

## FPC Briefing: Extradition- Time to remove the nationality bar

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### Introduction

Two years ago, a quiet landmark in extradition may have been reached. On an ordinary Japanese commercial flight departing on Tuesday 23<sup>rd</sup> July 2013 from Chicago O'Hare airport for Tokyo was no ordinary passenger. One American citizen, Jonathan Octavia Nunez, was being forcibly flown out. He was under the escort of Japanese police to face drug smuggling charges in Tokyo.

In 2004, Mr Nunez, then a retired United States (US) sailor, used his connections in the American military mail system to smuggle 50,000 synthetic drugs including ecstasy worth \$2million into Japan.<sup>1</sup> With no alternative income, he saw the profit from drugs sales as a way to support his Japanese wife. When two of his accomplices were arrested by Japanese customs, Nunez fled to Minnesota and then to Peru before returning to the US in 2009 when Japanese extradition proceedings against him were started. A conviction and ten year prison sentence followed in 2014.

Mr Nunez might not care to know it, but he has unwittingly made legal history. He is probably the first US citizen to be extradited to Japan under a 1978 treaty between the two countries. The US, like countries such as the United Kingdom (UK), Australia, Canada and New Zealand, do not refuse to return their own citizens to face trial, provided due process has been followed and proper protections are in place. There is no reason why an earlier case could not have occurred, as the treaty allows for the extradition of nationals, but Japanese requests are relatively few and this was simply the first to be pursued through the US system.

### Nationality protection

Nationality protection is unnecessary in modern extradition practice and a hindrance to the pursuit of justice. Countries will not hand over their citizens if there are substantial risks about a requesting country's standards of justice, prison conditions, or other concerns, where the right conditions are not in place before any extradition takes place. Domestic legislation, the courts, and properly constructed treaties provide this assurance. There isn't the need for a carte blanche nationality bar to decide on these matters: for nationality alone is not a reasonable ground on which to restrict return.

It particularly no longer makes sense for countries to refuse extraditing their own nationals to trusted law based democracies when there is a proper case to answer. Modern extradition practice provided it is done between trusted countries under sensible rules works well. It is perfectly sensible for those to be tried in the place which has been harmed by the alleged perpetrator. Not to do so is contrary to wider international initiatives to combat crime.

Extradition treaties grow in number. India has signed a clutch in recent years including with Egypt, Saudi Arabia, Vietnam and Bangladesh.<sup>2</sup> It signed another with Thailand after twenty years of negotiation in 2013.<sup>3</sup> The EU agreed one with the US in 2013 to standardise problems with member states about dual criminality, the requirement that the extradition request must be for alleged conduct that is also a crime in the extraditing country. Most of the former Warsaw pact countries are part of the 1957 Council of Europe Convention on Extradition.

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<sup>1</sup> Japan Today, Former U.S. sailor extradited to Japan on drug-smuggling charge, July 2013, <http://www.japantoday.com/category/crime/view/former-u-s-sailor-extradited-to-japan-on-drug-smuggling-charge>

<sup>2</sup> Ministry of External Affairs, Government of India, Extradition Treaties and Arrangements between India and Other Countries/Regions, November 2013, <http://www.meaindia.gov.in/extradition-treaties-and-arrangements.htm>

<sup>3</sup> Shiv Aroor, India and Thailand sign long-awaited extradition treaty, Daily Mail India, May 2013, <http://www.dailymail.co.uk/indiahome/indianews/article-2333541/India-Thailand-sign-long-awaited-extradition-treaty.html>

But there is no consistent extradition practice. Problematically, Brazil, a trusted country, has a blanket ban on returning Brazilians. Turkey is another with an automatic prohibition. France and Germany continue with their bans for extradition outside the EU. China heads this list of countries with a nationality protection (though Hong Kong has no nationality bar). Similarly, a citizenship bar is operated by the Commonwealth of Independent States (CIS), many of the former Soviet Republics, including Russia. Although it would never have agreed to extradition, Russia was superficially able to use this provision as grounds for rejecting the extradition of Andrey Lugovoy, an alleged assassin by polonium poisoning in 2006 in London of Alexander Litvinenko, a former KGB officer granted asylum in the UK. Extradition practice to an extent rests on mutuality, and there would clearly be problems in extraditing anyone, irrespective of nationality, back to either China or the CIS countries. However, this does not necessarily preclude those countries returning alleged criminals to face justice: mutual benefits in justice cooperation may follow, as well as cooperation in other areas.

Others have a selective practice. Despite opinion to the contrary Japan, can extradite depending on what has been negotiated within each treaty. It does extradite to the US. Its first extradition to America of its own national was Kaita Fukusaku, who was returned to Hawaii in 1994 to face trial and subsequent conviction for the murder of a fortune teller and her son.<sup>4</sup> A forty year prison sentence followed. And there are variations on this theme. Israel permits extradition of its nationals, if they met a residency qualification, provided that the requesting country consents to have any subsequent sentence served in Israel.<sup>5</sup>

By contrast, many countries particularly common law ones do not have or otherwise do not actively enforce a nationality restriction. India, America, the UK and Singapore are amongst them: some reserve the right but generally do not invoke it. Some regional organisations try to promote its removal. The Organisation of American States (OAS), for instance, rules out nationality as a ground for refusal unless it is legislated for by the concerned state.<sup>6</sup>

When two countries have trusted justice systems, invidious situations result if one extradites its own nationals but not the other. Although Brazil steadfastly does not, this fact hasn't stopped it requesting the return last year, 2014, from Italy of dual Brazilian-Italian national Henrique Pizzolato. This is a high profile extradition case which has received much coverage in Brazil. Mr Pizzolato, formerly a marketing director of the Bank of Brazil, was convicted with 25 others for crimes related to political corruption, the Mensalao scandal, in which money was paid by the ruling Workers Party to secure votes from congressional deputies.<sup>7</sup> Some of these funds came from the Bank. He was convicted in 2012 but while free during an appeal process fled to Italy supposedly using his dead brother's passport.<sup>8</sup> Arrested in 2014, his extradition was finally allowed by the Italian courts in February this year, with the final decision required by the Italian Justice Minister.<sup>9</sup>

