen legislative and judicial bodies increasingly recognise the possible infringement of a person's human rights as a legitimate reason for refusing to transfer a person into the custody of a requesting State.

This article will consider the intersection of extradition law and human rights in the Australian context. It is submitted that human rights could have a legitimate and positive influence upon the development of Australian extradition law. This article will consider that thesis in three parts: first, the way in which human rights have affected extradition law in foreign jurisdictions; second, the perceived difficulties of invoking human rights in extradition proceedings and the need for a balanced approach; and third, whether human rights considerations could be incorporated into the present Australian extradition regime.

Human rights and extradition law in foreign jurisdictions

Extradition is the process by which one State requests and obtains the return of a person from another State for the purpose of prosecuting that person for a crime committed against the law of the requesting State. Extradition is also sought to punish a person for a crime that he or she has been convicted of committing against the requesting State, when that person is within the territorial jurisdiction of the requested State.[1] Extradition law is a curious blend of international and domestic

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1 See, for example, Shearer I *Extradition in International Law* (Manchester University Press, Manchester, 1971); Aughterson E *Extradition: Australian Law and Procedure* (Law Book Co, Sydney, 1995).

law.[2] While extradition treaties provide for the mutual rendition of persons between States, the domestic law of the requested State determines whether or not the person is eligible to be surrendered to the requesting State.

Certain safeguards have long been included in both extradition treaties and domestic legislation to protect people who become the subject of extradition proceedings. For example, the principle of double criminality requires that the conduct constituting the offence for which extradition is sought by the requesting State be considered a criminal offence by the law of the requested State.[3] The principle of specialty requires that a person surrendered to a requesting State not be detained, prosecuted or punished for any offence committed prior to surrender, other than the offence for which extradition was granted. The political offence exception allows extradition to be refused if the offence for which extradition is sought is of a political character. It would, however, be inaccurate to say that these safeguards seek to protect human rights.[4] The principle of double criminality ensures that a requesting State may not prosecute a person for conduct that the requested State itself does not consider criminal. The principle of speciality aims to prevent an abuse of the requested State's criminal process. The political offence exception prevents the requested State's courts from adjudging the internal political disputes of the requesting State. Generally, these safeguards seek to protect the integrity of the criminal system of the requested State rather than the individual human rights of a person who is being sought for extradition.[5]

That is not to say that extradition law has entirely ignored individual rights. States are increasingly concluding extradition treaties that include human rights provisions. One popular clause is that extradition should not be granted for the purpose of punishing a person for their race, religion, nationality or political opinions. This principle has become known as the principle of non-refoulement.[6]

2 Dugard J and Van den Wyngaert C 'Reconciling Extradition with Human Rights' (1998) 92 *American Journal International Law* 187 at 188.

3 For a discussion of the principle of double criminality see *Reg v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827 at 836-39 per Lord Browne-Wilkinson, where it was held that the principle requires that the conduct be criminal in both the requesting and the requested State at the time of the alleged offence.

4 Dugard and Van den Wyngaert, above note 2 at 188.

5 International Law Association *First Report of the Committee on Extradition & Human Rights* May 1994, 142 at 146.

6 This clause was modelled on art 1A(2) of the *Convention Relating to the Status of Refugees* 28 July 1951, ATS 1954 No 5, 189 UNTS 150. One issue is whether the ability to refuse extradition on the basis that extradition is being sought for the purposes of punishing a person on account of his or her 'political opinion' actually enlarges the political offence exception: see Aughterson, above note 1 at 111. That issue is, however, beyond the scope of this article.

Another such provision excludes extradition where the requesting State retains the death penalty and is unwilling to provide assurances that this penalty will not be implemented if the fugitive is extradited. Another provision allows the requested State to refuse extradition if the person might be subjected to torture in the requesting State. To some extent, these clauses have overcome the limitations inherent in the traditional safeguards developed by extradition law.

Importantly, these developments have not been confined to bilateral treaties. Multilateral treaties have begun to deal with the alleged violations of human rights as a ground for refusing extradition. The 1990 *United Nations Model Treaty on Extradition*[7] excludes extradition if there are 'grounds to believe that the request has been made to prosecute or punish a person on account that person's race, religion, nationality, ethnic origin, political opinion, sex or status',[8] or if the person 'would be subjected to torture or cruel, inhuman or degrading punishment', [9] or if the person 'has not received or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights, [ICCPR] Article 14'.[10] The 1957 European Convention on Extradition[11] contains provisions that exclude extradition when the requesting State is unwilling to provide assurances that the death penalty will not be imposed if the person is extradited,[12] or if the principle of non-refoulement would be offended.[13] The principle of non-refoulement is also upheld in the International Convention Against the Taking of Hostages of 1979, the Inter-American Convention on Extradition, and the Commonwealth Scheme for the Rendition of Fugitive Offenders of 1990.[14] The

7 14 December 1990, GA/45/116. This treaty is only a model that countries can use as the foundation of their extradition treaties, and therefore is not a multilateral treaty as such. However, it does contain a useful explication of the ideals of a modern extradition treaty. The grounds for refusal of extradition under the Model Treaty which are quoted herein are mandatory grounds. There are also optional grounds for refusal, including the imposition of the death penalty by the requesting State (art 4(d)), trial by an extraordinary or ad hoc court or tribunal (art 4(g)), or if extradition would be incompatible with humanitarian considerations in view of age, health or other personal circumstances (art 4(h)).

8 Above note 7 art 3(b)

9 Above note 7 art 3(f)

10 Above note 7 art 3(f). Article 14 of the International Covenant on Civil and Political Rights (ICCPR) 19 December 1966, ATS 1980 No 23, 999 UNTS 141, protects the right to a fair trial.

11 13 December 1957, 359 UNTS 273.

12 Above note 11 art 11.

13 Above note 11 art 3(2).

14 Dugard and Van den Wyngaert, above note 2 at 192.

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[15] explicitly prohibits extradition to a State where the requested person is in danger of being subjected to torture.[16]

Given the proliferation of these clauses in recent extradition treaties, it is not surprising that States have begun to include human rights provisions in their municipal extradition legislation. For example, the legislatures of Austria, Switzerland and Germany have now introduced the procedural guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedom (the European Convention) in their domestic extradition legislation.[17]

These developments reflect the growing significance assigned to human rights by Western democratic governments in the second half of the twentieth century. It is clear that these inroads have largely been carved out by the executive and legislative arms of government, in concluding and ratifying treaties and through legislative reform. More recently, however, courts and tribunals, both international and domestic, have recognised that the possible violation of a person's human rights in the requesting State may justify refusing extradition. It is now argued that extradition should not be granted if this would violate a human rights norm *external* to those contained in the extradition treaty or legislation. Those human rights norms do not exist in a vacuum, but are rather contained in constitutional guarantees or human rights instruments that have a particular force in the jurisdiction of the court or tribunal. This development is significant because it indicates a determination on the part of courts to give pre-eminence to the protection of human rights over the obligation of a State to extradite under a concluded treaty.

