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Extradition between Kuwait and the UK: New dispositions, old doubts

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ABSTRACT

The Extradition Treaty between Kuwait and the UK, signed in 2016, presages a new stage of cooperation in criminal justice matters. The Treaty and the related arrangements are designed to facilitate the surrender of fugitives. However, a number of factors, not least the statutory bars to extradition in UK legislation and broader apprehensions about extradition, cast doubt on the effective implementation of the Treaty, particularly for extradition requests from Kuwait. There is contestation between the 'law enforcement expert community' which favours ever more 'efficient' extradition and proponents of a 'popular view', such as politicians and the media, who are suspicious that more accessible extradition threatens the interests of British citizens. In this way, the new dispositions with Kuwait must contend with older doubts about extradition which are being played out with other bilateral partners, such as the US and the European Union.

1. Introduction

Extradition is acknowledged as a key international instrument of cooperation across countries for the suppression of crime (Efrat, 2018). The first formal Extradition Treaty between the United Kingdom and Kuwait ('the Treaty') was signed on 15 December 2016 (Extradition Treaty, 2018, as explained by the Home Office, Explanatory Memorandum, 2018), followed by UK Parliamentary consideration in 2018 (Parliamentary Process, Extradition Treaty, 2018). According to Article 1 of the Treaty, Kuwait and the UK agree 'to extradite to each other, pursuant to the provisions of this Treaty, any person who is wanted for trial or punishment in the requesting state for an extraditable offence.' The Treaty also stipulates other relevant provisions, including the extraditable offences, the several grounds to refuse an extradition request and the attendant procedures.

This paper will explore three issues which arise from these new dispositions between the two countries. This first is the background to this Treaty in order to explain why it was devised almost sixty years after the independence of Kuwait from the United Kingdom. That considerable delay gives rise to questions about issues and pressures that spurred its advent. The second objective is to analyse the machinery set out within the Treaty in order to assess whether the package as a whole is fit for the purposes, as stated in Article 1 of the Treaty, relating to the extradition between Kuwait and the UK of 'any person who is wanted for trial or punishment in the Requesting State for an extraditable offence'. The third issue will focus on the implementation of the Treaty in order to provide a critical assessment of its potential success and whether attendant doubts about the extent of trust to be placed in the criminal justice processes of allied states can be overcome. Some conclusions will follow. In particular, it will be suggested that wider misgivings about

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extradition which are harboured by some British lawyers and politicians will feed into reservations about these arrangements with Kuwait. In this way, the smooth commencement and fruitful implementation of the Treaty are not to be expected.

2. Background

The Treaty represents the latest manifestation of the ever-developing relationships between Kuwait and the UK which have endured over more than two centuries. Historically, the Anglo-Kuwaiti relationship has been primarily characterised by the UK acting as the colonial power from the issuance of a Protection Treaty in 1899 until 1961 (Lauterpacht et al., 1991; Tétreault, 2000; Muir, 2006; Al-Yousifi, 2013; Joyce, 2013), when independence was arranged without apparent rancour (House of Commons Debates, 1961; Exchange of Notes regarding Relations between the United Kingdom of Great Britain and Northern Ireland and the State of Kuwait, 1961; Kuwait (Repealing) Order, 1961).

Extradition and other forms of international cooperation to deal with crime are generally expanding in the world because of the growth of transnational crime and globalisation in trade, travel and migration (Efrat, 2018). As between Kuwait and the UK, the strengthening of links is encouraged by the inter-governmental UK-Kuwait Joint Steering Group which was established in 2012 (Foreign and Commonwealth Office, 2012). At the level of trade, Kuwait is one of the UK's important trading partners in the GCC Region (UK Department for International Trade, 2015). In particular, Kuwait is one of the biggest investors in the UK, with approximately £100 billion of public funds invested in UK markets, while trade doubled between 2013 and 2015 to £4 billion (Institute of Export and International Trade, 2018). The UK imports petrochemicals from Kuwait (Office for National Statistics, 2016) and seeks to export expert services, such as consultancy and financial services and luxury goods (UK Department for International Trade, 2015). As for security relationships (Ulrichsen, 2009, 49), the enduring ties were demonstrated by UK interventions in the two Gulf Wars (Cordesman, 2018) as well as other shared interests. For example, counter-terrorism has become a more recent site for cooperation. In 2010, Kuwait signed a partnership agreement with the UK to share expertise on international security, counter terrorism and other issues, including human trafficking and cyber-crime (Home Office, 2010; Murray, 2013). Overall, the Treaty on extradition can be seen as a small part of the UK's strategic plan to revive its presence 'East of the Suez', including in the Gulf, partly in reaction to Brexit (UK Government, 2015, para 5.57). The policy has been reinforced by the reopening of a British naval base, HMS Jufair, in neighbouring Bahrain (Royal Navy, 2017).

Arising from these issues, the advancement of trade is the more pertinent to extradition. Underlying the relevance of trade is the globalisation of markets and the need to internationalise criminal justice cooperation so as to hold traders accountable for unacceptable or unlawful practices across different jurisdictions (Gilbert and Russell, 2002). One accentuated risk within Kuwait-UK trade is corruption. In Kuwait, the problem of corruption is mainly related to the public sector where its predominantly oil-based economy encourages 'grand' corrupt practices by high-level public officials (Al-Rashidi, 2020). In this context, Western companies could play an important role in instigating corruption in Kuwait and elsewhere since they are major consumers and suppliers, are vying for the awarding of major contracts, and are in competition with one another (Ross, 2012). Meanwhile, both sides have a strong interest in prosecuting those who transgress, whether British companies or Kuwaiti officials. For example, the Consolidated Contractors Company, one of the largest construction companies in the Middle East, headquartered in Greece but with branches in Kuwait and the UK, bribed public officials in Oman to secure oil-related contracts (Gulf News, 2014). The Unaoil corporation also bribed officials in the Iraq to secure oil and gas contracts, resulting in the conviction in English courts of some connected British businessmen (Serious Fraud Office, 2020, Serious Fraud Office, 2021). In Kuwait, Unaoil (Ambrose, 2017), FMC Technologies (also in the petrochemicals sector: Cassin, 2016; NEOnline IR, 2016) and Halliburton (a US defence company: Phinney, 2004) faced similar allegations. Grand corruption cases also can occur in other profitable areas of the public sector. A recent Serious Fraud Office ('SFO') investigation found that, to increase their sales, Airbus staff had bribed foreign officials to secure the purchase of aircraft. The Kuwait aspect was investigated by the French Parquet National Financier (*Director of the Serious Fraud Office v Airbus SE*, 2020; para.35). This transnational cooperation against corruption is an important and recurrent theme. As a further illustration, in the Unaoil case again, the SFO thanked the Australian Federal Police, the French Parquet National Financier, the Police Judiciaires of the Principality of Monaco, the Fiscal Information and Investigation Service of the Netherlands, and the United States Department of Justice (Serious Fraud Office, 2021), for the investigation was only possible with the help of these external agencies.