Italy has reason to be piqued by Brazil. Although not a case of nationality, Brazil consistently refuses to extradite an old-school terrorist, Italian national Cesare Battista, responsible for up to four murders in the 1970s. Its refusal is on bizarre political asylum grounds.<sup>10</sup> Italy, however, has a

<sup>4</sup> Keoki Kerr, Man convicted of murdering famous Japanese psychic, son asks for early release, April 2013, <http://www.hawaiinewsnow.com/story/21850160/man-convicted-of-murdering-famous-japanese-psychic-son-asks-for-early-release>

<sup>5</sup> Council of Europe, Israel - national procedures for extradition, March 2014, [http://www.coe.int/t/dghl/standardsetting/pc-oc/Country\\_information1\\_en\\_files/Israel%20Extradition.pdf](http://www.coe.int/t/dghl/standardsetting/pc-oc/Country_information1_en_files/Israel%20Extradition.pdf)

<sup>6</sup> Organisation of American States, Inter American convention on extradition, undated <http://www.oas.org/juridico/english/treaties/b-47.html>

<sup>7</sup> The Economist, What is Brazil's "mensalão"?, November 2013 <http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-14>

<sup>8</sup> BBC News, Brazilian 'Mensalao' banker Pizzolato arrested in Italy, February 2014, <http://www.bbc.co.uk/news/world-latin-america-26061848>

<sup>9</sup> BBC News, Fugitive Brazil banker Pizzolato faces extradition, February 2015, <http://www.bbc.co.uk/news/world-latin-america-31436779>

<sup>10</sup> The Economist, Fugitives from justice in Brazil, January 2009, <http://www.economist.com/node/12974127>

reasonable record of extradition and is unlikely to take counter-measures, whatever Brazil's unfortunate stance on extradition and nationality. America also extradites to Brazil, similarly one-way traffic as well. This is right for the absence of reciprocity should not be a barrier to justice.

### General Trends

Albeit hesitantly, the general international trend by practice and by policy is towards narrowing the grounds for refusing extradition including the removal of nationality bars, even for civil law countries.

Continued US-Mexican extradition cooperation on nationality, while still a bumpy ride, has continued to improve. This has helped to deal a blow to drugs cartels, such as, for instance, the Arellano-Félix Organisation (or Tijuana cartel), which is now a diminished criminal enterprise. It was at one time, one of the largest and nastiest cartels in operation, run by five brothers terrorising the border city of Tijuana and controlling nearly all cocaine and marijuana flows entering California. The cartel disposed of the bodies of rivals and innocents through vats of corrosive material. First came the ruling by Mexico's Supreme Court in January 2001 that the extradition of Mexican nationals was permitted for by the constitution. Prior to this point, extradition relations had been poor, with no Mexican national having been extradited to the US before 1995. This development facilitated another piece of extradition history with the first return of a senior drugs trafficker Everardo Arturo Paez-Martinez, one of the key lieutenants of the Arellano organisation and a Mexican national.<sup>11</sup>

Then the hiccup of a subsequent October 2001 ruling that Mexican nationals facing a life sentence could not be extradited was struck down by 2005.<sup>12</sup> This allowed for further US-Mexican cooperation against the cartels. Benjamin Arellano Félix, the baby-faced 'chief executive' of the family firm, who had been arrested by the Mexican authorities in 2002, was extradited in 2011. His conviction and a twenty-five year prison sentence followed in 2013.<sup>13</sup> Rafael Arellano Félix, the leader was extradited in 2006 and sentenced to 6 years. He was released in 2008, mainly due to time served in Mexico since his arrest in 1993 and deported the same year. (He was murdered in 2013 by a gunman disguised as a clown).<sup>14</sup> In August 2013, the last brother to be extradited, Eduardo Arellano-Félix, was sentenced by a San Diego court to 15 years. Arrested by Mexican authorities amid a gun battle in 2008 he was extradited to the US in 2010. (Another brother, Ramon, 'the enforcer', was killed in a shoot-out with Mexican police in 2002. And yet another, Francisco Javier, was arrested by the Americans in international waters and given a life sentence, remitted this year, 2015, to 23 years for cooperation).<sup>15</sup>

President Pena Nieto, elected in 2012, has continued Mexican cooperation. Another top trafficker, Ivan Velazquez Caballero, finance head of the Zetas Cartel and known colloquially as 'El Taliban', was returned for trial in November 2013. He was tried in Texas the following year with sentencing still awaited.

There have been disappointments. Mexico at first refused to extradite, Joaquin 'El Chapo' Guzman, another drugs lord, this time of the Sinaloa Cartel, whom it had arrested in February 2014. Declared number one Public Enemy by the Chicago Crime Commission, Mr Guzman is sought for drugs

<sup>11</sup> Robert J Cardwell, Cartel Secrets, The San Diego Union Tribune, July 2007, [http://www.utsandiego.com/uniontrib/20070701/news\\_lz1e1cartel.html](http://www.utsandiego.com/uniontrib/20070701/news_lz1e1cartel.html)

<sup>12</sup> BBC News, Mexico alters extradition rules, November 2005, <http://news.bbc.co.uk/1/hi/4483746.stm>

<sup>13</sup> Reuters, Mexican drug kingpin Eduardo Arellano Felix sentenced to prison in US, August 2013, <http://uk.reuters.com/article/2013/08/20/us-usa-kingpin-mexico-idUSBRE97J00H20130820>

<sup>14</sup> BBC News, Mexico 'clown' gunmen kill ex-drug chief Arellano Felix, October 2013, <http://www.bbc.co.uk/news/world-latin-america-24599842>