The decision of the European Court of Human Rights in *Soering v United Kingdom*[18] marked a fundamental shift in this respect. In *Soering*, the European Court considered whether the extradition of a person from the United Kingdom to Virginia, US, on murder charges should be refused because, if extradition was granted, he could be imprisoned for several years on 'death row' whilst awaiting execution. This treatment, it was argued, was contrary to art 3 of the European Convention, which guarantees

15 10 December 1984, ATS 1989 No 21, 1465 UNTS 85.

16 Above note 15 art 3(1): 'No State Party shall expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

17 See Van den Wyngaert C 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 *International & Comparative Law Quarterly* 757 at 759.

18 European Court of Human Rights, 1/1989/161/217, judgment of 7 July 1989.

freedom from inhuman and degrading treatment. The Court upheld Soering's claim, stating:

> ... the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 ... where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.[19]

The Court emphasised the need to make the human rights safeguards in the European Convention 'practical and effective',[20] holding that the fact that the UK loses full control of a requested person after extradition does not absolve it from responsibility under the European Convention 'for all and any reasonable foreseeable consequences of extradition suffered outside [its] jurisdiction'.[21]

Another international tribunal that has considered extradition and human rights is the United Nations Human Rights Committee.[22] The committee has held that the extradition of a person from Canada to California, US, where that person might be executed by gas asphyxiation, contravened art 7 of the ICCPR prohibiting cruel, inhuman or degrading punishment.[23]

Significantly, this development is not confined to international tribunals, which are bound to determine complaints in accordance with specific human rights instruments, and in which the extradition treaty and domestic legislation of the requested State are of little import. Domestic courts, particularly in Europe, have also recognised the possible infringement of a person's human rights as a justification for

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19 Above note 18 § 91.

20 Above note 18 § 87.

21 Above note 18 § 86.

22 The UN Human Rights Committee was established under the First Optional Protocol of the ICCPR. The Protocol empowers the Human Rights Committee 'to receive and consider . . . communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant'.

23 *Ng v Canada*, UN Doc CCPR/C/49/D/469/1991 (1994), judgment of 7 January 1994, in which it was held at § 16.4 that 'execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of art 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr Ng, if sentenced to death, would be executed in a way that amounts to a violation of art 7, failed to comply with its obligations under the Covenant, by extraditing Mr Ng without having sought and received assurances that he would not be executed'. Compare *Kindler v Canada*, UN Doc CCPR/C/48/D/470/1991 (1993), judgment of 11 November 1993.

refusing to extradite that person. The Supreme Court of the Netherlands refused to extradite an American staff sergeant on capital charges on the basis that the Netherlands was a party to Protocol No 6 of the European Convention, which prohibits the death penalty for peacetime offences.[24] The French Conseil d'Etat has held that extradition will not be granted if the requesting State's judicial system does not respect fundamental rights and freedoms.[25] Irish courts have refused extradition when the standards of justice prevailing in the requesting State fall short of the constitutional guarantees contained in the Irish Constitution.[26] The Italian Constitutional Court has held that the prohibition on the death penalty in the Italian Constitution is absolute and precludes extradition for a capital offence, regardless of assurances given by the requesting State that the death penalty will not be carried out.[27] The Swiss Federal Tribunal has held that the adherence of Switzerland to the European Convention implicitly modified the extradition statute such that Switzerland was required to ensure that extradition would not violate a right guaranteed under the European Convention.[28] Famously (or perhaps infamously) the Spanish Audiencia Nacional refused to grant the extradition of Christopher Skase from Spain to Australia, partly for constitutional reasons.[29]

In the United Kingdom, in *R v Secretary of State for the Home Department, ex parte Launder*,[30] the House of Lords considered whether the Home Secretary's decision to extradite Launder to Hong Kong, where he alleged that he could not be guaranteed

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24 *Short v Kingdom of the Netherlands*, HR 30 March 1990, excerpted at (1990) 29 *International Law Materials* 1375.

25 *Galdeano, Ramirez and Beiztegui*, 26 September 1984, [1985] *Public Law* 328.

26 *Shannon v Ireland* [1984] IR 548; *Finucane v McMahon* [1990] IR 165; *Magee v O'Dea* [1994] IR 500.

27 *Venezia v Ministero Di Grazia E Giustizia*, judgment no. 223, 79 Rivista di Diritto Internazionale 815 (1996). See Bianchi A 'International Decisions' (1997) 91 *American Journal International Law* 727. In November 1998, the Kurdish rebel leader, Abdullah Ocalan, was arrested in Italy. Italy refused Turkey's request for extradition on grounds that the Italian Constitution prohibits the death penalty.

28 *Dharmarajah v Ministere Public Federal, Arrets du Tribunal Federal Suisse* [ATF] 107 Ib 68 (1981).

29 Extradition Procedure No 1/94 (Audiencia Nacional, Criminal Division, 8 September 1994, Madrid), Motion for Review No 31/94 (Audiencia Nacional, Criminal Division, 19 December 1994, Madrid), where it was stated: '[I]t is a fundamental function of the Spanish Court, according to Article 7 of the Organic Judiciary Act to ensure the basic rights of persons involved in legal proceedings against them. Pre-eminent among such rights is the right to life and physical integrity and health (Article 15 of the Spanish Constitution)'. Excerpted from Gorina-Ysern M 'Humanitarian Bar to Extradition: the Controversial Decision of the Spanish Audiencia Nacional in *Re Skase*' (1994-1995) *Australian International Law Journal* 65 at 79.

30 [1997] 1 WLR 839.

a fair trial or humane punishment after the territory was transferred on 1 July 1997 to the People's Republic of China, offended para 12(2)(a) of the *Extradition Act 1989* (UK), which prohibits the Secretary from ordering extradition where 'it would, having regard to all the circumstances, be unjust or oppressive to return him'. Although the House of Lords held that the Secretary's decision had not miscarried, it did hold that the European Convention was relevant to the rationality and legality of the Secretary's decision-making process, even if it could not provide an independent remedy in domestic courts.[31] Another high-profile case in England is the attempted extradition of General Augusto Pinochet from the UK to Spain. While the Home Secretary's decision not to extradite General Pinochet was based upon his fitness for trial, in particular his mental and physical health, the decision can be seen in a wider human rights context. Interestingly, in exercising his discretion under s 12 of the *Extradition Act 1989* (UK), the Home Secretary stated that 'the attempted trial of an accused in the condition diagnosed in Senator Pinochet, on the charges which have been made against him in this case, could not be a fair trial in any country, and would violate Article 6 of the European Convention on Human Rights in those countries which are party to it'.[32]

Human rights have also received limited recognition in USA and Canadian extradition proceedings. In *Gallina v Fraser*,[33] a US court stated that extradition could be refused if the person, upon extradition, 'would be subject to procedures or punishment ... antipathetic to a federal court's sense of decency'.[34] A Federal District court in *Ahmad v Wigen*[35] granted the petitioner's request to hold an inquiry into the standards of the criminal procedures in Israel, stating that '[we] cannot blind ourselves to the foreseeable and probable results of the exercise of our jurisdiction'.[36]

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31 Above note 30 at 988-990 per Lord Hope. See Wilets J 'International Decisions' (1997) 91 *American Journal International Law* 733.

32 Statement of United Kingdom's Home Secretary Jack Straw, 2 March 2000.

33 278 F2d 77 (2nd Cir, 1960), certiorari denied, 364 US 851.

