UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF THE EXTRADITION OF MICHAEL L. TAYLOR	No. 20-mj-1069-DLC
IN THE MATTER OF THE EXTRADITION OF PETER M. TAYLOR	No. 20-mj-1070-DLC

EXTRADITION CERTIFICATION AND ORDER OF COMMITMENT

CABELL, U.S.M.J.

I. INTRODUCTION

The United States seeks to extradite Michael L. Taylor and Peter M. Taylor (the "respondents") to Japan to face a charge of harboring or enabling the escape of a criminal, in violation of Article 103 of the Japanese Penal Code. The extradition proceedings were commenced by the United States pursuant to 18 U.S.C. § 3184 and the Extradition Treaty between the United States and Japan, signed on March 3, 1978, and entered into force on March 26, 1980 ("Treaty").

On May 6, 2020, this court issued a complaint for the provisional arrests of the respondents with a view towards extradition at the request of the United States, acting on behalf of the Government of Japan. (D. 1).[1] The complaint indicates that

[1] Citation to the extradition dockets refer to the docket entries in *In the Matter of the Extradition of Michael L. Taylor*, Case No. 20-MJ-1069 (D. Mass).

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the Government of Japan issued warrants for the respondents' arrests for their involvement in the escape of Carlos Ghosn from Japanese authorities. Ghosn, who was under indictment in Japan for financial crimes, fled to Lebanon, a country with whom Japan has no extradition treaty, effectively shielding him from prosecution.

On May 20, 2010, the respondents were arrested in Massachusetts and, after a detention hearing, were ordered to be held without bail pending the outcome of their extradition hearing. (D. 41). The respondents sought an emergency writ of habeas corpus and injunctive relief, which was denied. *See Taylor v. McDermott*, No. 20-cv-11272 (D. Mass. 2020).

II. FINDINGS

On August 28, 2020, this court held an extradition hearing for both respondents pursuant to 18 U.S.C. § 3184. International extradition proceedings are governed by 18 U.S.C. § 3181 et seq. and by treaty. In applying an extradition treaty, the court is to construe it liberally in favor of the requesting nation. *See Factor v. Laubenheimer,* 290 U.S. 276, 293–94 (1933). The extradition court's role is not to determine guilt or innocence, but rather whether the following elements have been satisfied in order to support extradition of the accused: (1) the judicial officer is authorized to conduct the extradition proceeding; (2) the court has jurisdiction over the fugitive; (3) the applicable

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treaty is in full force and effect; (4) the crime(s) for which surrender is requested is/are covered by the applicable treaty; and (5) there is sufficient evidence to support a finding of probable cause as to each charge for which extradition is sought. *See Fernandez v. Phillips,* 268 U.S. 311, 312 (1925).

In considering the evidence presented by the Government of Japan as contained in the extradition documents submitted in support of the extradition request, the evidence offered by the respondents, the Extradition Treaty between the United States and Japan, and the applicable law, the court finds that the terms of the Treaty and 18 U.S.C. § 3184 have been satisfied with respect to the Taylors' extradition to Japan. More specifically, the court finds as follows.

1) Authority of the Court Over the Proceedings

The parties agree, and this court finds that it has subject-matter jurisdiction over these proceedings. 18 U.S.C. § 3184. Section 3184 provides that:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States ... may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence

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> of criminality may be heard and considered.... If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention .... *Id.*

Id. Further, magistrate judges in the District of Massachusetts are authorized by local rule to "[c]onduct extradition proceedings, in accordance with Title 18, United States Code, Section 3184." D. Mass. Local Magistrate Rule 1(e).

2) Jurisdiction Over the Respondents

The parties agree, and the court finds that it has jurisdiction over the respondents. Section 3184 gives the court jurisdiction over a fugitive found within the court's jurisdiction who has committed crimes in a foreign nation that are covered by an extradition treaty set forth in section 3181. The extradition treaty between the United States and Japan is included in section 3181. The court finds support in the record that the respondents are the persons who appeared before the court and are the ones against whom the instant charges are pending. The respondents also agree that they are the ones against whom the present charges are pending.

3) Treaty in Full Force and Effect

The parties agree, and the court finds that there is an

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extradition treaty (Treaty) in full force and effect between the United States and Japan, for all purposes of the extradition proceeding. 18 U.S.C. §§ 3181 and 3184.

4) Crime Covered by the Treaty

The parties agree, and the court finds that the charges for which extradition is sought are crimes pursuant to both Japanese and United States law and covered by the Treaty.

Article I of the Treaty provides for the return to Japan of persons found in the United States who are sought by Japan for prosecution, trial or to execute punishment for any offense specified in Article II of the Treaty. Article II of the Treaty provides for extradition for offenses listed in an annexed schedule which includes an offense relating to obstruction of justice, including harboring criminals. The respondents have been charged for their involvement in harboring or enabling the escape of someone charged with a crime, in violation of Article 103 of the Japanese Penal Code. This offense would also be subject to criminal prosecution under various United States statutes, including among others 18 U.S.C. § 1073 and 18 U.S.C. §§ 3148(a) and 401.