<sup>15</sup> Greg Moran, Cartel leader's help earns cut in sentence, The San Diego Union Tribune, June 2015, <http://www.sandiegouniontribune.com/news/2015/jun/17/cartel-leaders-sentence-cut-for-helping-government>

smuggling charges, money laundering, racketeering and arms trafficking by several states.<sup>16</sup> Mexico allegedly turned down a US request for extradition issued in June 2015. Then to its embarrassment, Guzman, spectacularly tunneled his way to escape and is a wanted man (he had previously escaped from a Mexican prison in 2001). Subsequently the Mexican Attorney General's office approved the extradition request in July this year.<sup>17</sup>

Both Mexico and the US have legitimate claims to the drugs lords. Extradition to the US is arguably preferred – a point with which Mexico City may quietly concur – as it secures the removal of arch criminal from the drugs scene. The effort to protect a Mexican trial and a prison from interference, be it from corrupt officials or armed intervention and ensure that the jail does not subsequently become the commissioning centre for a drugs enterprise, requires considerable resource, which is otherwise needed on the frontline. Handing the drugs lord to the US for prosecution relieves this pressure. There is also an argument that the US has bargaining power with the accused which is denied to the Mexican authorities: in return for information, visas and protection can be given to family members. When the Mexican prison system is reformed, the balance in such an argument may change.

Colombia which amended its laws in 1997 to allow the surrender of Colombian fugitives maintains its cooperation. In September 2013, a Washington court convicted the Colombian drugs trafficker Jose Maria Corredor-Ibague, and sentenced him to 194 months imprisonment. Corredor-Ibague, extradited by Colombia in 2008, had conducted his drugs trafficking and narco-terrorism operation in concert with the terrorist group, FARC.<sup>18</sup> (This sentence itself set another precedent, being the first time that a conviction had been secured in the US under its 2006 federal narco-terrorism law).

A main advance has been in the European Union. Under the 2003 European Arrest Warrant (EAW) system, all member states have agreed to return their nationals within the EU provided that on request any sentence is served on home territory. Prior to the EAW's implementation on 1<sup>st</sup> January 2004, member states such as France, Germany and Austria stoutly refused to extradite their own nationals even to fellow EU countries: now all twenty eight countries do not prohibit the return of their nationals within the EU. The EAW has faults but reduction of the nationality restriction is one of its successes.

Some went down this route unwillingly. Croatia, which was admitted to the EU in 2013, resisted Germany getting hold of Josip Perkovic, a former Cold War Croatian spy, for alleged involvement in the assassination of a dissident, Stjepan Djurekovic, in Bavaria in 1983. Mr Perkovic, believed to be the organiser, was at the time head of the Croatian section of the Yugoslav State Security Service (SDS). Another former Yugoslav spy and a co-accused were convicted by a Munich court in 2008. Germany sought Mr Perkovic's arrest in 2009 but was unable to secure cooperation from Croatia, which did not then extradite its nationals.<sup>19</sup>

His eventual arrest came after Croatia lifted its curb under threat of sanctions from Brussels. Despite agreeing to implement the EAW in full as part of its accession negotiations, Zagreb at the last minute limited the EAW to crimes committed only after 2002, the adoption date of the EAW framework agreement. The withdrawal of 80 million Euros worth of investment funds brought it around: and

<sup>16</sup> BBC News, Should drug lord Guzman have been extradited to the US?, July 2015 <http://www.bbc.co.uk/news/world-latin-america-33506562>

<sup>17</sup> Reuters, Mexico approves U.S. extradition warrant for fugitive kingpin Guzman, July 2015, <http://www.reuters.com/article/2015/07/31/us-mexico-guzman-idUSKCN0Q500N20150731>

<sup>18</sup> US Department of Justice, High-level Colombian Drug Trafficker Sentenced to 194 Months in Prison, September 2013, <http://www.justice.gov/opa/pr/high-level-colombian-drug-trafficker-sentenced-194-months-prison>

<sup>19</sup> DW, Perkovic extradition saga continues, January 2014, <http://www.dw.de/perkovic-extradition-saga-continues/a-17352849>

the Croatian law was hastily changed.<sup>20</sup> Mr Perkovic was returned to Germany in January 2014 and his high profile trial continues. (In addition to Mr Perkovic, Croatia arrested ten other Croatians on 1st January 2014 year under EAWs).

In the Middle East, Israel changed its law to amend a previous ban. This followed a rupture in relations with the US when Israeli courts refused to return an American-Israeli citizen, then 17 year old Samuel Sheinbein, accused of murdering a high school love rival in Aspen Hill, Maryland. In a split decision of February 1999, the Israeli Supreme Court ruled against extradition.<sup>21</sup> (Mr Sheinbein was later convicted in an Israeli court and died in 2014 in a shoot-out with prison officials). The Knesset consequently passed amendments in 1999 and 2001 to Israeli extradition law. The new test for was that if a country requested the return of an Israeli national who was also domiciled in Israel at the time of the offence, then any grant of extradition would be conditional on the right of that person, if convicted, to serve their time in an Israeli prison.<sup>22</sup>

Modern extradition procedures continue to develop because countries recognise it is everyone's interest to pursue criminal activity, particularly in the days of sophisticated transnational crime. Newer countries and those changing their regimes have an appetite for punishing corruption – as well as protecting their country's image. Moreover, the number of extradition treaties continues to grow; and ones that are in place are regularly modified to remove loopholes. Removing the nationality bar is the next natural next step in this development.

### Alternatives

There are ways around current nationality bars, which in some cases do have merits. The main alternative is for prosecution to occur in the accused's native country. Indeed, this is usually offered as an alternative when extradition is refused on grounds of nationality.