The policy of the UK government towards foreign corruption is clear and reflects growing international law condemnation through statements, such as the United Nations Convention against Transnational Organized Crime (UNTOC) 2000, the United Nations Convention against Corruption 2003 (UNCAC, 2003), and the (Arab Anti-Corruption Convention, 2010). These demands for fair competition in global markets and the fear of 'dirty money' polluting home markets prompted the enactment of the Bribery Act 2010 by which British citizens are prohibited from bribing foreign officials to secure a contract (Law Commission, 2008; Alldridge, 2012). The SFO's investigations against major traders, such as Airbus (*Director of the Serious Fraud Office v Airbus SE*, 2020) and Rolls Royce (*Serious Fraud Office v Rolls-Royce Plc*, 2017), reflect the UK's official determination to respond to international corruption. Yet, large Kuwaiti investments in the UK suggest that the UK will remain a favoured destination for Kuwaiti funds, whether legitimate or not. Indeed, several alleged abuses have been detected within the UK. In 2017, one Kuwaiti fugitive, Fahad Al-Raja'an, the former head of Public Institution for Social Security, was arrested in London on the request of the Kuwaiti Government and Interpol after being convicted in Kuwait of corruption crimes which may involve the misappropriation of public funds of up to US$390m (Hagagy and Holden, 2017). In the absence of any treaty at that time (Barkham, 2020), a gap still applicable to over 60 states, including Bahrain, Qatar and Saudi Arabia but not the United Arab Emirates (Home Office, 2021), the Secretary of State must decide whether to enter into 'special extradition arrangements' under section 194 of the Extradition Act 2003. If the Secretary of State agrees to enter into a special extradition arrangement, then the UK and the requesting country must reach a Memorandum of Understanding to deal with the specific extradition request. The country can then be treated as a 'category 2 territory' within the 2003 Act as if a treaty existed and will need to

meet the *prima facie* requirement, which is, as section 84(1) of the UK Extradition Act 2003 stipulates, 'whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him'. The country also needs to overcome any bars to extradition. Extradition in the Al-Raja'an case is pending, and is supplemented by asset freezing proceedings (*A and A v DPP*, 2016; *Public Institution for Social Security v Al Rajaan*, 2019; 2020; *Public Institution for Social Security v Amouzegar*, 2020), which is one reason why a firmer treaty basis, under which extradition is obligatory (Article 1 of the Treaty), is attractive.

The possibility of extradition from the UK to Kuwait has been welcomed in Kuwait. The Kuwaiti Minister of Justice, Falah Al-Azab, emphasised that 'The agreement is imperative, since it supports efforts to bring convicts and fugitives to justice, which in turn will help ameliorate Kuwait's ties with the UK' (Kuwait News Agency, 2017). The Kuwaiti National Assembly's Speaker, Marzouq Ali Al-Ghanim, also expressed the hope that 'Kuwaitis will no longer see embezzlers of public funds roaming the streets of London and Britain' (Kuwait News Agency, 2016). In this way, the Treaty increases the possibility of extradition and reduces the potential stalemate in cases such as Al-Raja'an. Given this background, the corruption mischief behind the new Treaty is evident, and extradition has emerged as one important tangible response to this darker side of globalisation (UNODC, 2012).

The importance of this type of treaty is also generally evident in relation to combating crime in the time of globalisation. Extradition of a subject to the jurisdiction where criminal process is most appropriate basically serves as an aid to the suppression of crime in the contemporary environment where, as stated by Lord Griffiths, 'crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality' (*Liangsiriprasert v United States Government*, 1990, 878). At the same time, the suppression of crime has to take into account other justice considerations, such as respecting the rights of the accused. Entering into an *ad hoc* extradition treaty is an effective means to deal with these concerns and to regularise international crime control (Andreas and Nadelmann, 2006). A more elaborate statement of the various competing purposes in UK law (and elsewhere) may be summarised as follows:

> Extradition is based on the principle that it is in the interest of all civilised communities that offenders should not be allowed to escape justice by crossing national borders and that States should facilitate the punishment of criminal conduct. It is a form of international cooperation in criminal matters, based on comity (rather than any overarching obligation under international law), intended to promote justice. …. It is also recognised that the law should contain appropriate safeguards for individuals where they would in the event of extradition suffer manifest injustice or oppression. Achieving a balance between these competing considerations is by no means an easy task … (Baker et al., 2011, paras 2.3 and 2.5).

Responding to these worthy objectives nevertheless risks disapproval when applied to Kuwait or otherwise. Thus, the 'law enforcement expert community', which favours ever more technically 'efficient' extradition arrangements to counter the problems of globalisation, is opposed by a more 'populist' faction which views with suspicion and distaste ever more accessible extradition arrangements which threaten the interests of residents (Efrat, 2018). These contrasting pressures are played out in the differing contexts of extradition arrangements with allies who can broadly be trusted (because they share UK values) and more authoritarian regimes which are less trusted international partners. However, in the circumstances of globalisation, not even the less trusted can be ignored, so this paper will consider the more challenging case of extradition arrangements with Kuwait as one of many jurisdictions which can be considered as a desirable ally but as an uncertain kindred spirit.

