ANZSIL *Perspective*

Edition 29
June 2022

Table of Contents

EDITORIAL

WELCOME to our 29th edition of ANZSIL Perspective with an excellent perspective by Neil Boister on Trust in Translation: Diplomatic Assurances, the New Zealand Supreme Court, and Extradition to China and a book review from Tamsin Paige On Tyranny and the Global Legal Order by Prof Aoife O'Donoghue

This year we have seen the Russian invasion and aggression on Ukraine, a violation of international law, including the prohibition on the use of force under Article 2(4) of the United Nations Charter, the principle of territorial integrity and self-determination of peoples.

Personally, I was proud to lead a team making an amicus curiae observation in the Dominic Ongwen appeal at the International Criminal Court on the non-punishment principle alongside 17 other Amici with a range of expertise on issues for consideration in that complex matter.

In May, we saw the death of renowned Palestinian journalist Shireen Abu Aqleh, which has been condemned as a war crime. Shireen Abu Aqleh consistently reported news with independence, integrity and courage and there have been calls for an investigation made by the UN, the US and the EU

As international law scholars and practitioners, curious and vexing questions arise for ANZSIL Perspectives in considering how established frameworks apply to new and ever shocking situations. Our authors enjoy the freedom to provide a detailed analysis of the facts, the background, and the possible legal categorization.

As ever, I look forward to receiving submissions from a diverse range of scholars who have previously contributed to ANZSIL Perspective, and welcome new and emerging authors at every level of postgraduate scholarship and legal practice.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 17 June 2022. The current call for *Perspectives* and submission details and guidelines are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

PERSPECTIVES

Trust in Translation: Diplomatic Assurances, the New Zealand Supreme Court, and Extradition to China

By Neil Boister

In 1606 in the *République*, Jean Bodin argued that it was wrong to render up the guiltless to a sovereign who wished to punish them, but right to render up the guilty. Today guilt alone is insufficient for extradition. The 1989 judgment of the European Court of Human Rights in *Soering v UK* set a precedent which forced the courts in States committed to human rights to enquire into the potential for a human rights breach in a State requesting extradition. The various human rights covenants generate a clear obligation of *non-refoulement* where potential breach of human rights obligations may occur. Subsequent domestic legislation and judicial decisions has, however, eroded that obligation of non-return. In 2012 in *Othman (Abu Qatada) v United Kingdom,* for example, the European Court of Human Rights held that torture-related assurances may be consistent with international obligations even when the requesting State systemically uses torture, provided that 'there are reasonable grounds to believe that the assurances will meet that risk'.

Assurances allow a requested State to build a cocoon of minimum special treatment standards around someone in a system which otherwise breaches human rights on a regular basis. The adequacy of the assurances is essentially what was at issue in June 2021 and April 2022, when the Supreme Court of New Zealand released two landmark extradition decisions, the *Minister of Justice v Kyung Yup Kim* [2021] NZSC 57 (per Glazebrook, Ellen France and Arnold JJ) and the *Minister of Justice v Kim* [2022] NZSC 44 (again per Glaze brook, Ellen France and Arnold JJ). In 2018 the New Zealand Court of Appeal had quashed a decision of then Minister of Justice Amy Adams to surrender a New Zealand resident to China. He was wanted for murder in Shanghai. Rejecting the approach of the Court of Appeal that

a preliminary analysis of the general human rights situation in a requesting country should be made before engaging in testing the impact of assurances, in June 2021, the majority of the Supreme Court adjourned the decision holding (at paragraph 471):

> *We have held that, assuming the matters [on which further assurances are sought] are satisfactorily resolved, there would be no substantial grounds (no real risk) that Mr Kim will be in danger of being subjected to an act of torture if surrendered to the PRC. Nor would there be a real risk of an unfair trial.*

In late 2021 the current New Zealand Minister of Foreign Affairs, Kris Faafoi, confirmed that further assurances had been received and could be relied on. This was challenged in the Supreme Court but to no avail. The Majority held that they were 'satisfied the further assurances provided a reasonable basis on which the Minister of Justice could be satisfied that there was no real risk that Mr Kim would be subject to an act of torture on surrender to the PRC' (para 40) and they were 'satisfied the further assurances provided a reasonable basis on which the Minister could be satisfied that there was no real risk Mr Kim would face an unfair trial on surrender to the PRC' (para 70). Dissenting in both decisions, O'Regan and French JJ held that the inadequacy of the assurances at the outset should have resulted in an upholding of the Court of Appeal's decision and there should have been no adjournment.