Blanket refusers such as China sometimes offer this facility. It can work as a last resort if the crime is particularly serious and there is no other foreseeable recourse to justice. Take a rare case. In the lonely hours of a late January morning in 2011, an Auckland taxi driver of Indian decent, Hiren Mohini, picked up a new fare, a Chinese man, Xiao Zhen. Instead of this being a simple and friendly dispatch for that unsocial time of day, it turned into a murder. A dispute occurred over the price, some \$16 dollars, which resulted in Zhen fatally stabbing Mr Mohini. Zhen fled New Zealand for his home country, leaving a grieving widow and daughter, and an angry community. China refused Wellington's request to hand him over but instead offered a local prosecution.

Faced with the stern prospect of no justice, New Zealand eventually took up the offer, but only after assurances that Zhen, if convicted, would not face the death penalty. Effective cooperation between the two countries followed: Zhen was convicted and sentenced to 15 years, probably five more than if convicted in New Zealand.<sup>23</sup> On the one hand it was an example of effective judicial cooperation, though on the other there was a limited choice given China's refusal to return and New Zealand's jurisdiction was compromised – it was possibly, the first time that a murder committed in New Zealand was tried in another country by forced circumstances.

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<sup>20</sup> EU Business.com, EU lauds Croatia change to controversial EU extradition law, October 2013, <http://www.eubusiness.com/news-eu/croatia-politics.qrp>

<sup>21</sup> The Washington Post, Sheinbein Can't Be Extradited, Feb 1999, <http://www.washingtonpost.com/wp-srv/local/daily/feb99/sheinbein26.htm>

<sup>22</sup> Ruth Levush, The Sheinbein Saga and the Evolution of Israel's Extradition law, Library of Congress, March 2014, <http://blogs.loc.gov/law/2014/03/the-sheinbein-saga-and-the-evolution-of-israels-extradition-law/>

<sup>23</sup> NDTV, Chinese man gets 15 years for killing Indian-origin cab driver in New Zealand, Aug 2011, <http://www.ndtv.com/world-news/chinese-man-gets-15-years-for-killing-indian-origin-cab-driver-in-new-zealand-464739>

There are other cases involving China. One is a variation on a theme for the victim and convicted killer were both Chinese. In this instance, in 2002, a then twenty-one year old, Amanda Zhao, a Chinese international student, was strangled by Chinese boyfriend, Li Ang, in their apartment in Vancouver, Canada. With an accomplice, also a Chinese national, Miss Zhao's body was disposed of in a suitcase which was then thrown into a nearby lake. Li fled to China. Protracted discussions with the Chinese authorities failed to persuade Beijing to hand over Mr Ang but the offer to prosecute was made. Seven years later, having exhausted all options and rather than have no justice, the Vancouver authorities agreed, on the assurance that there would be no death penalty if a conviction followed. Li Ang was convicted that same year in a Beijing court and given a life sentence.<sup>24</sup> (In 2014, his crime was reduced to manslaughter and the sentence reduced to seven years. There are suggestions that the change may be due to the influence brought by Li Ang's family compared to the poorer family of Amanda Zhao.)<sup>25</sup>

Two cases similar cases are pending. In June 2015, Chinese police arrested Li Xiangnan, who is sought in Iowa for the alleged murder of his girlfriend, Shao Tong in September 2014. Police later found the body in the boot of car.<sup>26</sup> What will happen next is uncertain. The US authorities would seem to have something in mind for, prior to the arrest in China, they co-operated with the Chinese officials who were allowed to attend the crime scene in June this year and who were handed various files and evidence to study. The other pending case is another Canadian one, in which Ottawa seeks the extradition of a Chinese immigrant, Gu Wei Wu. Mr Wu is accused of being the mastermind behind a failed kidnapping scheme in Greater Toronto that resulted in the death of an estate agent in 2011.<sup>27</sup> Two men were held for a \$2.5 million dollar ransom over a period of five days, during which time one of them Tony Han, suffered a fatal heart attack, and his body was discovered six months later – the other captive was set free. Mr Wu's accomplices were convicted in 2012 and Mr Wu was later arrested in October 2014 China on other matters.<sup>28</sup> The indications are that Ottawa are seeking a local prosecution with the relevant assurances being in place over the death penalty.

### Problems with local prosecutions

Whilst a case can be made for local prosecutions, the opportunity should always be afforded for the entitlement of extradition. On grounds of principle, it is right that the country that suffered the harm should have the right to prosecute. This has always been, by tradition and precedent, the British approach. It takes into account the rights of victims, whether they are institutions or individuals. Victims of crimes of aggression or serious fraud are entitled to see justice carried out in their own lands: and alleged perpetrators should not, as a general rule, be entitled to choose the location of their trial.

Moreover, as a diplomatic alternative, an obligation to prosecute is largely is hardly ever mandatory. Then comes the complexity of transposing case-work between two countries' legal systems. The requesting country's prosecuting authorities have no control over the case and the decisions they might make are not necessarily the ones which would actually be made by those carrying out the prosecution, especially in a different cultural context. Indeed, the consequence of a failed prosecution might always lead to a minor diplomatic rift over what actions should have been taken.

<sup>24</sup> Mark Mackinnon, Chinese court finds boyfriend guilty of murdering Amanda Zhao in B.C., The Globe and Mail, September 2012, <http://www.theglobeandmail.com/news/british-columbia/chinese-court-finds-boyfriend-guilty-of-murdering-amanda-zhao-in-bc/article4571154/>

<sup>25</sup> Amy Judd, Sentenced reduced for Chinese man accused of killing girlfriend in B.C., Global News, June 2014, <http://globalnews.ca/news/1424679/sentenced-reduced-for-chinese-man-accused-of-killing-girlfriend-in-b-c/>

<sup>26</sup> Shen Lu, Suspect in Iowa student murder charged after months on the run in China, CNN, June 2015, <http://edition.cnn.com/2015/06/30/asia/chinese-student-murder-suspect-arrested/>

<sup>27</sup> Patrick White, China refuses to extradite Canadian fugitive, will try him on murder charges, The Globe and Mail, January 2014, <http://www.theglobeandmail.com/news/world/one-of-canadas-most-wanted-fugitives-detained-in-china/article16259367/>

<sup>28</sup> CBC News, Guo Wei Wu to face trial in China for GTA realtor's death, January 2014, <http://www.cbc.ca/news/canada/toronto/guo-wei-wu-to-face-trial-in-china-for-gta-realtor-s-death-1.2490851>

And the prospect of a failed prosecution cause may lead some countries not to try, especially as the prospect of a future trial in the place where the harm occurred might be affected, for reasons of double jeopardy and so on. (And there remains the danger of misuse by a country which is not trusted).