34 Above note 33, at 79.

35 726 FSupp 389 (EDNY, 1989).

36 Above note 35, at 410. The Second Circuit Appeals Court (910 F2d 1063 (2nd Cir, 1990)) strongly criticised Weinstein J's holding of an inquiry into internal Israeli procedures. The court held at 1066 that '[a] consideration of the procedures that will or may occur in the requesting State is not within the purview of a habeas corpus judge' and that 'there is substantial authority for the proposition that this is not a proper matter for consideration by the certifying judicial officer'.

In *Gill v Imundi*,[37] the court upheld a habeas corpus petition, holding that it was conceivable that the treatment awaiting the petitioners in India would be so 'antipathetic to a federal court's sense of decency'[38] as to justify refusing extradition.[39] In a number of cases,[40] the Canadian Supreme Court has held that extradition may be refused where the nature of criminal procedures or penalties in the requesting State is 'simply unacceptable'[41] or 'sufficiently shocks'[42] the Canadian conscience such that extradition would breach s 7 of the *Canadian Charter of Fundamental Rights and Freedoms*, which guarantees the right to life and liberty.[43] One Supreme Court judge, albeit in dissent, endorsed a *Soering*-like approach, suggesting that the decision to extradite a person to face the death penalty in the requesting State would violate s 12 of the Charter, which contains the prohibition against cruel and unusual punishment.[44]

Difficulties in applying human rights to extradition law

Invoking human rights in extradition proceedings can raise a number of difficulties, particularly when the human rights norm exists outside the domestic legislation or extradition treaty. One difficulty is that allowing a person to raise human rights concerns in extradition proceedings would require courts in the requested State to

37 747 FSupp 1028 (SDNY 1990).

38 Above note 37, at 1048. See also *US v Lui Kin-Hong* 110 F3d 103 (1st Cir, 1997).

39 Although under US law there is no external instrument which is said to be violated in the event of extradition, but rather the somewhat amorphous concept of a 'federal court's sense of decency', there is a suggestion that the US Constitution, which protects due process rights, could constitute such an instrument. However, in *Gallina v Fraser* 177 FSupp 856 (DCConn 1959), affirmed, 278 F2d 77 (2nd Cir 1960), it was held that constitutional protections for persons held for trial in the US could not be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting to its traditional processes and within scope of its authority and jurisdiction. See also *Holmes v Laird* 459 F2d 1211 (DCCir 1972), certiorari denied 409 US 869.

40 *Canada v Schmidt* [1987] 1 SCR 500; *US v Mellino* [1987] 1 SCR 536; *US v Allard* [1987] 1 SCR 564; *Kindler v Canada* [1991] 84 DLR 4th 438; *Ng v Canada* [1991] 84 DLR 4th 498.

41 *US v Allard* [1987] 1 SCR 564 at 572.

42 In *Canada v Schmidt* [1987] 1 SCR 500 at 522 per La Forest J it was suggested that situations falling short of torture would justify refusing extradition on this ground.

43 Section 7 of the *Canadian Charter of Fundamental Rights and Freedoms* reads: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

44 *Kindler v Canada* (1991) 84 DLR 4th 438 at 472 per Cory J.

inquire into the standards of criminal justice that a person will be subjected to in the requesting State.[45] This is inappropriate, it is argued, because such an inquiry is properly made by the executive rather than the judiciary.[46] Moreover, judicial inquiry into conditions overseas would upset international comity and potentially prove inimical to the requested State's foreign relations. A US court, for example, has held that '[t]he interests of international comity are ill-served by requiring a foreign nation ... to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced'.[47] The judiciary is also said to be ill equipped to discover the truth about conditions overseas and to lack the investigative machinery to verify claims of human rights abuses.[48]

These arguments are misconceived for a number of reasons. Firstly, the argument that the inquiry into the criminal process of the foreign State is best left to the determination of the executive is premised on the notion that extradition is principally a foreign policy issue, and therefore exclusively within the domain of executive determination. This notion, however, is anachronistic.[49] It also ignores the fact that the executive may be swayed by the political or economic interests of the requested State in considering human rights objections made by a person. Secondly,

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45 This is what is known as the principle of non-inquiry. In the US, *Neely v Henkel* 180 US 109 (1901) established the general principle that the judiciary lacks jurisdiction to consider claims based on humanitarian exceptions with respect to crimes committed beyond the territorial jurisdiction of the US on the basis that this would involve inquiring into the criminal standards of the foreign State. See Quigley J 'The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law' (1990) 15 *North Cardoza Journal International Law & Communications Regulations* 401; Semmelman J 'Federal Court, the Constitution and the Rule of Non-Inquiry in International Extradition Proceedings' (1991) 76 *Cornell Law* Review 1198. In the English context, see, for example, *Re Arton* [1896] 1 QB 108, *R v Governor of Brixton Prison, ex parte Kotronis* [1971] AC 250.

46 In *Argentina v Mellino* [1987] 1 SCR 536 per La Forest J at 558, 'the primary responsibility for the conduct of external relations must lie with the executive'.

47 *Ahmad v Wigen* 910 F2d 1063 (2nd Cir 1990) at 1067. See also *Jhirad v Ferrandina* 536 F2d 478 (2d Cir 1976). In *Argentina v Mellino* [1987] 1 SCR 536 at 554-55, La Forest J stated that '[t]he assumption that the requesting state will give the fugitive a fair trial according to its laws underlies the whole theory and practice of extradition'. See also *In re Singh* 123 FRD 140 (DNJ 1988) at 164.

48 *Canada v Schmidt* [1987] 1 SCR 500 at 523 per La Forest J: 'this is an area where the executive is likely to be far better informed than the courts'.

49 Until the twentieth century, extradition was considered solely an aspect of a sovereign state's foreign policy. See Shea M 'Expanding Judicial Scrutiny of Human Rights in Extradition Cases After *Soering*' (1992) 17 *Yale Journal International Law* 85 at 132.

the argument that allowing judicial inquiry would be antipathetic to international relations is misplaced because it inappropriately places the interests of international comity above the interests of the person who is the subject of the extradition proceedings. The judiciary, especially in countries that endorse the doctrine of the separation of powers, should be unwilling to promote the government's interests ahead of the human rights of the accused and to give real effect to their constitutional guarantees. As was stated in *Ahmad v Wigen*, '[t]here may be instances where immediate political, military or economic needs of the United States induce the State Department to ignore the rights of the accused', and should such cases occur, 'the courts must be prepared to act'.[50] Finally, as to the argument that courts are ill equipped to inquire into alleged human rights abuses, courts already have to inquire into the political and legal circumstances of the requesting State in determining whether a fugitive may validly raise the political offence exception or rely on the principle of non-refoulement. Moreover, other areas of the law, such as refugee law, sanction a court making similar inquiries into the legal and political conditions in a foreign State.