The New Zealand Supreme Court's decision sparked a letter from the Inter-parliamentary Alliance on China (IPAC) which drew attention to China's lack of credibility and the inability of states to monitor its assurances. Other human rights organisations commented on the unreality of the decision.

The New Zealand Supreme Court considered the risk of torture to be acceptably low for a variety of reasons. It was content for the Minister to rely on the fact that Kim would be tried and detained in Shanghai, that torture was declining in urban areas in China, that arrangements had been made for NZ consular officials to visit him at least once every two days during the investigation and once a day for the duration of the trial, and because of the strength of the PRC's motivation to honour the assurances because of China and New Zealand's strong mutual interest in extradition and mutual assistance. Against this the respondents had led evidence that torture remained endemic in China and Kim's location in Shanghai would not

mitigate the risk, that Kim was no longer an ordinary prisoner but someone of political interest, and that it would be difficult to detect 'White' torture through for example drug administration. The Supreme Court was unconvinced. The respondents had also led evidence that the human rights situation in China had deteriorated with examples being the situations in Xinjiang and Hong Kong and detention of Canadian and Australian nationals without lawful cause. But the Minister's view was that this did not increase the risk to Kim, because these incidents were limited to the regions concerned and related to China's strained bilateral relations with Canada and Australia, and the Supreme Court accepted that view.

The essence of the New Zealand Supreme Court's decision on fair trial was a willingness to accept China's assurances that the various rights to fair trial including the right to an independent tribunal would be met by construing them in a formal way and not looking at the actual practice of the Chinese courts as urged by Kim's counsel. The most prominent example is regarding the role of a judicial committee in China's judicial system. These committees review results in sensitive trial cases on the basis of a summary report, and in doing so in terms of article 10 of the 2018 Organic Law of the People's Court 'practise[s] democratic centralism'. New Zealand asked China whether the committee was able to consult persons other than members in making its decision and sought the specific assurance that if so 'they will not be consulted in relations to Mr Kim's case'. No answer was supplied, although the Minister was assured that Communist Party and other officials would not attend. Relying on the latter assurance, the Court rejected the defence submission that this left open the possibility of consultation of persons other than members of the judicial committee; the court was content that the 'overall package of assurances provides a reasonable basis on which the Minister of Justice could conclude that the issues were satisfactorily resolved.' This contrasts with the 2019 Swedish Supreme Court decision refusing refused extradition to China on the basis of the lack of judicial independence in China and its subjection to political power, something which China condemned as based on 'pure speculations and "so-called human rights"'.

China has a vested interest in the extradition occurring. An article published in China in 2019 when it was confirmed that extradition proceed, was entitled 'First in History – NZ Possibly Extradite its Resident to China for Trial'. It recorded a Spokesperson for the Chinese Foreign Ministry as saying (translated):

> *China greatly values and promotes human rights. The human rights protection mechanism in its judicial system is obvious. China has successfully extradited over 260 criminal suspects from Europe, Asia, Africa and South America, which shows the full confidence the international society has toward China's judicial system.*

China has also been critical of what it sees as attempts by Western powers to bring New Zealand back in line. An article published after the second *Kim* Judgment entitled '[BBC Argues The Toss When NZ Agrees Extradition of its Resident the First Time]' states that a BBC report on 14 April, which criticised the judgment, was nothing more than a publicity stunt and that the BBC in a worrying precedent had slandered the court's decision citing human rights enthusiasts' comments to go with their lies to defame China.