3. New machinery

3.1. Treaty provisions

The Treaty contains 19 articles, beginning with the extradition obligation (Article 1) and covering: the extraditable offences (Article 2), including 'offences committed before or after the date on which it enters into force' (Article 18); the grounds for refusal (Article 3); and possibilities of prosecution instead of extradition (Article 4). The extradition procedure and required documentation are specified under Article 5; provisional arrest can be made if the case is urgent (Article 7); the decision shall be notified 'promptly' and surrender should follow within 28 days of the conclusion of proceedings (Article 8). Speciality rules must also be observed by the Requesting Party (Article 11). These rules are a common feature of extradition law whereby a person extradited cannot be prosecuted or punished except for specified offences in the extradition request and not for any others (Baker et al., 2011, para.3.28). In the event of the consent of the person sought for surrender, Article 12 allows the Requested party to surrender the person 'as expeditiously as possible' without meeting the Treaty requirements. Some of the foregoing terms will now be explained in greater detail, bearing in mind the context of 'grand' corruption which may underlie future requests.

Article 2 of the Treaty specifies extraditable offences. They comprise under Article 2(1):

a) the conduct on which the offence is based is punishable under the laws of both Contracting Parties by a maximum sentence of at least 12 months imprisonment or another form of detention, or by a greater punishment; or
b) where the person whose extradition has been requested has been convicted by a competent court of the Requesting Party, a sentence of imprisonment or another form of detention of a term of 4 months or more has been imposed and the conduct is punishable under the laws of the Requested Party by a maximum sentence of at least 12 months' imprisonment or another form of detention, or by a greater punishment.

Potential differences in the terminology and categorisations of these offences between Kuwait and the UK are not to bar extradition (Article 2(2)). The array of bribery and corruption offences in Kuwait is very extensive (Al-Rashidi, 2021, chapter 4), though some only

apply to public officials. For example, imprisonment terms vary from maximum of 3 years in the case of causing unintentional damage to public funds (Article 14 of the Protection of Public Funds Act 1/1993) and a minimum of 5 years for an embezzlement offence (Article 9 of the Protection of Public Funds Act 1/1993) to a maximum of 10 years for a bribery offence (Article 35 of Criminal Law Act 31/1970). As a result of these variations, care will have to be taken by Kuwaiti prosecutors in their choice of offences to remain within Article 2 with respect to both the nature of the offence and the penalty range.

Article 3 of the Treaty addresses ten situations in which extradition requests may be refused, many of which are commonly specified in contemporary extradition treaties. The grounds include: where the Requested Party has serious grounds for believing that the extradition request has been made for the purpose of prosecuting or punishing a person on account of race, religion, nationality, sex or status, or political opinions; where extradition would otherwise breach the human rights of the person sought; where the offence has already been the subject of trial process for the same offence in either Contracted Party or in a third state; where the offence is barred by lapse of time or prescription; where the offence is a military offence; where the subject has been convicted *in absentia* unless a new trial is an entitlement or the person failed to appear without justification; where the person could be, or has been, sentenced to death; and for any other reason under the domestic law of the Requested Party. Article 3 also makes clear that investigations, proceedings and sentences in the Requested Party can take priority and that these prior proceedings can make later extradition unjust or incompatible with humanitarian considerations.

Of prime relevance to high profile public figures from Kuwait will be allegations that political factors lurk behind extradition. Kuwait also retains the death penalty. Section 57 of Kuwaiti Criminal Law Act 16/1960 mentions capital punishment as one of the 'original' criminal penalties in the Kuwaiti law. Capital offences under Kuwait law include homicide (section 149 of the Criminal Law Act 16/1960) and certain forms of terrorism (sections 170-171) and of rape (sections 186-187), but bribery and corruption offences are not listed (Capital Punishment UK, 2017; Cornell Center on the Death Penalty Worldwide, 2021). In the case of Fahad Al-Raja'an, assurances of a retrial were allegedly specified in the Memorandum of Understanding for the special extradition arrangements (Arab Times, 2019). The assurance of retrial was to ensure that Al-Raja'an would be able to represent himself in person during the trial, given that his previous trial in Kuwait was held *in absentia* based on Articles 121–122 of the Kuwaiti Criminal Justice Act 17/1960 that apply whenever the defendant has fled (see also *Case No 1499/2008*, 27/6/2019, Criminal Division 10). A distinct system of appeal for defendants whose trial was held *in absentia* is provided by Articles 187–198 of the Kuwaiti Criminal Justice Act 17/1960 which enable defendants to ask for retrial; after that, they are able to appeal the second verdict.

Extradition requests affecting the nationals of the requested state receive special treatment and can be refused on grounds of nationality under Article 4. In that eventuality, the requested state undertakes, upon request and according to its domestic laws, to prosecute a national person 'as if he or she had committed an offence which is defined by both Parties as a criminal offence' (Article 4 (2)). This obstacle is more an issue for Kuwait than the UK. Under law (Article 28 of Kuwaiti Constitution 1962: 'No Kuwaiti may be deported from Kuwait or prevented from returning to it') and in practice (Implementation Review Group, 2012, 11), Kuwait bars the extradition of its own citizens. The feasibility of prosecution in the 'home' jurisdiction, especially where the offence can have an extra-territorial impact, is uncertain since no attempt has been made to harmonise the respective criminal codes, unlike, say, the harmonisation of terrorism offences between the UK and Ireland under the (UK) Criminal Jurisdiction Act 1975 and the (Irish) Criminal Law (Jurisdiction) Act 1976 (Hogan and Walker, 1989, chap.15). The harmonisation of criminal laws between Kuwait and the UK could mitigate the effects of the Kuwaiti's extradition bar based on nationality. Harmonising concepts and legal provisions of criminal offences, at least serious ones, in both Kuwait and UK criminal codes would help to secure the home trial of Kuwaiti citizens who commit crime in the UK or against its interests. However, rather than embark upon a challenging harmonisation initiative, some resolution is already at hand since, according to Article 12 of the Kuwaiti Criminal Law Act 16/1960, the Kuwaiti criminal law enjoys extra-territorial jurisdiction by which it extends its authority beyond Kuwaiti border and maintains its jurisdiction over Kuwaiti citizens who commit crime abroad.

Under Article 5, requests are made through diplomatic channels, which involve an initial decision by a Minister rather than a court. They will be accompanied by such level of evidence as would justify committal for trial under the laws of the Requested Party. As for 'speciality' rules, Article 11 of the Treaty does not allow for the detention, trial and punishment of the person 'for any offence committed before extradition' save for any offence in respect of which the person has been extradited or any extradited offence disclosed by the documentation (unless a capital offence: Article 11(1)). Article 11(2) also does not permit the 'onward extradition' to a third state 'for any offence committed prior to extradition to the Requesting Party unless the Requested Party consents'.