Another more potent difficulty is that allowing human rights to be invoked in extradition proceedings effectively infringes the sovereignty of the requesting State because the treatment and punishment of alleged offenders is a matter solely within the requesting State's control. In *Argentina v Mellino*,[51] La Forest J (of the Canadian Supreme Court) stated that countenancing a suggestion that a person would not receive fair and proper treatment in the requesting State would amount 'to a serious adverse reflection ... on its judicial authorities concerning matters that are exclusively within their competence'.[52] Further, in imposing the requested State's own constitutional guarantees upon the standard of justice prevailing in the requesting State, the requested State effectively gives those guarantees extraterritorial application.[53] Moreover, courts in the requested State should not assess the judicial system of the requesting State according to standards that those courts consider acceptable, as this would ignore fundamental

50 *Ahmad v Wigen* 726 FSupp 389 (EDNY 1989) at 415. See also *Barr v United States* 819 F2d 25 (2d Cir 1987) at 28: '[It is a] recognized principle that, regardless of the degree of American government involvement in the conduct of a foreign sovereign, the federal courts will not allow themselves to be placed in the position of putting their imprimatur on unconscionable conduct.'

51 [1987] 1 SCR 536.

52 Above note 51 at 555 per La Forest J.

53 In *Canada v Schmidt* [1987] 1 SCR 500 at 518, La Forest J (with whom Lamer J agreed at 530) stated that 'the Charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted'. Compare, however, Wilson J at 532-33. See also *Neely v Henkel* 180 US 109 (1901) at 122-23.

differences in criminal procedure from State to State, such as the difference between the adversarial and inquisitorial systems of criminal justice, or the presence or absence of the presumption of innocence.[54]

However, extradition is not a neutral act. By its very nature, extradition involves the active participation of the courts of the requested State in the process of prosecution, and perhaps conviction, of a person in the requesting State. If it is acknowledged that the courts of the requested State participate in the proceedings in the foreign State, then those courts should at least be held co-responsible for the treatment that the person may be subjected to in the foreign State.[55] Given this responsibility, a court should be willing to refuse extradition where such treatment would infringe that person's human rights, even if it means denying a State custody of a person over whom it would normally have criminal jurisdiction. Nor is the fact that the treatment will actually occur outside the territorial jurisdiction of the requested State sufficient reason to ignore fundamental freedoms and rights as contained in municipal constitutions or human rights instruments. In sum, no court in which fundamental rights are recognised and protected should be willing to give its imprimatur to mistreatment and oppression.

Another difficulty of applying human rights to extradition law is whether a human rights treaty should override an extradition treaty where the two treaties give rise to conflicting international obligations.[56] The Supreme Court of the Netherlands considered this question in *Short v Kingdom of the Netherlands*,[57] in which a member of the US military was sought for a crime committed in the Netherlands that, if convicted in the US, carried the death penalty. The Netherlands had two incompatible treaty

54 *Canada v Schmidt* above note 53 at 522-523 per La Forest J: 'The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country.'

55 Van den Wyngaert, above note 17 at 760-761. In *Soering*, above note 18, the European Court of Human Rights (at § 36) acknowledged that the basis of the requested State's responsibility was the fact that the requested State's action (extradition) 'has as a direct consequence the exposure of the individual to proscribed ill-treatment'.

56 This discussion obviously ignores those States where domestic constitutional guarantees (rather than international human rights treaties) have been invoked to prevent extradition. See Dugard and Van den Wyngaert, above note 2 at 195 and Van den Wyngaert C, above note 17 at 762.

57 HR 30 March 1990, excerpted at (1990) 29 *International Law Materials* 1375. Although ordinarily individuals have no standing to raise a breach of a provision of a treaty, international law has recognised that, in some circumstances, an individual has standing to raise human rights issues. See *Bertran v Vanstone* [2000] FCA 359 (unreported, Kenny J, 27 March 2000) at § 132.

obligations: a human rights obligation pursuant to the European Convention and its protocol concerning the abolition of the death penalty, and an obligation to extradite under the NATO *Status of Forces Agreement*, which gives the US primary jurisdiction over a member of its military. While the court rejected the inherent priority of obligations under human rights instruments over other obligations, it nevertheless held that the obligation of a state under a human rights instrument may constitute an obstacle to the fulfilment of another treaty obligation.[58]

There is very little explanation in international law for the proposition that human rights treaties are, by their very nature, superior to other treaties. One explanation for the priority of a human rights instrument over an extradition treaty may lie in the higher status of some human rights norms arising from notions of *jus cogens*.[59] That is, a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. However, this explanation would only operate with respect to those human rights that undoubtedly belong to the *jus cogens*. This is a very small class of human rights; for example, while the prohibition against torture may be said to belong to the *jus cogens*, it is very likely that the prohibition against the death penalty would not.[60] Another explanation may be that some human rights may be said to be created by customary international law.[61] However, States can, in general, derogate from customary international law by treaty if they wish to. Moreover, in many countries customary international law does not form part of the domestic law without legislative adoption, and in those States where customary international law is automatically incorporated into the domestic law, it is subordinate to legislation.[62] Further, domestic courts are generally reluctant to

58 Above note 57 at 1383. The Supreme Court of the Netherlands held that where 'it can be assumed on valid grounds that the requested person runs a real chance to be subjected to torture or to inhuman or humiliating treatment or punishment after extradition . . . responsibility of the extraditing State rests . . . on the circumstance that its acts have the direct result that the requested person will be subjected to said acts'.

59 The status of some rights or prohibitions as peremptory norms of customary international law gives rise to non-derogable obligations erga omnes (that is, enforcement obligations owed by each nation State to the international community as a whole). See generally Weil P 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal International Law* 413; Cherif Bassiouni M 'International Crimes: Jus Cogens and Obligato Erga Omnes' (1996) 59 *Law and Contemporary Problems* 63.

60 For a discussion of the prohibition against torture as part of the jus cogens, see *Reg v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827 at 841 per Lord Browne-Wilkinson, at 886 per Lord Hope, at 898 per Lord Hutton.

61 Dugard and Van den Wyngaert, above note 2 at 197.

62 See, for example, Mason Sir Anthony 'International Law as a Source of Domestic Law', published in Opeskin B et al, *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997) p 210-26.

invoke customary international law norms external to treaties and legislation in extradition proceedings.[63]

Another difficulty is that allowing fugitives to invoke human rights norms in extradition proceedings jeopardises the successful suppression of international crime. The increased ease of international travel, improved communications systems, the growth of international business, the resort to transnational political terrorism and the growth of international crime syndicates have meant that crime has spread beyond traditional territorial boundaries. There are two main branches to this argument: first, a nation that refuses extradition on the basis of a person's human rights objection will become a sanctuary for fleeing fugitives;[64] and second, the need for international co-operation in the fighting of crime and the administration of justice.[65] Both of these arguments were referred to by the European Court in *Soering*:

> As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition.[66]

In response it may be said that overemphasising these arguments risks ignoring the rights of the person who is the subject of the extradition proceedings. These rights deserve protection. Extradition proceedings are such that a person, even a national of the requested State, may be detained for a long period of time before being surrendered to a foreign country on standards of evidence well below those normally required by an ordinary criminal trial.[67]

It is clear from a discussion of the difficulties of recognising human rights in extradition proceedings that there is a need for a balanced approach that recognises

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63 In *US v Alvarez Machain* 504 US 665 (1992) the US Supreme Court refused to apply the rule of customary international law prohibiting a violation of territorial sovereignty of States to imply a term prohibiting abduction in the US-Mexico Extradition Treaty.