This does not mean that local prosecutions are without their uses. It does allow for some form of justice in the last resort, as the Mohini case has demonstrated. It can also be offered as a genuine alternative to extradition in certain circumstances. For instance, it helps to get around technical grounds for refusing extradition when, for instance a crime for which a person is sought is either not listed in the relevant treaty.

Ever developing technology advances does start to make a supporting case for local prosecutions in some circumstances. A furore was cased over the case of Gary McKinnon, a British Asperger's syndrome sufferer, who in 2002 hacked into and allegedly caused damage to US Government computer systems, which sparked off an extradition request.<sup>29</sup> He admitted the hacking but not the damage and claimed a motive of looking for UFOs. After a protracted extradition battle, the Home Secretary finally refused extradition on human rights grounds in 2013, namely that Mr McKinnon's extradition would give rise to a high risk of him ending his life. This was an unusual decision, and possibly the first time that a British Home Secretary has used his/her then available quasi-judicial powers to halt extradition to the US on medical grounds, when British courts have not finally objected.

A point raised by this case was that the alleged crime was committed outside of the US from the comfort of Mr McKinnon's bedroom. This raised issues about extra-territorial jurisdiction, which included the argument that Mr McKinnon should be tried in the UK because he conducted the alleged offence from there. There was an element in a public campaign in support of Mr McKinnon that a British citizen should be tried in the UK for this reason. It was a case that led in 2013 to the introduction, amongst other changes, to the UK's extradition procedures of a forum bar, which is a court decision to decide on what is the proper jurisdiction to prosecute a cross-border crime. One of the criteria in that test is the connection that the accused person has with the UK.

An argument could be made that a local prosecution for this type of situation has advantages. Seven years of cost and delay that result in a decision not to extradite isn't good for the legal system, the victims, or diplomatic relations, or arguably the accused if they genuinely want the matter dealt with promptly. A local prosecution would be efficient and timely. Court technology can provide for witness evidence almost as smoothly as if the witness were in an actual court. And it would remove the passions and pressures of a public campaign.

It is for the legal test, in this case the forum bar, to decide on whether the circumstances warrant it, based on many factors including the weight of the harm suffered by the country or countries requesting extradition. It is highly unlikely ever to be used to stop extradition on grounds of nationality alone. And local prosecution in these types of cases should be an adjunct and not a substitute for extradition. There is room for more work here, particularly in speeding up mutual legal assistance requests (though most countries' legal systems are already beleaguered).

The other use of local prosecutions is to get around technical problems such as when the alleged crime committed does not appear in the relevant extradition treaty. This may or may not affect nationality. A sore in US-Mexico extradition relations, mainly at the state level, is that many offences cannot be extradited on because they are not covered within the Treaty. Keen to assist, Mexico does

<sup>29</sup> BBC News, Gary McKinnon: Timeline, December 2012, <http://www.bbc.co.uk/news/19959726>



prosecute locally as an alternative to extradition. Possibly 100 US Citizens have been prosecuted under Article 4 of its Federal Penal Code, facilitating requests from California, Texas and other South Western States including Colorado.<sup>30</sup>

Local prosecution has a role to play, and should be further developed as a recognised alternative in certain types of extradition cases. However, as a general principle, discretion must always be towards extradition, so that jurisdiction which has suffered the harm has the right to prosecute for it.

It is in passing worth mentioning one other way of addressing the nationality problem in extradition cases. This is when a mix of citizenship is involved. At the moment, the Brazilian courts are deciding on the nationality of Claudia Hoerig, who is wanted by the US for the alleged murder in 2007 of her husband, a decorated US Air Force Reserve Major Karl Hoerig in Ohio. Mrs Hoerig was born a Brazilian national but was later naturalized in America. She allegedly shot her husband in the head, emptied their bank accounts and then fled to her original native country. After many years of refusing to extradite, the Brazilian courts were considering in July 2013 whether to revoke her citizenship, subject to appeal, which may then allow for extradition proceedings.<sup>31</sup> This is a painfully slow case, but possibly the start of interesting developments.

### **Problems with removing the nationality bar**

Removing a nationality barrier is not a panacea, but it is an advance. Extradition processes generally continue to have problems that require modification. Proceedings still take far too long and regularly go into years – and this is in addition to the subsequent case trial itself. Any resulting pre-trial imprisonment in far-away places is costly and wearing on families.

Moreover, rigour has to be applied to avoid extradition for minor crimes. This is generally the case in bilateral schemes, which as state to state affairs look to avoid wasting important diplomatic and government time on relatively small matters. Improvements, led by the UK, have made the European Arrest Warrant (EAW) system better. Under the UK's anti-Social Behaviour and Crime and Policing Act 2014, the National Crime Agency (NCA) now decides whether EAW requests meet a proportionality test, that is that the conduct committed is serious enough to warrant extradition, before allowing any extradition request to proceed.<sup>32</sup> This will exclude minor offences such as shoplifting and filter out cultural differences, particularly in some civil law countries in which there is recourse to the law to settle what in the UK, the US and others would not be regarded as criminal matters.

