

## ***“What place is there for the political offence exemption in modern extradition law?”***

### **Introduction**

This essay will argue that whilst in recent years there may be a renewed need for protection in the form of a political offence exemption, the lack of clear definition of what constitutes a political offence means that in reality the political offence exemption simply cannot safeguard suspects accused of politically motivated crimes from extradition. The absence of clear, legal definitions of both pure and relative political offences will each be analysed in turn. It will then be maintained that even if clearer definitions of types of political offences did exist, in current world politics, states can evade the political offence exemption by classifying suspects' actions as completely non-political offences, focusing instead on labelling actions as ordinary crimes to evade discussion of the exemption completely. It is this failure and inability to protect political activists that ultimately proves there is no place for the political offence exemption in modern extradition law.

To begin, extradition can broadly be defined as "the delivery by one government to another of persons accused or convicted of crimes committed (and justiciable) in one state or territory who have fled to another."<sup>1</sup> The political offence exemption has existed since the 19th century and is one of four safeguards outlined in the United Nations Model Treaty on Extradition.<sup>2</sup> The exemption exists on the mainstay that people have, or should have, the right to act in a way that cultivates political change, even if those actions are disobedient. Yet, there is no internationally accepted definition of what constitutes a political offence; neither do bilateral extradition treaties usually define the crimes that fall under this exemption. There have been attempts to positively define what is a political offence, including looking at motives, targets, and whether the crime is of an ordinary nature or a political nature. But, there has been little success to clearly identify what actions do and do not count. History has better determined what are not political offences or which crimes are not to be characterised as political, such as attempts to kill heads of state or destruct

---

<sup>1</sup> *Cherk Ching v Superintendent of Lai Chi Kok Reception Centre* [2005] 4 HKLRD 105, 109G (CFI).

<sup>2</sup> James J Kinneally II, 'The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End' [1987] 2(1) *American University Journal of International Law and Policy* 206-207; UN General Assembly, *Model Treaty on Extradition* (adopted on the 14 December 1990), art 3(a).

government property, which have at their heart an attack on a political order, but are not considered crimes of a political character.<sup>3</sup> Defining negatively what offences are excluded from the exemption allows for expansion. Too much positive determination of crimes that are political offences could lead to an exhaustive list and narrower application of the exemption, to the detriment of requested persons. But, it is also important that the exemption does not include too many offences as to render extradition law futile. Defining a political offence by assessment of its motives or purposes in relation to achieving a political objective appears to be the most successful at adequately separating different types of action into political and non-political offences. However, this assessment method also offers the widest scope for crimes or action to fall within the category of political offences, which is often contrary to the preference of states requesting extraditions, and thus has not been adopted by the international community as an authoritative definition.

Scholars agree that political offences can be divided into two categories: “pure political offences” and “relative political offences”.<sup>4</sup> Pure political offences target governments, but not individuals, and are not ordinary crimes. Pure political crimes could include espionage, sedition, treason, subversion and secession. Garcia-Mora adds “that these offences are regarded as such only by the society against which they are directed.”<sup>5</sup> This might be pushing the principle of pure political offences too far, but the underlying notion that such offences are only seen as in need of punishment by the states which the suspect acts against is a strong one. Garcia-Mora continues that pure political offenders are not normally a threat or danger to society in the way that offenders of ordinary crimes are.<sup>6</sup> Case law can be used to evidence that crimes such as those aforementioned can fall under the political offence

---

<sup>3</sup> *Re Meunier* [1894] 2 QB 415; CF Amerasinghe, 'The Schtraks Case, Defining Political Offences and Extradition' [1965] 28(1) *Modern Law Review* 27.

<sup>4</sup> Mark Kielsingard and Ken Gee-Kin Ip, 'Hong Kong's Failure to Extradite Edward Snowden: More Than Just a Technical Defect' [2014] 13(1) *Richmond Journal of Global Law & Business* 49, 59; Barbara Banoff and Christopher Pyle, 'To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law' [1984] 16(2) *New York University Journal of International Law & Politics* 169, 178.

<sup>5</sup> Manuel Garcia-Mora, 'Treason, Sedition and Espionage as Political Offenses under the Law of Extradition' [1964] 26(1) *University of Pittsburgh Law Review* 65-85.