64 Kobayashi A 'International and Domestic Approaches to Constitutional Protections of Individual Rights: Reconciling the *Soering* and *Kindler* Decisions' (1996) 34 *American Criminal Law Review* 225 at 258

65 Above note 64 at 258.

66 *Soering*, above note 18 at § 89.

67 For example, General Pinochet was in custody for a period of almost 17 months from the time that he was arrested in London on 16 October 1988.

the human rights of the person who is the subject of the extradition proceedings, while at the same time recognising the legitimate interest of the requesting State in prosecuting a person for committing a crime against the law of that State. A balanced approach calls for a relatively high threshold to be satisfied before a court refuses to extradite a person on human rights grounds. The satisfaction of that threshold would depend on the type of human right that is alleged to be violated. Clearly, some human rights are more 'fundamental' than others. Human rights may be usefully categorised into three groups: rights that may be restricted for certain purposes, rights that may not be restricted save in exceptional or emergency circumstances, and rights which are 'absolute'.[68] Courts should more readily seek to protect those rights which fall into the 'absolute' category, such as the right to life (to the extent that the individual is protected against 'arbitrary' deprivation of that right), freedom from torture or inhuman or degrading treatment or punishment, as well as some rights within the 'exceptional circumstance' category, such as the guarantee of a fair trial, freedom from discrimination, or the guarantee of an effective remedy before a national authority.

Satisfaction of a high threshold would also mean that courts should only refuse to extradite where there is a real risk that a serious violation of the person's human rights will occur. A 'real risk' test would not be as stringent as the balance of probabilities, and could be satisfied even though there is far less than a 50 per cent chance that the violation of the person's human rights will occur.[69] The alleged violation should also be sufficiently 'serious' or 'flagrant'.[70] However, a requirement that the treatment that the person will receive in the requesting State be so serious as to 'shock the conscience' of the requested State would impose too high a burden upon a person seeking to establish a human rights violation. Alternatives to refusing extradition could also be used to promote a balanced approach. The principle of *aut dedere aut judicare* would allow the requested State to try the person if extradition is refused on human rights grounds. Another alternative is that extradition could be granted subject to certain conditions or assurances given to the requested State by the requesting State. Such conditions could include that the person is to receive an open

68 Dugard and Van den Wyngaert, above note 2 at 210. See also Meron T 'On a Hierarchy of International Human Rights' (1987) 80 *American Journal International Law* 1.

69 For a discussion of the 'real risk' test in relation to refugee applications, see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 (per Mason CJ) and 429 (per McHugh J), and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-73 per Brennan C J, Dawson, Toohey, Gaudron, McHugh, and Gummow J J.

70 *Soering*, above note 18 at § 113 (emphasis added): 'The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant* denial of a fair trial in the requesting country.'

and fair trial, that the person not be subjected to cruel or inhuman treatment, or that the requested State be allowed to send an observer to the trial of the person extradited.[71]

Human rights and extradition law in Australia

It is questionable whether the Australian extradition regime balances the human rights of the person who is the subject of the proceedings with the interests of the requesting State in that person's prosecution and conviction. Mr Lionel Bowen, then Commonwealth Attorney General, said in introducing the Extradition Bill 1987 (Cth) that the new legislation sought to ensure that 'a proper balance is struck between the aspirations of the international community in wanting to limit havens for law breakers and the legitimate expectations of persons accused or convicted of crimes that they will be dealt with humanely and in accordance with law'.[72] However, there has been much comment that while the *Extradition Act 1988* (Cth) (Extradition Act) helps facilitate the quick and efficient extradition of people who become the subject of extradition proceedings from Australia, it fails to provide adequate protection for these people.[73] One comment is that there has been 'a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion'.[74] A prominent example is that the Act no longer requires the requesting State to establish a prima facie case against the accused person, even if that person is an Australian national.[75]

That is not to say that the Australian extradition regime totally ignores the human rights of the person who is the subject of the extradition proceedings. The principle of non-refoulement, discussed above, is protected under ss 7(b) and (c) of the Extradition Act. Extradition is also forbidden when the requesting State refuses to give assurances that the death penalty will not be carried out (s 22(3)(c)), or when the person will be subjected to torture (s 22(3)(b)). Section 45 of the Extradition Act also allows the Attorney General to determine that an Australian citizen be prosecuted in

71 In *Soering*, above note 18, the fugitive was eventually extradited from the UK to the US on the basis of assurances given by Virginian prosecutors that the death penalty would not be imposed.

72 Second Reading Speech Extradition Bill 1987 (Cth), 28 October 1987, House of Representatives Weekly Hansard No 15 1987 at 1618.

73 See, for example, Walker T 'Recent extradition laws under fire' (1987) 61 *Law Institute Journal* 540.

74 Shearer I 'Extradition and Human Rights' (1994) 68 *ALJ* 451 at 452. See also *DPP v Kainhofer* (1995) 185 CLR 528 at 541 per Toohey J; *Papazoglou v Philippines* (1997) 74 FCR 108 at 140.

75 Above note 74. Legislation prior to the adoption of the *Extradition Act 1988* (Cth) required a prima facie case to be put to the magistrate; see s 15(6)(b) *Extradition (Commonwealth Countries) Act 1966* (Cth), s 17(6)(b) *Extradition (Foreign States) Act 1966* (Cth).

Australia for a crime committed overseas. Subsection 34(2) of the Act also prohibits extradition to New Zealand if 'the accusation was not made in good faith or in the interests of justice ... or ... it would be unjust, oppressive or too severe a punishment' to do so.[76]

One important clause that appears in the *Extradition (Commonwealth Countries) Regulations*, and other regulations extending the Extradition Act to some other countries,[77] is one which allows Australia to refuse to extradite when it would be 'unjust or oppressive' to do so.[78] For example, reg 7 of the *Extradition (Commonwealth Countries) Regulations* provides that:

> ... a person shall not be surrendered in relation to such an offence if the Attorney General is satisfied that by reason of ... (b) the accusation against the eligible person not having been made in good faith or in the interests of justice; or (c) any other sufficient cause ... it would, having regard to all the circumstances, be unjust or oppressive or too severe a punishment to surrender the eligible person.

Such clauses have received little judicial attention.[79] However, in *Foster v Senator Amanda Vanstone*[80] Moore J held that the expression 'unjust or oppressive or too severe a punishment' raises for consideration 'the general adverse consequences of extradition on a person at risk of extradition'.[81] His Honour referred with

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76 See discussion of this clause below.

77 Currently, such a clause only operates with respect to ten non-Commonwealth countries. For example, reg 6(4)(b) *Extradition (Iceland) Regulations*, reg 6(4)(b) *Extradition (Japan) Regulations*, reg 5(4)(b) *Extradition (Fiji) Regulations*. The clause is found in very few of the treaties entered into by Australia, but see art 3(2)(f) of the Treaty with Hellenic Republic, and art 5(1)(c) Treaty with Finland.

78 It should be noted that s 16 of the *Extradition (Commonwealth Countries) Act 1966* (Cth) included an 'unjust or oppressive' prohibition.