In some ways, the Treaty is unremarkable in content. Many of its features can be found in other extradition treaties. Therefore, more noticeable are the underlying facts that the developing relations between Kuwait and the UK gave rise to the impetus for seeking more elaborate extradition arrangements and that it was possible to agree upon a suitable design of the Treaty's content and terms. At the same time, that design contains many qualifications (such as the 10 clauses in Article 3) and reflects some stark differences in the respective criminal processes and standards as well as an underlying tepid degree of mutual recognition and mutual trust which has been a recurrent feature at least of UK attitudes to extradition as will be explained later in relation to its US and EU extradition arrangements. Not least in the light of these differences, the resulting arrangements are important as they represent the collection of compromises which arise when 'Global Britain' (UK Government, 2021) engages, primarily for trade and security reasons, not just with comfortable and compatible neighbours in the common law world or in Western Europe but with countries which cause concern in terms of democracy and human rights within their criminal justice systems. Rather than giving up on extradition treaties with states operating criminal justice systems, which are viewed as alien and incorporate features such as the death penalty, the variant of treaty secured with Kuwait is still viewed as a worthwhile prize and might be replicated more often than the more elaborate arrangements with closer allies.

3.2. UK law

For the UK, the Treaty operates under the Extradition Act 2003, as amended after several reviews (Baker et al., 2011; Secretary of State for the Home Department, 2012; House of Lords Select Committee on Extradition Law, 2015; Secretary of State for the Home Department, 2015). The Act distinguishes between two categories of states and subjects, and each category is subject to a different extradition scheme. Part 1 of the Act is applied mainly to EU member states acting under the European Arrest Warrant (or corresponding arrangements after Brexit, described later); these are called category 1 territories, as listed under the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003. Part 2 deals with the other states with which formal treaty arrangements have been entered (category 2 territories, as listed under the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003). As explained above, a residual group of states is covered by neither of these two standing arrangements and so must be dealt with by special *ad hoc* agreements, each set out in a Memorandum of Understanding.

Before the Treaty, Kuwait was not designated as a category 1 or 2 territory and so would require special extradition arrangements (House of Lords Debates, 2018). However, after ratifying the Treaty in 2020, Kuwait has been designated as a category 2 territory under the Extradition Act 2003 (Amendments to Designations) Order 2020. For category 2 territories, the Home Secretary has authority under sections 70(1) and 70(9) of the Extradition Act 2003 to certify each individual request for extradition and send it to a domestic court to handle the appropriate procedure, such as warrant to arrest and extradition hearing in case the subject raises objections. Therefore, this form of extradition is still not 'automatic' in the UK but requires specific judicial and diplomatic approvals. However, consideration of an extradition request is no longer optional under category 2. Furthermore, the Extradition Act 2003, section 74(11)(b), allows for the extension of the period that follows the provisional arrest within which the judge must receive some documents, such as the formal extradition request and the Secretary of State's certificate that are required by section 70(9) of the Extradition Act.

Despite the arrangement of a treaty and designation as a category 2 territory, extradition of individuals to Kuwait is not necessarily assured. As noted earlier in this paper, it remains necessary to strike a balance between the competing considerations in relation to extradition, namely, promoting justice and averting individual injustice or oppression (Baker et al., 2011, paras 2.3 and 2.5). That calculation may prove especially fraught because of the following potential challenges.

First, at the beginning of extradition, the Secretary of State may refuse to certify an extradition request if the requested person is recorded under section 70(2)(b) as a refugee or, under section 70(2)(c), asylum has been refused but removal is blocked by the European Convention on Human Rights, Article 2 (right to life) or 3 (right against torture, inhuman or degrading treatment or punishment). This avenue for challenge encourages Kuwaiti fugitives to submit an asylum application. The UK Foreign and Commonwealth Office does not categorise Kuwait as a 'High Priority Country' with major human rights deficiencies (Foreign and Commonwealth Office, 2019). However, the US Department of State finds faults with aspects of its trial processes including limited disclosure of evidence and the ability to confront witnesses, denial of access to lawyers, as well as charges being brought because of expressed political views (US Department of State, 2019, 6–9). Therefore, these human right concerns might form grounds for the refusal of the Secretary of State to certify extradition requests coming from Kuwait.

Second, more commonplace bars to extradition, as stipulated in the Extradition Act 2003 and reflected in the Treaty, include: double jeopardy (section 80); extraneous considerations, as when extradition requests are in reality made for the purpose of persecuting the person on account of race, religion, nationality, gender, sexual orientation or political opinions (section 81); the passage of time (section 82); hostage-taking considerations (section 83); forum (section 83A); and incompatibility with the Human Rights Act 1998 (section 87). The issue of forum has been especially controversial and refers to the most convenient or appropriate place for a legal proceeding to be heard and determined (Baker et al., 2011, Part 6). Disputes over forum have affected several extradition requests to the UK from the US where the commission of crime involves activities or impacts across more than one jurisdiction (*Sarao v United States*, 2016; *Love v United States*, 2018; *Scott v United States*, 2018; *Wyatt v United States*, 2019). Similar concerns may be relevant where corruption in Kuwait arises through the actions of a British company. The Bribery Act 2010 imposes a very wide territorial scope, and, under section 12, some UK law offences can be committed anywhere in the world by companies or individuals with a footprint, such as incorporation, citizenship or ordinary residence in the United Kingdom. Foreign officials found within the British jurisdiction might be considered accomplices in such cases, and then the issue of forum would arise provided a substantial measure of the impugned activity was performed in the United Kingdom. The forum as a bar is being taken seriously in the UK courts (Efrat, 2018; Lloyd et al., 2019; Arnell and Davies, 2020). In *Love v United States* (2018), all of the offending activity against US military and government computers occurred from the UK, so the forum bar could be successfully raised, entwined around arguments about oppression by reason of Love's physical and mental condition which amounted to a further ground for sustained objection. In *Government of the United States of America v McDaid* (2020), it was decided that extradition of the requested person was not in the interest of justice based on the fact that McDaid's connection to the UK was a 'weighty factor' against extradition.

