

13 February 2023

## EXTRADITION – INTERNATIONAL LAW PERSPECTIVES

Lawrence L. Herman

1. Extradition is a process recognized under customary international law by which one State, upon the request of another, effects the return of a person for a crime punishable by the laws of the requesting State. Extradition is not based on multilateral agreements or international conventions. Rather, the substance and process of extradition depends on whatever two consenting States agree to in bilateral treaties.

2. That said, there are widely agreed principles that apply to extradition among and between such consenting countries, principles that are enshrined in Canada's bilateral extradition treaties, including the 1976 Canada-US extradition treaty that was very much in the news during the Meng Wanzhou affair.

3. The three critical rules in that treaty – and in Canada's other extradition treaties – are that:

- The offense for which extradition is sought must be punishable by the laws of both Canada and the requesting government for imprisonment exceeding one year;
- No extradition will be allowed if the person is being proceeded against or has been tried and discharged or punished in Canada for the offense for which his extradition is requested; and, importantly,
- Canada will refuse extradition if the offense for which extradition is requested is of a political character.

4. As indicated, these principles are contained in the range of bilateral treaties that Canada has concluded. These same terms are part of the *Extradition Act* that this Committee is examining. While in accordance with widely accepted international norms, as stated above, they are not obligations that follow from any intergovernmental or multilateral treaty (as opposed, for example, to Canada's trade law system which is government by multilateral obligations under the *World Trade Organization Agreement*) but reflect Canadian domestic law and public policy considerations.

5. Other key elements in Canada's extradition treaties involve mandatory procedures before an individual is extradited even if all of the above conditions exist. In the case of the Canada-US treaty, the extradition request,

- must be made through diplomatic channels;
- must be accompanied by a foreign arrest warrant issued by a judge that would justify arrest and committal for trial if the offense had been committed in Canada (or the US); and
- must include a description of the person sought, a statement of the facts of the case, the text of the laws of the requesting State describing the offense and prescribing the punishment for the offense, and a statement of the law relating to the limitation of the legal proceedings.

6. These are pretty straightforward elements. The other provisions, very much in issue in the Meng case, are in Article 10 of the Canada-US treaty (as in each of Canada's other extradition treaties) which says that extradition shall be granted only if the evidence is found to be sufficient under Canadian law to justify committal for trial here in Canada for that exact same offense.

7. Once these elements are complied by the requesting government, Canada has a bound treaty obligation to arrest and detain the person sought and, following arrest, to process the request to determine if actual extradition is to be granted. In the Meng case, each of these steps were followed. Had Canada not acted as it did, for example if Canada had refused to arrest Meng following receipt of the properly documented American request, it would have violated its treaty obligations vis-à-vis the United States.

8. To repeat, these are the general international legal aspects of the extradition process. As to the application of Canadian domestic law under the *Extradition Act*, that is a different matter.

9. Another international law aspect, indirectly related to extradition and very much involved in the Chinese hostage-taking of the Two Michaels, concerns obligations in the 1963 *Vienna Convention on Consular Relations* which is a binding multilateral treaty in force between Canada and China. The *Vienna Convention* contains legal obligations on governments to facilitate consular access in all cases of nationals of one State arrested and incarcerated by another.

10. Among the key parts of the *Convention* is Article 5 (consular functions) that says consular officials of the sending State have full rights to assist their own nationals. More pertinent is Article 36 that sets out important obligations that the receiving State must meet, including the following paragraphs:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State . . .

- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. . .

11. In the case of the Two Michaels, it is clear China breached these obligations. While the Convention says these obligations are subject to the laws of the receiving State and China's response was that the two were arrested and incarcerated in accordance with Chinese law and treated the same as any Chinese national arrested under similar circumstances, these arguments do not hold water.

12. To begin with, the objective of the Convention, as stated in its preamble, is to "ensure the efficient performance of functions by consular posts" in application of the rules of customary international law. Thus, in addition to ensuring full and unfettered performance of consular functions, this brings into play the 1948 *United Nations Declaration of Human Rights* and the 1985 *Declaration on the Rights of Aliens*, both adopted with Chinese concurrence, whereby non-citizens are to be guaranteed the right of liberty, security and freedom from arbitrary arrest.

13. Another treaty binding on China is the *Vienna Convention on the Law of Treaties*, which provides that all treaties, including the consular treaty referred to, "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." In the case of the Two Michaels, by any objective standard in refusing and later severely limiting full and regular consular access by Canadian officials, China was in breach of its treaty obligations.

Respectfully submitted,



LAWRENCE L. HERMAN

13 February 2023