<sup>6</sup> *ibid.*

exemption as extradition requests for them were refused.<sup>7</sup> Alternatively, such crimes are omitted from lists of offences for which someone can be extradited for within extradition treaties.<sup>8</sup> There have also been moves to classify which crimes do not explicitly fall within the remit of political offences, such as the Convention for the Suppression of Unlawful Seizure of Aircraft, which sought to exclude civilian aircraft hijacking from the exemption.<sup>9</sup> Here, one may argue that the political offence exemption at least holds some weight in modern extradition law if pure political offences can be vaguely defined and some suspects have been safeguarded. Nonetheless, in reality, cases where the suspect has allegedly committed only pure political offences are not easily accepted as non-extraditable, and in some circumstances the political offence exemption is excluded from applying in bilateral extradition treaties, such as that between the United States (US) and United Kingdom (UK), showcased by the US's request for Julian Assange's extradition for espionage charges.<sup>10</sup> Therefore, even where a suspect's actions seem prima facie purely political, in modern global politics the political offence exemption is rarely easily exercised.

To continue, the definition for relative political offences is not as clear as that of pure political offences. Relative political offences can be common crimes: with a political element, within a political context, in association with a political act, or, with a political motivation.<sup>11</sup> Beyond this, there is no internationally agreed, legal definition of what can or cannot be included under this category and little attempt has been made to explicitly define the scope of the principle.

---

<sup>7</sup> *R v Governor of Brixton Prison, ex parte Soblen*, [1963] 2 QB 243; *R v Governor of Pentonville Prison, ex parte Rebott*, [1978] L.S. Gaz. R. 43 (CA).

<sup>8</sup> *Quinn v Robinson*, 783 F.2d 776, 793 (9th Cir. 1986) [793]-[794].

<sup>9</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (adopted on 16 December 1970, effective from 14 October 1971).

<sup>10</sup> *Assange v The Government of the United States* [2021], available at <https://www.judiciary.uk/wp-content/uploads/2021/01/USA-v-Assange-judgment-040121.pdf>.

<sup>11</sup> *Quinn* (n 8) [807].

The UK has adopted the 'incidence test' to determine whether an offence is relatively political.<sup>12</sup> There are two limbs to the incidence test. The first is that the political offence exemption is "applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective" within the requesting state, known as the 'uprising component'.<sup>13</sup> The level of politically motivated violence needed to constitute a political uprising ranges from slight disunity to war,<sup>14</sup> depending on the jurisdiction. However, it is determined that without the existence of an uprising, the exemption fails. The second limb is known as the 'nexus component', and simply means there must be sufficient nexus between the offence and the political uprising, often limited by the geographical area within which the uprising takes place or has to be ideologically linked, either through clear support or opposition of the political uprising.

The UK has adopted a more liberal approach to the incidence test. The 'uprising component' can be met with lesser circumstances, such as some "political opposition" between the suspect and the requesting state government<sup>15</sup> (not government in general),<sup>16</sup> or, an assessment of whether the suspect's political motives were the dominant purpose of their actions.<sup>17</sup> The actions may also be "considered according to the circumstances existing at the time."<sup>18</sup> Meanwhile, the US interpretation of the 'incidence test' has not adapted in the same way, still requiring that the offence takes place as part of a political disturbance in the form of an uprising.<sup>19</sup> This is high criteria for suspects to meet. The uprising component narrows the applicability of the exemption so much in relation to relative political offences

---

<sup>12</sup> *Schtraks v Government of Israel and Others* [1964] AC 556, 591 (HL); *R v Governor of Brixton Prison, ex parte Koczyński* [1955] 1 QB 540.

<sup>13</sup> *Quinn* (n 8).

<sup>14</sup> *Koczyński* (n 12); *Re Castioni* [1891] 1 QB 149.

<sup>15</sup> *Schtraks* (n 12).

<sup>16</sup> Anti-government, anarchist motivations were not enough to meet the uprising component in *Re Meunier* (n 3).

<sup>17</sup> *Cheng v Governor of Pentonville Prison* [1973] AC 931 (HL); *R v Governor of Belmarsh Prison, ex parte Dunlayici*, *The Times*, 2 August 1996.

<sup>18</sup> *Koczyński* (n 12).

<sup>19</sup> Duane Thompson, 'The Evolution of the Political Offense Exception in an Age of Modern Political Violence' [1983] 9(2) *Yale Journal of World Public Order* 322-332.

that it is rendered futile. Consequently, much like with pure political offences, invoking the political offence exemption on the basis that one has committed a relative political offence and therefore should be protected from extradition is, in reality, unlikely to succeed.