79 See, in relation to s 34(2) which deals with objections to Australia-New Zealand extradition, *Bannister v New Zealand* [1999] FCA 362 (unreported, Full Court of the Federal Court of Australia, 1 April 1999) in which the court ordered that a person be released because it would be 'unjust or oppressive' if he would be subject to representative or specimen charges in New Zealand, which were expressly disapproved by the High Court in *S v The Queen* (1989) 168 CLR 266.

80 [1999] FCA 1447 (unreported, Full Court of Federal Court of Australia, 22 October 1999), Moore and Keifel J J dismissing the appeal, Carr J dissenting. On 10 December 1999, the High Court granted special leave for Foster to appeal from the decision of the Full Court. On 21 June 2000, the High Court dismissed Foster's appeal, Kirby J dissenting. At the time of writing, the High Court has not yet published its decision.

81 Above note 80 at § 41.

approval to *Henderson v Secretary for Home Affairs*,[82] where Tucker LJ held that the said expression would be relevant 'where it appears that the contemplated proceedings, although, perhaps, lawful by the law of the country concerned, are really going to be conducted in a way contrary to natural justice or contrary to our ideas of it'.[83]

It is also useful to consider, by way of analogy, those cases that have looked at whether allowing extradition within Australia would be 'unjust or oppressive'. In *Binge v Bennett*,[84] for example, the NSW Court of Appeal considered an application for 'return' from NSW to Queensland pursuant to the *Service and Execution of Process Act 1901* (Cth). The appellants wished to adduce evidence that it would, pursuant to s 18(6)(c) of that Act, be 'unjust or oppressive' to order their return to Queensland because of the infrequency with which Aborigines served on juries in that State, the perceived bias of potential jurors against Aborigines, bail issues and prison conditions. The court held that such evidence could be adduced and remitted the matter for rehearing, in which subsequent proceedings extradition was refused on the basis of a finding that it would be unjust or oppressive to return the alleged offenders to Queensland.[85] In so doing, Justice Mahoney stated that the words 'unjust or oppressive' would not 'exclude matters going to ... the nature and incidents of the justice system to which the person in question is to be returned or to the circumstances or mode of his treatment pending trial in that system'.[86] Although that case considered an internal extradition procedure, there is no reason why similar reasoning could not be applied to an international extradition proceeding.[87]

Importantly, extradition treaties that have been concluded by Australia with other countries have also included clauses that go towards protecting human rights. The principle of non-refoulement,[88] the prohibition against the death

82 [1950] 1 All ER 283.

83 Above note 82 at 286.

84 (1988) 13 NSWLR 578.

85 *Binge v Bennett* (1989) 98 FLR 193.

86 *Binge v Bennett* (1988) 13 NSWLR 578 at 596.

87 Above note 86 per Mahoney J A: 'those words [referring to the term 'unjust or oppressive'] . . . would authorize an inquiry by the court as to whether the state of the justice system or the facilities of it in the country to which the person was to be returned were such as to fall within these provisions'.

88 For examples of such a provision in an Australian bilateral treaty, see art 3(1)(b) of the Treaty with Federal Republic of German; art 3(h) of the Treaty with Brazil; art III(1)(b) of the Treaty with Ireland; art III(1)(b) of the Treaty with Belgium; art 4(b) of the Treaty with Italy.

penalty,[89] and the prohibition against torture,[90] have all been included in Australian extradition treaties. Moreover, other treaties recognise that the extradition of a person may be refused in circumstances that would be incompatible with humanitarian considerations, such as the age or health of the person who is sought for extradition.[91]

Apart from these provisions there are no enforceable human rights instruments that could constitute a ground, external to either the treaty or legislation, upon which a person could object to extradition. Unlike many of the foreign jurisdictions that were considered in the previous section, under Australian law there are very few implied constitutional guarantees that could be invoked to prevent extradition,[92] nor are general international human rights instruments such as the ICCPR legally enforceable.[93] While conceivably a person could apply to the United Nations Human Rights Committee[94] or the United Nations Committee Against Torture[95] to assert

89 For examples of such a provision in an Australian bilateral treaty, see art 8 of the Treaty with Federal Republic of Germany; art 4 of the Treaty with Brazil; art 6 of the Treaty with Finland; art 7 of the Treaty with Indonesia.

90 For examples of such a provision in an Australian bilateral treaty, see art VII of the Treaty with Chile and art 9 of the Treaty with Indonesia.

91 For examples of such a provision in an Australian bilateral treaty, see art 5 of the Treaty with Finland, art 3(2)(f) of the Treaty with Kingdom of Belgium and art 4(2)(e) of the Treaty with Republic of Korea.

92 For example, the implied guarantee of communication on political issues: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

93 *Dietrich v The Queen* (1992) 177 CLR 292 at 305 per Mason C J and McHugh J.

94 Australia's accession to the First Optional Protocol to the ICCPR in 1991 has the effect of affording access to the UN Human Rights Committee. The complainant must have exhausted all domestic remedies. Although a finding by the committee is non-binding, it would be unlikely that the Australian government would ignore an adverse finding. Indeed, an adverse finding in relation to a complaint about Tasmanian sexual laws spawned the *Human Rights (Sexual Conduct) Act 1994* (Cth): the *Toonen Case*, UN Doc CCPR/C/30/D/486/1992, 4 April 1994. See generally Caleo C 'Implications of Australia's Accession to the First Optional Protocol to the ICCPR' (1993) 4 *Public Law Review* 175 at 187.

95 The UN Committee Against Torture was established under art 17 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to receive and consider communications from individuals who claim to be victims of a breach of the Torture Convention by a party. On 8 August 1989, Australia ratified the Torture Convention and, on 28 January 1993, recognised the competence of the Committee against Torture to receive and consider communications. For a discussion of the implications of Australia's accession to the Torture Convention in relation to refugee applications, see *Nagaratnam v Minister for Immigration & Multicultural Affairs* (1999) 84 FCR 569 at 580-81 per Lee and Katz JJ.

that their rights protected by the ICCPR or the Torture Convention would be violated if they were extradited from Australia, these remedies are time consuming and their effectiveness is questionable. The real issue is whether a person could raise a general human rights objection to extradition, outside the terms of the Extradition Act or a treaty, in a municipal court. It is submitted that a general human rights objection could be relevant at the various stages of the extradition process: determination by a magistrate of eligibility for surrender; review by a superior court; and executive determination that the person is to be surrendered.[96]

A magistrate determines a person's eligibility for surrender to the requesting State under s 19 of the Extradition Act. Section 19(1) provides that if certain procedural requirements are met,[97] 'the magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country'. Section 19(2) states that a person 'is only eligible for surrender' if a number of requirements are met. Paragraph 19(2)(a) and 19(2)(b) require that supporting documents in relation to the offence have been produced to the magistrate.[98] Paragraph 19(2)(c) requires the magistrate to be satisfied that 'if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia'. Paragraph 19(2)(d) requires

96 The discussion ignores, for present purposes, the possibility of raising a human rights objection when either a magistrate issues a warrant under s 12 of the Act or the Attorney General issues a notice under s 16 of the Act. A magistrate acting under s 12 could not be subject to review by the Federal Court under s 39B of the *Judiciary Act 1903* (Cth), because he or she would not answer the description of an officer of the Commonwealth: *Kainhofer*, above note 74 at 541-42 per Toohey J citing *Trimbole v Dugan* (1984) 3 FCR 324. Although the Attorney General acting under s 16 is subject to s 39B review (*Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 400-401), a court will usually be reluctant to intervene at an intermediate stage of the extradition process in the absence of exceptional circumstances (*Harris* at 412-413). Hence, a human rights objection would most appropriately initially be raised under s 19 of the Act, which explicitly deals with 'determination of eligibility for surrender'.