And even if Russia and China did accept the principle of justice and agree regularly to return fugitives back to trusted extradition partners, this would not immediately lead to reciprocity until their own justice systems are of a trusted and satisfactory standard. Of course this raises the matter of why they would want to extradite if the position is not mutual. However, sensible countries do this knowing that there might not be reciprocity, but in the wider causes of justice. Italy's consideration about the case of Henrique Pizzolato to Brazil is a case in point.

Cyber-crime and the related issues about extra-territorial jurisdiction will increase in number and profile. With them, when an accused national causes harm from the safety of his/her own country, national opinion may call for a local trial. This was a force of opinion in the case of Mr McKinnon.

<sup>30</sup> David Jackson and Gary Marx, U.S. fugitives can be prosecuted in Mexico, Chicago Tribune, April 2012, [http://articles.chicagotribune.com/2012-04-01/news/ct-met-fugitives-article-four-20120401\\_1\\_u-s-fugitives-juan-manuel-casillas-arturo-daza](http://articles.chicagotribune.com/2012-04-01/news/ct-met-fugitives-article-four-20120401_1_u-s-fugitives-juan-manuel-casillas-arturo-daza)

<sup>31</sup> Michelle Nicks, The Hoerig case 7 years later, wfmj, March 2014, <http://www.wfmj.com/story/25010418/the-hoerig-case-7-years-later>

<sup>32</sup> Legislation.gov.uk, Anti-social Behaviour, Crime and Policing Act 2014, <http://www.legislation.gov.uk/ukpga/2014/12/section/157>

However, such issues must be handled on case-by-case basis using carefully developed criteria, such as the forum bar that the UK has implemented, and taking into account a range of matters including the location and seriousness of the harm which was caused. By contrast with the Mr McKinnon case, the UK Government itself was adamant that the trial of the two Libyans accused of the bombing in 1988 of Pan Am 103 over Scotland in 1988 be prosecuted under local jurisdiction and not that of another country, even though the sought persons had committed their crime – the commissioning and preparation of the event – outside of the UK.

Although the trial itself was held in a neutral country, the Hague in the Netherlands, it was conducted in 2001 under the full authority of the Scottish court by Scottish judges.<sup>33</sup> In other words the Scottish system temporarily moved to the Hague for the trial, under a bilateral agreement between the UK and Holland. One of the two defendants, Abdelbaset Ali Mohamed al-Megrahi, was convicted and served his sentence in Scotland. Extra-territorial jurisdiction is an area that needs careful examination, but it is a problem that is wider than nationality and will not be solved by blanket nationality bans.

### Why does extradition fail?

In general terms, extradition cases fail for three reasons. Firstly, simply because of due process, which include findings by the courts that extradition is improper based on domestic law and/or that treaty requirements have not been fulfilled. Extradition cases can and do fail in trusted countries for these types of reasons, which can include unusual one-off court judgements by independent judiciaries. Requesting countries simply have to accept these as they would judgements their own domestic system and move on.

Then come political reasons. Brazil's continued refusal to return to Italy the convicted bomber Cesare Battisti for no sensible reason while expecting others to comply with its extradition request remains bizarre. Ecuador's decision to grant Julian Assange asylum in its London Embassy has no grounds for what is a proper Swedish extradition request to the UK for sexual related offences. The allegation that Sweden would consequently transport Mr Assange to America has to face the reality of due process: any US request that Sweden receives has to be processed in accordance with Swedish law and extradition treaty requirements. There is no reason to believe that any American extradition request made to Sweden would be more or less successful than any made to the UK. Similarly, Russia's refusal to return Edward Snowden, a US citizen, is another prominent case embedded in political circumstances (an extradition treaty between the US and Russia is not a pre-requisite for one-off extraditions): US courts are as free and fair as any other trusted country.

Then there are reasons of nationality. This was the technical basis behind the Russian decision in 2007 to bloc the extradition of Andrei Lugovoi for the alleged assassination of Alexander Litvinenko in 2006.<sup>34</sup> This event has murky political circumstances, and it would be naive to assume that Moscow would have handed over Mr Lugovoi had there been no nationality bar in its own laws. (A Russian TV drama shows Boris Berezovsky to the killer and Mr Lugovoi is portrayed as a hero.)<sup>35</sup> However, a resort to this prohibition simply endorses Russia's image as a haven for criminality; and does not foster good judicial cooperation in a range of areas - including the exchange of information on organised gangs, visa liberalisation, and the enforcement of civil court decisions - that would benefit Russia as much as other countries.

### Recommendations

<sup>33</sup> BBC News, Libyan guilty of Lockerbie bombing, January 2001, <http://news.bbc.co.uk/1/hi/world/1144893.stm>

<sup>34</sup> BBC News, Russia rejects agent death claims, July 2007, <http://news.bbc.co.uk/1/hi/uk/6905794.stm>

<sup>35</sup> BBC News, Litvinenko death: Russian TV rewrites London polonium murder, December 2015, <http://www.bbc.co.uk/news/world-europe-34968066>



The merits for reducing extradition barriers, providing there are present robust protections, are stronger than any case against. It is a system that should now be encouraged. This is how it can be taken forwards:

1. The international community can and should play a role in promoting a culture that does away with nationality bars. The United Nations can issue an addendum to its Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters and make the case for removing the nationality bar.<sup>36</sup> All such UN treaties and changes to them are passed by a General Assembly resolution which requires a simple majority to carry. Similarly the Council of Europe should be encouraged to gain consensus for the issue of a Fifth Additional Protocol which encourages the dropping of the nationality bar. This will not be easy, but the technical work can be done by its Justice and Legal Co-operation department. Only 20 members of the Parliamentary Assembly of the Council are required to propose a motion or recommendation to the Council's Bureau which will then decide whether to refer it to a Committee for a draft resolution. The final decision rests with the Committee of Ministers, made up of all 47 countries' foreign ministers, for which a two-thirds majority is required. Even if not passed, a Partial Agreement, which is an instrument that does not include all member states, could be considered. The Asian Development Bank and the Organisation for Economic Co-operation and Development (OECD) can build on its 2007 report on the Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific and issue guidance on this point.<sup>37</sup> Other fora including the International Association of Prosecutors can raise these issues for discussion and promotion.<sup>38</sup>
2. France, Germany, Austria and other leading European Union countries should now lead the way. They have already agreed the precedent of extraditing free of citizenship within the EU. It makes little sense to maintain this bar to other trusted extradition partners including the US and Australia to name a few. Paris and Berlin were among the advocates of the EAW system, they should now set the example of removing further unnecessary barriers to justice. Yes, it does require constitutional change in some cases, but the precedent has been set. Signals like this matter in encouraging other countries to follow suit.
3. The EU collectively has a role to play in promoting this development. Brussels signed an EU wide extradition agreement with the US in 2009 which was silent on the grounds for refusing extradition.<sup>39</sup> This is partly because the agreement sits alongside existing bilateral treaties, which already deals with the grounds for refusal. However, it is a step forward in promoting the right culture. It should go further in pushing for those affected by the agreement to agree an addendum which removes nationality protection. Why not build on the 2009 EU-Japanese mutual legal assistance agreement in criminal matters and develop one on extradition without any nationality provision with Japan as well?
4. Other leading regional countries which are, or should be, trusted extradition partners, should be encouraged through international fora to do likewise. Prime amongst these are Brazil and Japan. The latter has the precedent in place with the US, which should be built on in renegotiating and amending its bilateral treaties. Brasilia is a harder nut to crack, but its grounds for refusing to make

<sup>36</sup> United Nations Office on Drugs and Crime, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, [https://www.unodc.org/pdf/model\\_treaty\\_extradition\\_revised\\_manual.pdf](https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf)

<sup>37</sup> Asian Development Bank/Organisation for Economic Co-operation and Development, Mutual Legal Assistance, Extradition, and Recovery of Proceeds of Corruption in Asia the Pacific, 2007 <http://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>

<sup>38</sup> International Association of Prosecutors, <http://www.iap-association.org/About>

<sup>39</sup> EU Law, Agreement with the United States on extradition, February 2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:jI0053>



the necessary constitutional changes are not strong. Mexico and Columbia have led the way. It is now for Brazil to take that next step. Brazil's image as a safe haven does not help its business image.

5. Then there is the conundrum of how to encourage Russia and China to return their nationals. It does China and Russia no harm, as a first step, to do this for non-nationals. And there is yet another extradition precedent to build on. In 2011, David Price, a British citizen, became the first person to be returned by China, in this case to face charges of possessing and distributing indecent images of children.<sup>40</sup> Mr Price was subsequently convicted and sentenced to seven and a half years' imprisonment.<sup>41</sup> This extradition was a one-off, and achieved through a diplomatic agreement, for the UK like many countries does not have an extradition treaty with China (an extradition treaty is not an absolute requirement for extradition: as long as person is lawfully returned by the requested country).

If Beijing has the appetite to co-operate, then it could be encouraged as a first step to return non-nationals on a regular basis without an extradition treaty. Once this process is established and leads to trust, the second confidence building stage is for China - and Russia to - return their own nationals. If really necessary, as a temporary confidence building measure, this could be done under certain conditions, such as the Israeli example of requiring the right for any consequent prison sentence to be served at home. Governments including the UK and the US should start formal policy considerations to facilitate such requests. Of course, both China and Russia are highly protective of their sovereignty, which tends to happen with those in a long term transition, but other proud countries such as Mexico and France and Germany, within the EU, have overcome this hurdle and have agreed to extradite, albeit with conditions with the latter two. Dialogue to facilitate this development with China should be continued both bilaterally and through regional bodies including the EU and the Asia-Pacific Economic Cooperation (APEC).

Moscow and Beijing may insist on reciprocal arrangements before agreeing to any form of regular extradition. This is not going to happen quickly given concerns about an independent judiciary, standards of court justice and standards of the prison system. But it doesn't have to be that far away either. It is in China's and Moscow's vested interest to reform their justice systems: and the more they do so, the more cooperation is likely to follow. Effective working co-operation on judicial matters does happen. Chinese and US justice officials meet each year through the US-China Joint Liaison Group on Law Enforcement Cooperation set up in 1997.<sup>42</sup> Similar arrangements used to occur between US and Russian officials until they were suspended by Moscow in 2013. As this paper has shown, China has returned at least one sought person, albeit not a Chinese national, to the UK. And China has not unsatisfactorily pursued local prosecutions for Australia and Canada.

That step towards any extradition treaty depends as much on China's and Russia's willingness to reform their justice standards as much as anything else. Doubtless, the more that Beijing co-operates the more it will expect return assistance, and the same with Russia. But this provides leverage to facilitate co-operation: to encourage an independent judiciary and a fair and free trial system and start new prisons with satisfactory standards. China has a strong appetite to apprehend those accused of corruption and regularly raises the issue of return, whether extradition or deportation with the US authorities.<sup>43</sup> Outside of political cases, Russia has grounds for wanting to

<sup>40</sup> CPS, First UK citizen extradited from China jailed, January 2012, [http://www.cps.gov.uk/news/latest\\_news/first\\_uk\\_citizen\\_extradited\\_from\\_china\\_jailed/](http://www.cps.gov.uk/news/latest_news/first_uk_citizen_extradited_from_china_jailed/)

<sup>41</sup> BBC News, Paedophile David Price jailed after China extradition, January 2012, <http://www.bbc.co.uk/news/uk-england-merseyside-16655833>

<sup>42</sup> US Department of State, U.S.-China Joint Liaison Group on Law Enforcement Cooperation, December 2012, <http://www.state.gov/r/pa/prs/ps/2012/12/202280.htm>

<sup>43</sup> Tim Reid, Exclusive: U.S., China to discuss repatriation of Chinese fugitives, Reuters, February 2015, <http://www.reuters.com/article/2015/02/11/us-usa-china-assets-idUSKBN0LE2I820150211>

prosecute serious criminals committed in its jurisdiction. Besides which, the more advances that are made, the greater will be international cooperation in other judicial areas like smuggling and trafficking and corruption.