5) Probable Cause that the Respondents Committed the Offenses

Thus, the only issue left for the court is to determine whether there is probable cause to believe that the respondents committed the offenses charged. The evidence from which that

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determination is to be made is the evidence contained in Japan's extradition request. To certify an extradition warrant, the magistrate judge must find that there is "probable cause" or "reasonable grounds" to believe the individual is guilty of the crime charged. *See Fernandez v. Phillips,* 268 U.S. 311, 312 (1925); *see also Shapiro v. Ferrandina*, 478 F.2d 894, 904-05, 913-14 (2d Cir. 1973). A magistrate judge applies the same standard of probable cause in international extradition hearings as used in preliminary hearings, in federal criminal proceedings. *See Castro Bobadilla v. Reno*, 826 F.Supp. 1428, 1433 (S.D. Fla. 1993). The evidence is sufficient and probable cause is established if a person of ordinary prudence and caution can conscientiously entertain a reasonable belief in the probable guilt of the accused. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

Factually speaking, the parties agree, and the court finds support in the record, that the respondents committed the conduct underlying the charges against them. Specifically, the court finds that there is probable cause to believe that Peter Taylor traveled to Japan at least three times and visited Ghosn on at least seven occasions in the months preceding the escape. Then, on December 28, 2019, Peter Taylor arrived in Tokyo and checked into a room at the Grand Hyatt. Ghosn then arrived at the Grand Hyatt and met with Peter Taylor for about an hour. On December 29, 2019, Michael Taylor and a third individual, George-Antoine Zayek, traveled on

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a private jet from Dubai, United Arab Emirates, to Japan's Kansai International Airport. At Kansai, Michael Taylor and Zayek carried large black audio equipment-style cases and told airport workers that they were musicians. From Kansai, Michael Taylor and Zayek checked into the Star Gate Hotel Kansai. After placing the cases in one of their rooms, they caught a train bound for Tokyo at about noon. At 2:30 p.m., also on December 29th, Ghosn left his home without luggage and walked to the Grand Hyatt, where he apparently changed into clothing from luggage that had been dropped off and received by Peter Taylor earlier in the day. Michael Taylor and Zayek arrived in Tokyo at about 3:30 p.m. and went to Peter Taylor's room at the Grant Hyatt.

Shortly thereafter, the Taylors, Ghosn, and Zayek left Peter Taylor's room at the same time, each carrying luggage. Peter Taylor then traveled to the Narita Airport to catch a flight to China. However, Ghosn, Michael Taylor, and Zayek caught a train back to the Kansai Airport area and returned to the Star Gate Hotel Kansai at approximately 8:15 p.m. At about 10:00 p.m., Michael Taylor and Zayek left the hotel with luggage, including the two audio-style cases, and went to Kansai Airport. Surveillance footage did not show Ghosn leaving the hotel. Once at the airport, the baggage of Michael Taylor and Zayek was loaded onto their private jet without being checked. The jet departed for Turkey at about 11:00 p.m. On December 31, 2019, Ghosn announced that he

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was in Lebanon.

Although the respondents do not dispute the foregoing facts, they argue that those facts do not make out a violation of Article 103. This court finds that they do, however.

Among other things, Article 103 makes it a crime to "harbor[] or enable[] the escape of another person who has...committed a crime." As this court stated previously in considering the issue in the context of the respondents' motion for bail, the respondents' conduct literally brings them squarely within the purview of this portion of Article 103 because they harbored or enabled the escape of Carlos Ghosn, who had allegedly committed a crime. A separate court reached the same result after considering the issue in the context of the respondents' unsuccessful motion for injunctive relief. *See Taylor v. McDermott*, No. 20-cv-11272 (D. Mass. 2020) at D. 44 ("Petitioners have not shown a high likelihood of success in their argument [that] Article 103 does not prohibit interfering with the Japanese criminal justice system by harboring Ghosn and enabling Ghosn to elude discovery by law enforcement and escape judgment from a Japanese court.").

To be sure, the respondents do not really take issue with the court's interpretation of Article 103 as it is written. Rather, they argue that the English translation of Article 103 is misleading because it does not accurately convey the true required elements of the offense. They argue that a proper reading of the

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actual Japanese text of Article 103 requires one to do more than merely harbor or enable the escape of someone who has committed a crime to violate the provision; it requires one to harbor or enable the escape of someone who either was in physical confinement or was actively being pursued by law enforcement for a recently committed crime. They contend that they did not violate Article 103 under this interpretation because, although Ghosn was on release for charges for which he had been indicted, he was neither in physical confinement nor actively being pursued by law enforcement for a crime at the time the respondents helped him flee Japan.