97 The procedural requirements are: a person is on remand under s 15; the Attorney General has given a notice under s 16(1); an application is made to the magistrate (either by the person or the extradition country) for proceedings to be conducted; and the magistrate considers that the person and extradition country have had reasonable time in which to prepare for the conduct of such proceedings.

98 The term 'supporting documents', as used in § 19(2)(a), is defined in s 19(3).

that the 'person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence'. The term 'extradition objection' is defined in s 7 of the Extradition Act:

> For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:
>
> (a) the extradition offence is a political offence in relation to the extradition country;
>
> (b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;
>
> (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;
>
> (d) assuming that the conduct constituting the extradition offence, or equivalent conduct, had taken place in Australia at the time at which the extradition request for the surrender of the person was received, that conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law, of Australia; or
>
> (e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence.

The magistrate may determine either that the person is eligible or is not eligible for surrender to the extradition country in relation to the extradition offence (subss 19(9) and 19(10)).

The main difficulty for a person seeking to raise a human rights objection at a magistrate's hearing under s 19 of the Extradition Act is the terms of the section itself. Under s 19(2), a person is only eligible for surrender if paras (a), (b), (c) and (d) are satisfied, thereby precluding a magistrate from taking extraneous matters, such as a human rights objection, into account when determining the eligibility of a person for surrender. Such an approach is reinforced by judicial authority that suggests that the functions performed by a magistrate under s 19 are administrative functions

performed by them as *personae designatae*.[99] Furthermore, a magistrate acting under s 19 is confined to the terms of that section because he or she is merely one link in a sequence of separate and distinct repositories of power.[100] In this respect, it would be highly unusual to allow a magistrate to step outside the terms of s 19(2) and determine matters, such as a human rights objection, which are prima facie within the competence of another repository of power, namely the Attorney General, who has a general discretion not to surrender the person under s 22(3)(f). The statutory objects of the Act support such a restrictive interpretation, namely the intention of Parliament to 'to codify the law relating to the extradition of persons from Australia',[101] and 'to enable Australia to carry out its obligations under extradition treaties'.[102]

Such an interpretation is not necessarily correct. The language of s 19(2) is arguably consistent with factors other than the four specified matters being taken into account in determining whether a person is eligible for surrender.[103] Section 19(2) does not use the formula 'if and only if'. Moreover, the jurisdiction of the magistrate to conduct proceedings is stated (in s 19(1)) in very general terms, namely that 'the magistrate shall conduct proceedings to determine whether the person is eligible for surrender'. Further, the restriction stated in s 19(5) (that a person to whom the extradition proceedings relate is not entitled to adduce evidence to contradict an allegation that the person has engaged in conduct constituting an extraditable offence) would not extend to prevent a person adducing evidence of a possible abuse of that person's human rights in the requesting State. On this interpretation, a s 19 magistrate would be entitled to receive evidence of a possible infringement of a person's human rights in the requesting State and to order under s 19(10) that the person is not eligible for surrender.

Principles of statutory interpretation would also support an expansive interpretation of s 19. The High Court has stated that 'the presence of general words in a statute is insufficient to authorise interference with the basic immunities which are the foundation of our freedom; to constitute such authorisation express words are required ... [t]he courts should not impute to the legislature an intention to interfere

99 *Wiest v Director of Public Prosecutions* (1988) 23 FCR 472 at 486 (per Burchett J) and 522 (Gummow J, with whom Sheppard J agreed); *Kainhofer*, above note 74 at 538; and *Papazoglou*, above note 74 at 125.

100 In *Kainhofer*, above note 74 at 538, the High Court held that a s 19 magistrate is neither required nor authorised to determine the issue whether a person is an 'extraditable person', that task being only exercisable by a magistrate under s 12(1) and the Attorney General under s 16.

101 Section 3(a)

102 Section 3(c)

103 *Papazoglou*, above note 74 at 131.

with fundamental rights.'[104] Hence, if legislation is to abrogate or curtail fundamental rights, 'it must contain a clear expression of an unmistakable and unambiguous intention to do so'.[105] There is nothing in the terms of the Extradition Act to indicate an intention to interfere with a person's fundamental rights. Moreover, given that legislation should be construed in the light of the presumption that Parliament intended to legislate in conformity with any international obligations,[106] it may be presumed that Parliament intended to legislate in conformity with the ICCPR[107] when enacting the Extradition Act. As Mason C J and Deane J stated in *Minister for Ethnic Affairs v Teoh*,[108] 'If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail'.[109] It is for these reasons that a magistrate acting under s 19 should be prepared to take account of human rights in reaching a decision as to a person's eligibility for extradition.

Review of the magistrate's order is governed by s 21. Section 21(1) states that the person or the extradition country may, within 15 days after the day on which the magistrate makes the order, apply to the Federal Court, or to the Supreme Court of the State or Territory, for a review of the order. Section 21(2) allows the court, by order, to confirm or quash the order of the magistrate. Under s 21(3), the person or the extradition country may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court. The appeal must be made within 15 days of the order of the Federal Court or the Supreme Court (s 21(4)). The High Court is not to grant special leave to appeal against the order of the Full Court of the Federal Court if the application for special leave is made more than 15 days after the day on which the order of the Full Court is made (s 21(5)).

It has been held that in a review of a magistrate's determination under s 19, the court will not consider points not taken before the magistrate.[110] Therefore, a person must

104 *Coco v R* (1994) 179 CLR 427 at 436-437 per Mason C J, Brennan, Gaudron and McHugh J J.

105 *Papazoglou*, above note 74 at 128.

106 *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771 per Lord Diplock; *R v Secretary of State for the Home Department; Ex p Brind* [1991] 1 AC 696 at 747-748 per Lord Bridge.

107 Ratified by Australia on 13 August 1980.

108 (1995) 183 CLR 273.