Third, the requirement of proof of a *prima facie* case, stated in section 84 of the Extradition Act, may further impede extradition from the UK to Kuwait. The problem here is that Kuwait generally operates an inquisitorial criminal justice system (Al-Samak and Nasserallah, 2007; Al-Newibt, 2008) under the Criminal Procedures Act 17/1960, and so some of the concepts of criminal justice in the common law tradition may be unfamiliar, such as equality of active participation in proceedings (US Department of State, 2019, 6–9). This unfamiliarity could be a result of differences between the two systems in terms of their emphasis either on due process or crime control models of procedural law (Reichel, 2013, 129). Furthermore, unlike inquisitorial systems in Western Europe, there are no shared detailed standards and jurisprudence based on the European Convention on Human Rights 1950 which can bolster mutual trust as shown by *Soering v UK*, 1989, just as they apply in the UK (under the Extradition Act 2003, sections 21 and 87). The task for Kuwaiti officials could be eased by section 84(2) of the Extradition Act 2003 which gives the judge a very wide discretion to admit hearsay evidence. For example, the judge can take into account a summary of witness statements provided in a statement by a prosecutor or

police officer. Although this makes extradition easier, it does little to offset the procedural differences between the two countries. A further way of easing the task would be to designate Kuwait under section 84(7) whereupon the judge does not need to consider the *prima facie* case requirement at all. However, this favoured status, which applies to member states of the Council of Europe Convention on Extradition 1957, plus Australia Canada, Hong Kong, New Zealand, the USA and a number of other territories (as listed in the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, Article 3, as amended), has not been accorded to Kuwait, perhaps unsurprisingly as it is not a Commonwealth country with a shared heritage of common law and constitutionalism. The concession is in any event under some strain because of the persistent perception that it favours the USA (House of Commons Debates, 2020), even though expert reviews have concluded that the tests applied on each side are functionally similar (Baker et al., 2011, Part 6; Secretary of State for the Home Department, 2015, chap.4).

Fourth, even if extradition applications successfully pass judicial scrutiny, the Secretary of State still has a role to play. Of potential relevance, section 208 of the UK Extradition Act 2003 affords the Secretary of State discretion to halt the process if extradition is believed to be against the interests of national security (Baker et al., 2011, para 3.90). There are two possibilities arising from this provision. The first is that the person was acting for the purpose of assisting in the exercise of a UK statutory power by engaging in the conduct amounting to, or alleged to amount to, the extradition offence. For instance, the disclosure of foreign information supplied in confidence for the purpose of conducting UK inquiries or enforcing UK regulations might qualify. The second is that the person can be excused as a result of an authorisation given by the Secretary of State. For instance, directions might be given under the Security Service Act 1989 to allow the breach of foreign law, such as when UK secret agents assume false identities abroad.

Fifth, when the judge confirms the extradition request, the Secretary of State may still consider the discharge of the requested person based on: whether the requested person is, or can be, sentenced to death (section 94, subject to diplomatic assurances: Anderson and Walker, 2017); speciality (section 95); earlier extradition to the UK from another territory (section 96); and earlier transfer to the UK by the International Criminal Court of a person convicted in that Court of the offence for which extradition for prosecution is requested by a category 2 country and the consent of the Presidency of the Court is not given (section 96A). As already noted, most of these points are addressed by the Treaty, save for the position of a transfer by the International Criminal Court which may not be categorised a 'third state' under Article 3. The International Criminal Court Act 2001, schedule 1 paragraph 1, envisages the Court as having the capacities of a body corporate. However, as sustained in the *Government of the United States of America v Assange* (2021), despite what the Treaty may or may not specify, the Extradition Act 2003 will prevail.

3.3. Kuwaiti law

In Kuwait, extradition is not regulated by a comprehensive national legal instrument but 'is mainly governed by bilateral agreements' and other multilateral conventions (Implementation Review Group, 2012, 9). Based on the monist approach to international law in Kuwait, Article 70 of the Kuwait Constitution (1962) provides for treaties to have the force of law once ratified, sanctioned and published. As a result, only a few extra general domestic legal measures are necessary to facilitate extradition.

First, several rules derive from the Kuwait Constitution itself. As already mentioned, Article 28 prohibits the deportation of Kuwaiti nationals. Given the constitutional status of the rule, the absence of implementing legislation, and the allowance in Article 3(1)(h) of the Treaty that extradition can be barred 'for any other reason under the domestic law of the Requested Party', it seems that nationality will act as a bar in that direction at least. In addition, Article 46 of the Kuwaiti Constitution stipulates that 'Extradition of political refugees is prohibited'. As a concept, the meaning of 'political refugees' could raise uncertainty in Kuwait. Save in the aforementioned statement in the Kuwait Constitution (1962), the Kuwaiti law does not contain specific definitions or arrangements, leaving full discretion to the executive authorities when determining who can be considered a political refugee (Nasserallah, 1982; Al-Ajmi, 2014). Next, the Kuwaiti Public Prosecution ('KwPP') is mandated by Article 167 of the Kuwait Constitution and Part 4 of the Judiciary Act 1990 (sections 53-60) with all functions related to public prosecution and the application of, and watch over, criminal laws, including extradition (Kuwait Public Prosecution, 2015). Within the KwPP, the Criminal Execution and International Cooperation Department was established in 2009 to deal with extradition requests as well as other matters relating to international cooperation (Attorney General Resolution No 8/2009). In 2020, the International Cooperation Department became a distinct Department that deals with international cooperation in criminal matters. Furthermore, Kuwait has been a member of INTERPOL since 1965, and acts through its National Central Bureau (Kuwait NCB) as 'the main law enforcement platform for international investigations involving Kuwait or Kuwaiti citizens' including law enforcement actions related to extradition (INTERPOL, 2020).