The difficult question when accommodating requests from a non-traditional extradition partner, is just how far is New Zealand prepared to go in order to make that accommodation possible. It appears that the Supreme Court of New Zealand is prepared to go quite far. In *Kim* the basic tenor of the majority of the New Zealand Supreme Court was to approach China's request in a positive light, construing it as necessary for the assertion of victims' rights and preventing New Zealand becoming a safe haven for criminals. The positive disposition of the judgment is an expression of three basic ideas:

(i) That there is a global public order in which New Zealand must treat China as a legitimate participant;
(ii) That there is a need to reconcile through some judicious patching up of Chinese assurances if necessary, the somewhat incompatible criminal justice systems of New Zealand and China;
(iii) that there are sufficient procedural and substantive human rights guarantees in China to make this possible, if not entirely comfortable.

Taking human rights seriously in transnational criminal law means placing brakes on situations where the logic of that transnational system pushes constantly for greater engagement. Cases like *Othman* provide persuasive precedents in extradition law for individuating risks by ensuring against them rather than assessing the risk to the individual presented by the system as a whole. However,

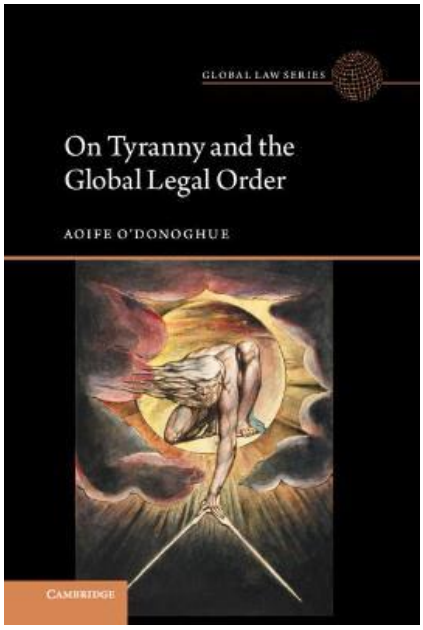
even when highly detailed, assurances provide a poor mechanism for translating the human rights norms of the requested state into the requesting state, particularly when they are used to try to change the essence of the system itself. China, for example, could not assure New Zealand about the absence of political consultation after the trial, in a system in which the Chinese Communist Party is supreme. The New Zealand Court of Appeal considered evidence of pervasive political influence on China's criminal justice system as stymieing extradition between New Zealand and China. The Supreme Court should have done the same. A threshold test of this kind would be a useful test to employ in other cases where systemic problems of the rule of law and human rights are identified.

Neil Boister is Professor in Law at the University of Canterbury, New Zealand, and the author of *Extradition Law in New Zealand* (Thomson Reuters 2020). His research is mainly in transnational criminal law, and his publications in this area include *An Introduction to Transnational Criminal Law* (Second edition, OUP, 2018) and (with Professor Robert Currie of Dalhousie University) the *Routledge Handbook of Transnational Criminal Law* (Routledge, 2014). In 2014, he was awarded the Friedrich Wilhelm Bessel Prize from the Alexander von Humboldt Foundation in Germany for his work on transnational criminal. In 2021 together with Florian Jessberger and Sabine Gless he edited *Histories of Transnational Criminal Law* published by OUP.

BOOK REVIEW

On Tyranny and the Global Legal Order by Prof Aoife O'Donoghue

Review by Tamsin Phillipa Paige



While the question of tyranny and how the law creates and supports tyranny in society arises frequently in research, including my own, until this delightful new book there has been no comprehensive treatment of the concept. In *On Tyranny in the Global Legal Order*, O'Donoghue engages with the deep historical review of the philosophical thought on what constitutes tyranny before engaging in an exploration of what that means in our contemporary context. This is both important and valuable because, as O'Donoghue notes, the concept of tyranny shortly after World War II became somewhat banished from political thought in favour of related, but less adaptable, ways of expressing governmental oppression in society. O'Donoghue's writing is cogent and engaging, and I would heartily recommend the book to anyone with an interest in either the historical philosophical origins of thought on tyranny or in global political interplay.