Lastly, another feature of the lack of clear definition of what does and does not constitute a political offence is that the political character of a crime can be downplayed in the hope of evading the political offence exemption. Suspects can be charged with an ordinary, criminal crime, with no recognition to the political nature or context of the actions. This often happens in scenarios of whistle-blowers, like Edward Snowden, who was charged with theft of government property (alongside charges of espionage).<sup>20</sup> Similarly, in Hong Kong over 10,000 people have been arrested on charges relating to their participation in the 2019 protests. Some of the charges are for offences that one could argue are clearly political, such as rioting and unlawful assembly. Some charges are related security, such as inciting secession, colluding with foreign forces, and conspiracy to subvert state power. Finally, some are what we may consider ordinary criminal charges, including: possession of offensive weapons, assault, arson, criminal damage, disorderly conduct, resisting arrest, obstructing police, flag desecration, wounding, grievous bodily harm, obstructing a public place, breaking and entering, and contempt of court.<sup>21</sup> These crimes are clearly politically motivated, their aim being to foster long-term political change, and occurred within a city-wide political movement. However, without an adequate definition of what constitutes a political offence, there is the possibility that should mainland China seek the extradition of protest participants, the political context within which the crimes occurred would not matter, and thus the political offence exemption could be evaded.

## **Conclusion**

To conclude, this essay has demonstrated that both pure and relative political offences lack sufficient definitions to aid the use of the political offence exemption. Furthermore, in reality, states seek to label political offences as ordinary crimes and shift the narrative away

---

<sup>20</sup> Criminal Complaint, *United States v. Snowden*, No. 1:13 CR 265, (E.D. Va. June 14, 2013), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-074.pdf>.

<sup>21</sup> 'Arrests and trials of Hong Kong protesters' (*Medium*, 18 January 2022) <<https://kongtsunggan.medium.com/arrests-and-trials-of-hong-kong-protesters-2019-9d9a601d4950>> accessed 16 January 2023.

from any possible discussion of the application of the political offence exemption. Therefore, the consequence of the lack of legal definition of political offences is that the political offence exemption fails to protect dissidents from politically motivated extradition requests. For this reason, the political offence exemption has no place in modern extradition law.

Word count: 1961

## **Bibliography**

### **UK Cases**

- *Assange v The Government of the United States* [2021], available at <https://www.judiciary.uk/wp-content/uploads/2021/01/USA-v-Assange-judgment-040121.pdf>.
- *Cheng v Governor of Pentonville Prison* [1973] AC 931 (HL)
- *R v Governor of Belmarsh Prison, ex parte Dunlayici*, *The Times*, 2 August 1996
- *R v Governor of Brixton Prison, ex parte Koczynski* [1955] 1 QB 540
- *R v Governor of Brixton Prison, ex parte Soblen*, [1963] 2 QB 243
- *R v Governor of Pentonville Prison, ex parte Rebott*, [1978] L.S. Gaz. R. 43 (CA)
- *Re Castioni* [1891] 1 QB 149
- *Re Meunier* [1894] 2 QB 415
- *Schtraks v Government of Israel and Others* [1964] AC 556, 591 (HL)

### **Foreign Jurisdiction Cases**

- *Cherk Ching v Superintendent of Lai Chi Kok Reception Centre* [2005] 4 HKLRD. 105, 109G (CFI)
- *Quinn v Robinson*, 783 F.2d 776, 793 (9th Cir. 1986)

### **International Treaties**

- Convention for the Suppression of Unlawful Seizure of Aircraft (adopted on 16 December 1970, effective from 14 October 1971)
- UN General Assembly, *Model Treaty on Extradition* (adopted on the 14 December 1990)

### **Journal Articles**

- Amerasinghe CF, 'The Schtraks Case, Defining Political Offences and Extradition' [1965] 28(1) *Modern Law Review* 27
- Banoff B and Pyle C, 'To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law' [1984] 16(2) *New York University Journal of International Law & Politics* 169
- Garcia-Mora M, 'Treason, Sedition and Espionage as Political Offenses under the Law of Extradition' [1964] 26(1) *University of Pittsburgh Law Review* 65-85
- Kielsingard M and Gee-Kin Ip K, 'Hong Kong's Failure to Extradite Edward Snowden: More Than Just a Technical Defect' [2014] 13(1) *Richmond Journal of Global Law & Business* 49

- Kinneally II JJ, 'The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End' [1987] 2(1) American University Journal of International Law and Policy 206-207
- Thompson D, 'The Evolution of the Political Offense Exception in an Age of Modern Political Violence' [1983] 9(2) Yale Journal of World Public Order 322-332

#### **Online Sources**

- -- 'Arrests and trials of Hong Kong protesters' (*Medium*, 18 January 2022) <<https://kongtsunggan.medium.com/arrests-and-trials-of-hong-kong-protesters-2019-9d9a601d4950>> accessed 16 January 2023
- Criminal Complaint, United States v. Snowden, No. 1:13 CR 265, (E.D. Va. June 14, 2013), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-074.pdf>