Compared to the UK, extradition is rare, and there are no judicial decisions on extradition because, first, the Kuwaiti law does not require extradition hearings before surrendering the requested person, and second, extradition lies within the jurisdiction of the KwPP and not the courts. In 2015, the KwPP issued the *Guidance on International Cooperation in Criminal Matters* (Kuwait Public Prosecution, 2015) which explains the procedures and requirements relating to extradition requests and related issues. In general, Kuwait's policy on extradition depends on the terms of its ratified bilateral agreements or multilateral conventions, subject to the principle of reciprocity (Kuwait Public Prosecution, 2015, 10). 'Reciprocity' is a principle of international law, meaning 'the mutual concession of advantages or privileges for purposes of commercial or diplomatic relations' (Garner, 2004, 3981). Under the principle of reciprocity, Kuwait has ratified a number of bilateral agreements, such as with Algeria (Ratification, 2013c) and India (Ratification, 2007), and multilateral conventions, including the UNCAC 2003 (Ratification, 2006a), the UNTOC 2000 (Ratification, 2006b), the Arab Anti-Corruption Convention 2010 (Ratification, 2013a), and the Arab Convention against Transnational Organised Crime 2010 (Ratification, 2013b). The *Guidance* also emphasises two relevant provisions. First, Kuwait prohibits the extradition of political refugees and nationals, and 'double jeopardy' is a ground to refuse extradition (Kuwait Public Prosecution, 2015, 10). Second, an extradition request can be postponed whenever the person sought is being investigated, tried or serving a sentence of imprisonment for a different offence within Kuwait

(Kuwait Public Prosecution, 2015, 10). Otherwise, one is struck by the brevity of the legal framework in Kuwait compared to the UK. In particular, issues such as standard of proof, the relevance of human rights (Kuwait Constitution 1962, Part III: Public Rights and Obligations) and other bars, as well as the roles of Ministers and courts, must be determined for the arrangements in each case.

4. Implementation and future impact

On the Kuwaiti side, the Treaty was ratified by the Kuwaiti National Assembly on 23 April 2017 (Ratification, 2017). For the UK, the Treaty took a slower path. It was signed in December 2016, but the Parliamentary procedure was concluded only in October 2018 (Parliamentary Process, Extradition Treaty, 2018), whereupon the Treaty was ready to be ratified. However, that final governmental step was delayed until March 2020, when secondary legislation was issued to designate Kuwait as a category 2 territory (Extradition Act 2003 (Amendments to Designations) Order 2020). This considerable delay on the part of the UK might derive from at least three possible causes. First, the Brexit processes caused a major political distraction which meant that the ratification of such treaties become of low priority for the UK authorities. Second, the impetus for a Treaty came from Kuwait, which made it more important for Kuwait than the UK. Third, the pending prominent case of Fahad Al-Raja'an may have engendered a cautious approach in the UK, pending the resolution of such delicate litigation which remains the province of the independent judiciary.

The implementation of extradition from the UK to Kuwait remains uncertain. That represents the more likely direction of traffic based on existing reported cases, especially that of Fahad Al-Raja'an, and the flow of assets and their controllers to the perceived safe haven of London. Conversely, UK based subjects accused of bribery and corruption may face more risk of prosecution at home because they will prefer to return to the UK if possible. The resort to extradition may be unavoidable because of globalisation, but it still generates unease because contrasts in national standards and processes remain stark. In the UK, misgivings about foreign standards of criminal justice have generated heated public and political debates over extradition reforms from 2003 onwards (Efrat, 2018). The objections to extradition have been voiced by two UK constituencies: the 'law enforcement expert community' which favours ever more 'efficient' extradition; and proponents of a 'populist view', such as politicians and the media, who voice suspicions that more accessible extradition threatens the interests of British citizens (Efrat, 2018). Paradoxically, these controversies have been most engendered by extradition claims from countries that are close allies of the UK and, generally speaking, have fine records of respect for the rule of law, such as the US and Member States within the EU, rather than from more authoritarian regimes. *A fortiori*, one may expect that when extradition requests arise from a country that is legally and culturally more distant from UK norms, such as Kuwait, the apprehensions about the fairness and standards of the foreign criminal justice systems will then be amplified.

What makes it even more difficult to anticipate the future fate of the Treaty with Kuwait is that, before 2011, the two countries had no mutual experience of extradition (Baker et al., 2011, Appendix D). Thereafter, based on data provided by Home Office in a response to a Freedom of Information Act (2000) request, one arrest was made in the UK between 2016 and 2020 on the basis of an extradition request from Kuwait. One may presume this was Fahad Al-Raja'an who was arrested in 2017. Based on this experience, one may argue that extradition traffic with Kuwait will be sparse, that any pending case will revolve around arguments about the bars to rendition and that resolution of those plaints will not be swift. By comparison, a prior UK case dealing with a request from the neighbouring UAE resulted in the extradition request being quashed on human rights grounds (*Lodhi v Secretary of State for the Home Department*, 2010). Lodhi was one of 24 defendants who were tried for serious drug offences in relation to the production, possession and supply of several tons of Mandrax. He was convicted *in absentia* in Dubai in 1999 after he had fled from the UAE in 1997. Despite diplomatic assurances about conditions of treatment during pre-trial detention, the High Court determined those assurances to be limited by their vagueness and the absence of monitoring and so there remained a real risk of a breach of the ECHR, Article 3. As the court stated: 'The general conditions of custody heighten the degree of risk that his Article 3 rights would be breached; they encourage harsh treatment especially of foreigners, brutality in punishments, and risk being degrading in themselves' (*Lodhi v Secretary of State for the Home Department*, 2010; para.80). As for the possibility of a fundamentally unfair (re)trial arising from the inability to confront witnesses, lack of interpretation services and so on, the High Court again examined the assurances and identified due process faults but not to the extent that 'they reach the high level required for the trial to be a complete nullification of the concept of a fair trial within Article 6' (*Lodhi v Secretary of State for the Home Department*, 2010; para.103).

Although the lessons of US and EU arrangements with the UK are instructive, one should also draw out the deeper problems caused by the forging of criminal justice relations with more authoritarian regimes. In that context, distrust arises because underlying apprehensions about divergent legal standards are unresolved rather than because the technical extradition resolutions are uncomfortable. Thus, the criminal justice arrangements agreed with authoritarian regimes are less malleable than the arrangements for expanded trade and travel which may have fewer effects on fundamental rights and apply more evenly on both sides. This application of extradition beyond close allies means that relatively old-fashioned arrangements will continue to represent the extent of tolerable arrangements, and even they will be hard to roll out in practice. This imposition of restraint to protect Western values echoes the view of Andreas and Nadelmann (2006, 10) who suggested that the '(l)ess powerful and especially less developed countries have typically played a more secondary and reactive role in the internationalization of crime control' and that the developing countries are subject to Western hegemony that shapes international crime control.