109 Above note 108 at 287.

110 *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 at 292.

raise a human rights objection to extradition before the magistrate in order to be able to entertain such an objection on review. However, the precise nature of review contemplated by s 21 of the Extradition Act has not been the subject of any concluded view.[111] The word 'review' has no settled predetermined meaning, but takes its meaning from the context in which it appears.[112] In this context, however, two alternatives may be suggested: the review is of a supervisory nature in that court does not itself determine whether the person is eligible for surrender, but only whether the magistrate has committed some legal error; or the court itself determines the issue of eligibility for surrender.[113]

Authorities tend to suggest that the latter approach is the correct one. The Full Federal Court in *Kainhofer v Director of Public Prosecutions*[114] held that a court under s 21 is to determine whether the person is eligible for surrender in relation to *any* of the offences for which surrender is sought by the requesting State, and not the more limited question of whether the person is eligible for surrender in relation to the offence(s) for which the *magistrate* has determined that the person is so eligible.[115] The fact that the Extradition Act provides for review of the magistrate's order and not for an appeal was held to be significant by the Court.[116] In the same matter, but before a differently constituted Full Court of the Federal Court,[117] it was held that '[t]he word "review" is not a word of limitation; it is a word of great width'.[118] Significantly, the Extradition Act does not seek to limit the grounds upon which a person may seek review; there is no provision in the Act that limits the court to consideration of whether the magistrate committed an error of law. Moreover, s 21(6)(g) specifically contemplates that a review court may determine that the person is eligible for surrender. Hence, Hill J in *South Africa v Dutton* held that the review contemplated by s 21 is not a species of judicial review in the sense of a review limited to correcting legal error, but 'a rehearing in which the court undertaking the review is authorised to reach its own conclusion on eligibility for surrender'.[119] However, the rehearing is limited statutorily to the material before

111 *South Africa v Dutton* (1997) 77 FCR 128 at 133.

112 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261.

113 Above note 111 at 132-33.

114 (1994) 52 FCR 341.

115 Above note 114 at 360.

116 Above note 114 at 360.

117 *Kainhofer v Director of Public Prosecutions* (unreported, Full Court of the Federal Court of Australia, 17 September 1996).

118 Above note 117 at 22.

119 Above note 111 at 135-36.

the magistrate; para 21(6)(d) states that the court to which the application or appeal is made 'shall have regard only to the material before the magistrate'.

The implications for a person seeking to rely upon a human rights objection to extradition from Australia are that he or she may also raise an objection to a review court (as long as the objection was raised before the magistrate), and the review court will undertake a rehearing of that person's eligibility for surrender, but will be restricted to material that was before the magistrate in relation to the objection.

The executive determination, by the Attorney General, that the person is to be surrendered to the requesting State is made under s 22(2) of the Extradition Act. The Attorney General's determination under s 22(2) is made pursuant to s 22(3), which states that the person is only to be surrendered if:

(a) the Attorney General is satisfied that there is no extradition objection in relation to the offence;

(b) the Attorney General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture;

(c) where the offence is punishable by a penalty of death — by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) the person will not be tried for the offence;

(ii) if the person is tried for the offence, the death penalty will not be imposed on the person;

(iii) if the death penalty is imposed on the person, it will not be carried out;

(d) the extradition country concerned has given a specialty assurance in relation to the person;

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused; or

(ii) surrender of the person in relation to the offence may be refused; in certain circumstances — the Attorney General is satisfied:

(iii) where subparagraph (i) applies — that the circumstances do not exist; or

(iv) where subparagraph (ii) applies — either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

The advantage of seeking to raise a human rights objection in relation to the Attorney General's determination under s 22(2) is that it is not dependent on the interpretation of the terms of the Extradition Act for success. While review of the Attorney General's determination under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) would be excluded under Sch 1, para (r) of that Act, review could be sought pursuant to s 39B(1) of the *Judiciary Act 1903* (Cth), which states that the original jurisdiction of the Federal Court of Australia includes 'jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth'.[120] Such a course was endorsed by the Full Court of the Federal Court in *Harris v Attorney-General (Cth)*.[121]

It should be remembered that the Attorney General's discretion to surrender an eligible person is ultimately 'at large': s 22(3)(f) of the Act.[122] This means that the Attorney General should take a human rights objection into account in reaching a determination under s 22 if raised .[123] Another matter which should be mentioned is

120 It is worth noting that jurisdiction could now also be invoked under s 39B(1A)(c) of the *Judiciary Act 1903* (which was inserted by Sch 11 to the *Law and Justice Legislation Amendment Act 1997* (Cth)), which states that the original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter 'arising under' any laws made by the Parliament. See as to the scope of this phrase, *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581 and *Re McJannet; Ex parte Australian Workers' Union of Employees (Q)* [No 2] (1997) 189 CLR 654 at 656- 657. See also *Transport Workers' Union of Australia v Lee* (unreported, Full Court of the Federal Court of Australia, 30 June 1998) at 9.

121 (1994) 52 FCR 386 at 413. See also *Kainhofer*, above note 74 at 541 per Toohey J.

122 *Forrest v Kelly* (1992) 34 FCR 74 at 81.

123 For an example of an application for review of the Attorney General's determination under s 22 in relation to, inter alia, an assertion that the applicant's life would be in danger in the UK prison system, see *Foster v Attorney-General (Cth)* (unreported, Federal Court of Australia, Spender J, 12 October 1998) and *Attorney-General(Cth) v Foster* [1999] FCA 81 (unreported, Full Court of the Federal Court of Australia, 16 February 1999).

reg 7 of the Extradition Act, which, as discussed above, requires the Attorney General to be satisfied that extradition to a Commonwealth country would not be 'unjust or oppressive or too severe a punishment'.[124]

However, as long as all expressly relevant considerations were taken into account by the decision-maker, there is no obligation on him or her to accept a human rights objection. The question of weight in relation to competing assertions is a matter for the decision-maker.[125] As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[126] '[i]t is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator ... in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power'.[127] The nature of the remedies under s 39B should also be noted. Prohibition is only available where jurisdictional error has occurred.[128] Although a court could grant either an injunction or mandamus in relation to the Attorney General's determination, these remedies are inherently discretionary: as the Court stated in *Harris*, 'investment with jurisdiction to hear a dispute is one thing; the grant of discretionary prerogative relief including declaratory relief if appropriate, is another'.[129]

Conclusion

The previous section demonstrates that the Australian extradition regime accords only limited protection to human rights. However, although the position is far from clear, there is enough to suggest that a person who is the subject of extradition proceedings could attempt to raise a human rights objection to extradition from Australia, either via the Act or the treaty, or by way of a general human rights objection. Whether the courts will countenance such an attempt is another question. However, there are powerful justifications for the courts doing so. For one, it would

124 For a discussion of the implications of this expression for the exercise of the Attorney General's discretion under s 22, see *Foster v Senator Amanda Vanstone* [1999] FCA 1447 (unreported, Full Court of Federal Court of Australia, 22 October 1999).

125 Above note 124 at 26 (Spender J), at 28 (Full Court).

126 (1985-86) 162 CLR 24.

127 Above note 126 at 40-41.

128 *Kainhofer*, above note 74 at 542, per Toohey J citing *Craig v South Australia* (1995) 131 ALR 595.

129 *Harris*, above note 96 at 401.

recognise the participatory role of the Australian legal system in the treatment and punishment that a person will receive in the requesting State. If the Australian legal system is to be shown to truly recognise and respect human rights, it cannot blind itself to the foreseeable consequences of assenting to a request for extradition. While Australia may not have the constitutional guarantees or human rights instruments of some of its European and North American counterparts, it should also act to prevent gross violations of a person's human rights. There are enough problems, however, to suggest that Australian courts would be justified in requiring that a relatively high threshold be satisfied before refusing extradition on the basis of an alleged violation of human rights. If a balanced approach is adopted in which a court only refuses to extradite a person if there is real chance that their fundamental human rights will be seriously infringed in the requesting State, then human rights could have a legitimate and positive influence upon the development of Australian extradition law. ●