The book itself is divided into five chapters, with chapters one and three doing a lot of heavy lifting on ensuring that the reader is across the wide-ranging historical literature that anchors the work in the other chapters. When I say wide-ranging, I'm not being hyperbolic – O'Donoghue covers the key thought on the concept of tyranny from Ancient Greece in a continuous thread to contemporary theory. It is this meticulous but accessibly explained exploration of philosophical thought about how we understand the nuance of tyranny that sets up what I think is the most significant and valuable contribution of this book: a taxonomy of tyranny. The value of the taxonomy of tyranny, as O'Donoghue notes on page 83, is that, unlike the definition, a taxonomy is flexible and adaptable allowing it to be kept current as society and culture develops rather than being mired in a no longer relevant past conception. The other value of the taxonomy is that it allows for a diagnosis of society caught in tyranny based upon an accumulation of events rather than that diagnosis being held back by the need for absolute precise conformity to a

definition. The insight provided in this chapter alone is staggeringly erudite and one that I have no doubt I will be returning to frequently when considering questions of oppression through law in society.

While I enjoyed and thoroughly recommend O'Donoghue's book there were elements that frustrated me. In chapter four where O'Donoghue looks at the question of scale and empire in tyranny, the first half of the chapter was somewhat opaque. O'Donoghue's discussion of the operation of scale theory in relation to tyranny relied more than I was comfortable on at least a passing knowledge of how scale theory functions. The theory itself, explained in the first half of the chapter, became clearer as I read the case study analysis of the UN Security Council in the latter half of the chapter, but I feel like more could have been done to make the theory set up more accessible before the case study. In relation to the case study itself, as someone who has done a lot of work on the Security Council I found that a number of scholars – established and emerging – who I would expect to see on any significant discussion of the Security Council were absent from the footnotes. Instead, O'Donoghue has relied upon theorists who, like her, have relied upon the Security Council to demonstrate the working of their theory. This isn't an inherently a problem, and I agree with her analysis on the Security Council – especially the conclusion that the Security Council operates in a rule by law and thus tyrannical framework – but to my mind the analysis would have been stronger by turning to subject matter experts instead of relying upon theorists.

The other area I would have liked to have seen more exploration of is a point that O'Donoghue notes but mostly allows to fall by the wayside. Namely the way in which Cis/het misogyny and queerphobia underpins so much of the history of tyranny. O'Donoghue notes that masculine modes of power are presumed by theorists discussing tyranny, and that femme presenting people are treated as inherently suspicious based upon masculine assumptions that if the feminine were to be given the power masculine subjects wield that it would be used in the same way that they wield it. This is then combined with the tendency to frame those accused of tyranny as queer in an effort to undermine their regime and position. While O'Donoghue picks up later on feminist responses to tyranny briefly, this overarching thread of misogyny and queerphobia mostly falls by the wayside but to my mind is ripe for a queer theory analysis and investigation that could have taken place but didn't.

Overall, O'Donoghue makes a compelling argument that tyranny as a concept is one that needs to be returned to our lexicon when discussing international law and its interplay with global politics. The basis of this argument is that tyranny as a concept is broader and more adaptable than the concepts we tend towards today such as totalitarianism, fascism, and authoritarianism for example. O'Donoghue's argument that we can do this through the use of a taxonomy of traits that mark tyranny in society is insightful and cogent. I would recommend reading this book to anyone who has an interest in the interplay between power, law, and legitimacy.

Tamsin Phillipa Paige is a Senior Lecturer with Deakin Law School and periodically consults for the UN Office on Drugs and Crime in relation to Maritime Crime. Her work is interdisciplinary in nature, using qualitative sociological methods to analyse international law. She also does law and literature research using popular fiction to understand social perceptions of the law. Tamsin's work has examined (among other things) Somali piracy, UN Security Council decision making, and conflict based sexual violence. In a former life, she was a French trained, fine dining pâtissier.