Reflecting its political and diplomatic background, the Treaty may signal a new determination to forge stronger alliances with Gulf states, such as Kuwait, and that signal has been reinforced significantly with the delivery of the Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the state of Kuwait, which was signed on 28 January 2018 ('MLA Treaty', as explained by the Home Office, Explanatory Memorandum, 2018). In Kuwait, the MLA Treaty was approved by the government (Decree No 283/2018). On 25 September 2018, the MLA Treaty was referred to the Kuwaiti National Assembly to be ratified, and the Foreign Affairs Committee gave its initial approval. According to

the Kuwaiti Constitution (1962), Article 70(2), such treaties that affect individuals' rights require an enactment of law. However, the MLA Treaty has not been ratified, and the reason is unclear. In the UK, in tandem with the extradition Treaty, on 5 July 2018, the MLA agreement was laid before the House of Commons and House of Lords, and no concerns were raised by the Secondary Legislation Scrutiny Committee. On 15 October 2018, the UK Parliamentary procedure was concluded, and ratification can take place (Parliamentary Process, Mutual Legal Assistance Treaty, 2018). Why ratification has not yet occurred and why the process has been decoupled from the Treaty ratification and entry into force is also unclear. However, it should be noted that a MLA Treaty basis is not determinative of the form of MLA available under UK law, and there is no requirement to 'designate' a country under the Crime (International Co-operation) Act 2003 or the Proceeds of Crime Act (2002). Thus, any provisions in a MLA Treaty should still be observed (Home Office, 2015, 5).

The UK MLA Treaty is wider than the extradition Treaty since it applies to all crimes that are investigated or prosecuted in the territory of the requesting state where required evidence is located in the requested state. The MLA Treaty also provides for assistance in restraint and confiscation matters and the sharing of assets. However, requests are again subject to multiple grounds for refusal, including: prejudice to the sovereignty, security, *ordre public* or other essential interests, or inconsistency with the domestic law of the requested state; where an offence of a political or military nature is involved; where there are substantial grounds for believing that the request has been made for the purpose of investigating, prosecuting, punishing or prejudicing a person on account of that person's race, sex, sexual orientation, religion, nationality, ethnic origin or political opinions; where prosecution would conflict with the requested state's domestic law on double jeopardy; where assistance would, or would be likely to prejudice an investigation or criminal proceeding in the requested state or endanger the safety of any person; or where dual criminality is absent in cases of search and seizure of evidence, production orders and the restraint and confiscation of crime proceeds (relevant UK powers may be found mainly in the Police and Criminal Evidence Act 1984, the Criminal Justice Act 1987, and the Proceeds of Crime Act 2002). Unfortunately, it is not possible to rule out *ab initio* any MLA request which might assist prosecutions for death penalty offences, but assurances can be demanded as arose for the Pakistani investigation of the murder in London of Imran Farooq (Foreign and Commonwealth Office, 2020), rather than awaiting the delay and expense of litigation as occurred with US requests for assistance with the investigation of ISIS detainees in Syria in *Elgizouli v Secretary of State for the Home Department* (2020).

From the UK perspective, MLA will be helpful for UK-based prosecutions, the opposite direction of expected traffic to extradition, including for charges of bribery and corruption. According to the Home Office:

> This Treaty will provide a sound framework for co-operation between the UK and the State of Kuwait, especially where requests from UK prosecution agencies are sent to the State of Kuwait. There is now a clear basis under which such requests can be made and, where possible under the domestic law of the requested State, executed. … This Treaty is a clear commitment by both parties to mutual co-operation in the cross- border fight against crime and will strengthen bilateral relations more generally (Home Office, 2018, 3).

The MLA pathway has become even more vital since, in the case of *R (KBR) v Director of the Serious Fraud Office* (2021), the UK Supreme Court held that the Serious Fraud Office's powers under section 2(3) of the Criminal Justice Act 1987, requiring the production of documents in connection with investigations into corruption and bribery in the Unaoil scandal, cannot be served on a foreign company with no fixed place of business in the UK. Consequently, the MLA reforms can fill a gap in the statute.

From the Kuwaiti perspective, the prospects for activating the MLA are also difficult to fathom. Clearly, there is a strong urge to cut down on grand corruption and to minimise the losses of public resources to overseas safe havens (Chittum and Fitzgibbon, 2018). It may be noted that the Panama Papers recorded 288 Kuwait-related entries, including reference to Fahad Al-Raja'an who is listed through his ownership of Tawny Real Estates Ltd (International Consortium of Investigative Journalists, 2016). However, precise evidence of Kuwait intentions is hard to pin down. MLA and extradition matters in Kuwait are dealt with by the KwPP, whose decisions and investigations are not transparent. In addition, because grand corruption is inherently infused with politics, extradition processes in Kuwait are even more subject to extraneous (non-legal) considerations than in the UK. To overcome the apparent lack of trust on the part of the UK, Kuwait may need to take further confidence-building measures. The resort to semi-independent courts, with non-national judges, could allay some concerns related to justice standards. For example, the Dubai International Financial Centre (DIFC) court has been viewed as achieving reputable standards of justice (Krishnan, 2018; Sharar and Al Khulaifi, 2016), including decisions in cases that have involved UK nationals (*GFH Capital Ltd v Haigh and Ors*, 2020). However, a similar innovative approach to building confidence in the grand corruption cases in Kuwait would require a considerable compromise of to its sovereignty and so would be more reluctantly conceded especially for criminal cases. However, there might be some advantages to good international relations and effectiveness in investigating and prosecuting transnational crimes if some civil law approaches to criminal asset forfeiture, equivalent to the confiscation of property (as under the UK's Proceeds of Crime Act 2002, Part 5) or other forms of civil sanctions against funds or resources associated with crime (as under the UK's Policing and Crime Act 2017, Part 8) could be handled this way.