And a contributing factor is that trusted countries do want to return fugitives to face justice in Russia, China and elsewhere when there is a clear absence of political interest and the alleged crime involve serious criminal activity, including corruption. It does no-one any good to harbour people accused of serious criminal activity. For instance, another extradition precedent was established in 2013 when Britain actually returned, possibly, the first ever person to Moscow, in this case on manslaughter charges. Thirty-two year old Maxim Vintskevich was flown back to face charges that in 2005 in St Petersburg he beat an acquaintance, who later died from his injuries. Mr Vintskevich moved to the UK after the alleged crime and was reportedly arrested by British police in 2011 after Russian authorities issued an international arrest warrant.<sup>44</sup> This was a one-off case as, quite surprisingly, Mr Vintskevich does not appear to have opposed extradition.

With appetite and willingness events can develop, but the speed is up to Moscow and Beijing. The more serious they are about extradition the more they will have to grapple with these issues. If China, Russia and others want normalised reciprocal arrangements, then unpalatable activity may be needed, which could include a breach of their sovereignty. One way forward might be the use of the Hague, following the Scottish example in 2001, for China and Beijing to prosecute cases in open court sessions, so that the standards of the case can be assessed and monitored in a neutral country. Alternatively, the trial might take place in Russia or Beijing but only under strict international monitoring conditions (or by the officials of the requested country) with the condition that the alleged person is immediately returned should flaws in the fairness of the procedure be identified.

A second condition to any return is to provide prisons and prison regimes of a satisfactory standard. This might mean creating special prisons for extradited prisoners, until other prison standards are raised, and which are subject to close international monitoring. Any failing can result in the convicted person being returned to the country from which they were originally returned. Such measures would be necessary for as long as the normal prisons and prosecuting procedures remain under par.

There are signals that Russia has started along this road. An interesting development occurred in the recent extradition hearing of Igor Valerievich Kononko, who is sought from the UK by Moscow for fraud charges related to the collapse of the Kazak Bank, BTA. In June this year, a Westminster magistrate refused the extradition on the grounds that Mr Kononko would not receive a fair trial. However, he did make a qualified judgement in accepting Russian assurances about the remand conditions which would be used to house Mr Kononko; and that there had been efforts to improve the standards of prison conditions by lowering prison populations and reducing over-crowding, though such conditions as existed were still seriously 'problematic', particularly within the context of Article 3 of the UK's Human Rights Act which requires consideration to the risk of degrading treatment.<sup>45</sup>

In time, these can lead to achieving reciprocal extradition arrangements with the usual robust safeguards that protect against any potential abuse. When it is reached, any agreed treaties should of course be free of nationality provisions.

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<sup>44</sup> Tom Parfitt, Britain extradites man to Russia for the first time, The Telegraph, March 2013, <http://www.telegraph.co.uk/news/worldnews/europe/russia/9918051/Britain-extradites-man-to-Russia-for-the-first-time.html>

<sup>45</sup> Financial Times, Lawyers see breakthrough in UK- Russia extradition cases, June 2015, <http://www.ft.com/cms/s/0/d655115c-0def-11e5-9a65-00144feabdc0.html#axzz3mO1GCyMW>

6. Finally, because these developments will take require a lot of negotiation and time to work, developing the practice of local prosecution should in the meantime be further developed and be considered in some cases in which there is no clear political element. Trusted requesting governments should be flexible and consider using this alternative, at least in the cases of China, as a means of securing a prosecution in some cases, if extradition fails. The Zhen and Li Ang cases can be built on.

There is merit in developing the practice for other type of cases. The extradition case of Gary McKinnon took ten years to run its course. After the Home Secretary denied the US extradition request, the UK Crown Prosecution Services (CPS) decided not to prosecute on the grounds that the chances of a successful conviction were not high. However, this was after ten years of high profile campaigning; the decision on local prosecution at the start may have been different. Even if it had not, then the matter would have been settled in a far shorter period. It is this nature of case when the alleged perpetrator turned out not to be a career criminal or any had any terrorist association but a then misguided student with a learning disability and acting completely alone in which local prosecution seem a sensible time and cost efficient way forward.

However, this will always be a matter of discretion and local prosecution should never replace extradition. There was nothing inappropriate about the US request for Mr McKinnon's extradition. And nor does it mean that western governments are suddenly going to act as outsourced justice departments for another country. On the other hand it, it needs to be developed both for this type of case and also to cater for the inevitable growth of cross border cyber-crime; and to work with China and Russia for local prosecutions as a last resort, for serious non-political crimes, until the nationality barrier is overcome.

How can this be started? Criteria are already available for establishing where is the suitable location to try a crime when two or more jurisdictions are involved, for instance in the guidance of the CPS and in the EU-US treaty to name a few areas. What there is not is an established process for the prosecution of a crime committed elsewhere. Formalised arrangements therefore need to be put in place, which embrace technology for the transmission of evidence and witness testimony. Protocols can be established on how to arrange and process this material; and at least discussions started. Criteria can be established about when the UK government and other governments might consider making a request for local prosecution if an extradition automatically fails for reasons of nationality. Any start is a good one.

The modern trend of extradition is towards the speedier movement of extradition. Failed cases for reasons of politics and or because of nationality bars are against the wider cause of justice. There are no valid reasons for refusing extradition simply on grounds of nationality. Instead, the dropping of nationality bars should be speeded up. The sooner this is done, the sooner criminals will have less places to seek refuge.

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