5. Conclusion

Extradition law in the UK has been in a state of flux for almost two decades. Though the purpose of this paper is to explore the more challenging case of extradition arrangements with Kuwait rather than with closer and more trusted allies, it is important to note that the general themes of law enforcement versus populism play out even in these friendlier contexts. Therefore, it is important to appreciate that a spectrum of problems and tensions affects the development of all extradition arrangements rather than a sharp division between the treatment of allies and non-allies or Western and non-Western states.

The latest major turbulence within extradition law, the Brexit process, has been seized upon by the UK government as the ideal opportunity to address various ongoing perceived faults and lack of reciprocity, including the imbalance of traffic with the European Union and also unfair trials and conditions of detention in receiving states (Niblock and Oehmichen, 2017; Efrat, 2018). Consequently, the UK government announced in 2020 that, as part of the Brexit arrangements, the continuance of the European Arrest Warrant arrangements would not be sought (UK Government, 2020a, paras.39-51), despite the supposed added value of this form of EU cooperation (van Ballegooij, 2020, 66). Other arrangements have been substituted under the terms of the Trade and Cooperation Agreement of December 2020 (UK Government, 2020b, Part III, Title VII) along the lines of a fast-track process similar to that negotiated by the European Union with Norway and Iceland in 2006 (Agreement, 2006; Home Affairs Committee, 2018, 71; MacPartholán, 2020, 124; Roberts and Glaser, 2020; Schomburg and Oehmichen, 2021; Grange et al., 2021). Accordingly, EU member states (but not Iceland and Norway) still remain territories under a reworked Part 1 of the Extradition Act 2003 (Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, Article 56; European Union (Future Relationship) Act 2020, section 11). These future arrangements fall somewhere between the European Arrest Warrant and the previous Council of Europe Convention on Extradition 1957. Thus, the new model preserves some existing European Arrest Warrant features, such as direct transmission between judicial authorities, limited grounds for refusal (though less limited than under the European Arrest Warrant arrangements, as described next) and time deadlines.

Within this framework, bars on extradition under the Council of Europe Convention on Extradition 1957 related to 'political offences' (Article 3) and nationality (Article 6) can be revived (UK Government, 2020b, Part III, Title VII, 317–318), though exceptions for those offences falling within the Council of Europe's Convention on the Suppression of Terrorism (1977) can be applied. Lists have since emerged of countries that intend to prohibit the extradition of their own nationals subject to obligatory reference to their national prosecution authorities (10 in total, plus two more which require the consent of the subject) or to apply a political offence exception (12 in total) (Home Office, 2021a). Additional limits will be imposed on surrender, including refusal if fundamental rights are at risk, extradition would be disproportionate, or long periods of pre-trial detention are likely. In this way, both the 'law enforcement expert' view, which seeks to maximise the range and simplicity of collaborative arrangements, and the 'populist view', which emphasises greater sovereign controls and protections for individuals, each receive partial endorsement in these arrangements. As also envisaged in the negotiations (UK Government, 2020a, para 52), future MLA relationships will be more closely based on the Council of Europe Convention on Mutual Legal Assistance 1959 (UK Government, 2020b, Part III, Title VIII). At the same time, the Convention will be supplemented by providing standard formats for making requests and time limits for responses. As with extradition, there will be direct transmission which allows UK prosecutors to send requests directly to competent authorities in EU Member States without executive approval. By these changes, what some might view, on the one hand, as the regression of extradition and MLA, which operational police officers feared would cause a serious 'capability gap' (Dawson and Gower, 2020, 3), might, on the other hand, be viewed as a more positive outcome which 'highlights the role that human rights can play in shaping and constraining foreign policy' (Efrat and Newman, 2020, 594).

These European controversies build upon previous laments about extradition. Some are broad, such as the abuse of Interpol Red Notices (Fair Trials International, 2018; David and Hearn, 2018; Council of Europe Parliamentary Assembly, 2019; Wandall et al., 2019) at the behest of allegedly repressive regimes, including by Gulf states (Mackinnon, 2018; Finlay, 2019), in order to trigger the UK authorities into persecuting political dissidents. Ironically, since Brexit has ended UK access to the Schengen Information System II, Red Notices will gain in prominence, allied to a power of provisional arrest under the Extradition (Provisional Arrest) Act 2020 and based on a certificate from the National Crime Authority based on a Red Notice request (Vamos, 2020). These arrest powers apply to specified territories which do not currently include Kuwait.

Some problems are more specific, such as the UK-US extradition treaty (Extradition Treaty, 2003), which, despite changes in 2013 to the rules about forum in section 83A of the Extradition Act 2003, is still seen as conceding to the US overly favourable arrangements (Arnell and Davies, 2020) and as providing an excuse for English prosecutors to shirk their duties especially against terrorism suspects (*Barbar Ahmad and other v UK*, 2012; *Hamza v Secretary of State for the Home Department*, 2012; *Elgizouli v Secretary of State for the Home Department*, 2020; Kapoor, 2018). A further argument with the US concerns whether sufficient protection is given to politically motivated subjects, the leading candidate being the case of Julian Assange whose case has initially been decided on contingent mental health grounds (*Government of the USA v Assange*, 2021) or whether there should be a return to a more explicit political offence exception (Saul, 2019). This nagging doubt about whether high profile fugitives can be treated fairly by extradition has been further highlighted by the multiple cases relating to Catalan separatists in Belgium (Carles Puigdemont and Antoni Comin: Deutsche Welle, 2020), Germany (Carles Puigdemont: Oberlandesgericht for the State of Schleswig-Holstein, 2018), and Scotland (Clara Ponsati: Carrell, 2020), all of whom face charges in Spain such as 'rebellion' and 'sedition' which appear highly 'political' (Junqueras, 2019).

The foregoing controversies arose in the context of countries other than Kuwait. However, this litany of British backlashes against extradition has potential resonance for future relations with Kuwait, not least in the context of international corruption (Carr, 2007, 230). These shortcomings add to the statutory bars as reflected in the Treaty and to the already expressed specific misgivings about human rights around due process and the death penalty in Kuwait. Set against this background, the new dispositions around extradition between the UK and Kuwait could remain elusive in practice because of old doubts about extradition which are also being played out in other bilateral arrangements and even with the European Union. Only with greater attention to detailed arrangements rather than diplomatic gestures will meaningful extradition and MLA processes become a reality between Kuwait and the UK.

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