Despite strong urging, however, the court declines to consider the respondents' argument. Even assuming an extradition court has both the authority to resolve disputed issues of foreign law, and the hopeful belief it could do so competently, that does not mean it should. "[E]xtradition proceedings are not vehicles for United States federal courts to interpret and opine on foreign law," and American extradition courts therefore have consistently cautioned against doing so, particularly to invalidate arrest warrants. *See e.g., Noeller v. Wojdylo*, 922 F.3d 797, 805 (7th Cir. 2019); *Marzook v. Christopher*, No. 96 CIV. 4107 (KMW), 1996 WL 583378, at *5, n.4 (S.D.N.Y. Oct. 10, 1996) (citing *Peters v. Egnor*, 888 F.2d 713, 716 (10th Cir. 1989) ("we think that an extensive investigation of [the requesting country's] law would be

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inappropriate"); *Matter of Assarsson*, 635 F.2d 1237, 1244 (7th Cir.1980), *cert. denied*, 451 U.S. 938 (1981) ("We are also not expected to become experts in laws of foreign nations.").

Moreover, where a Japanese court has now twice issued warrants alleging that the respondents' conduct violated Article 103, and the Government of Japan has through declarations and case citations presented a reasonable interpretation of Article 103 under which the respondents' conduct would constitute a violation of that provision, the prevailing view is that the extradition court should defer to the foreign country's interpretation of its own laws. *See In Matter of Extradition of Pineda Lara*, No. 97 CR. MISC. 1 (THK), 1998 WL 67656, at *7 (S.D.N.Y. Feb. 18, 1998) ("a judge in the United States should therefore defer to a foreign judicial officer's or government official's reasonable interpretation of a statute where the statute is subject to more than one interpretation"); *see also Matter of Extradition of Lui*, 939 F.Supp. 934, 949 (D. Mass. 1996) (comity and common sense "suggest[] that the foreign judicial officer should be presumed to be more knowledgeable than the judicial officer in the United States about the foreign law."). That is the course the court chooses to follow here. Accordingly, the court finds that there is probable cause to believe that the respondents violated Article 103 of the Japanese Penal code.

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III. CONCLUSION

Based on the foregoing, this matter is certified to the Secretary of State in order that warrants may issue, upon the requisition of the proper authorities in Japan, for the surrender of Michael L. Taylor and Peter M. Taylor on the charge of harboring or enabling the escape of a criminal, in violation of Article 103 of the Japanese Penal Code, according to the provisions of the Treaty between the United States and Japan.

No later than seven days after the date of this decision, the government shall file a proposed extradition certification and order of commitment.

The court will then order that the Clerk of Court forward a certified copy of this Extradition Certification and Order of Commitment, together with a copy of all the evidence taken before this Court, to the Secretary of State, Department of State, to the attention of the Office of the Legal Adviser.

The Taylors shall remain in the custody of the U.S. Marshal for this District, to be held pending final disposition of this matter by the Secretary of State, and pending each respondent's potential surrender to the government of Japan.

SO ORDERED.

/s/ Donald L. Cabell
DONALD L. CABELL, U.S.M.J.

DATED: September 4, 2020

ATTACHMENT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF THE EXTRADITION OF MICHAEL L. TAYLOR	No. 20-mj-1069-DLC
IN THE MATTER OF THE EXTRADITION OF PETER M. TAYLOR	No. 20-mj-1070-DLC

CERTIFICATION OF PETER M. TAYLOR AND COMMITTAL FOR EXTRADITION

WHEREAS, on August 28, 2020, this Court held an extradition hearing in the above-captioned extradition proceedings; and

WHEREAS, on September 4, 2020, this Court issued an Extradition Certification and Order, after considering the evidence, including the certified and authenticated documents submitted by the Government of Japan, and the pleadings and the arguments of the parties.

NOW THEREFORE, the Court formally certifies to the Secretary of State for the United States as follows:

1) This Court has jurisdiction over, and the undersigned is authorized to conduct, extradition proceedings pursuant to 18 U.S.C. § 3184 and Rule 1(e) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts;

2) This Court has personal jurisdiction over Peter M. Taylor pursuant to 18 U.S.C. § 3184. On May 6, 2020, this Court signed a complaint filed by the United States in response to the request of the Government of Japan for Peter M. Taylor's provisional arrest with a view towards his extradition and issued a warrant for his arrest based on the complaint. On May 20, 2020, Peter M. Taylor was found and arrested in this District pursuant to the warrant and complaint. On June 29, 2020, Japan submitted to the United States Department of State its formal request for Peter M. Taylor's extradition;

3) The extradition treaty between the United States and the Government of Japan, Treaty on Extradition Between the United States of America and Japan, U.S.-Japan, Mar. 26, 1980, 31

U.S.T. 892 ("Treaty"), has been in full force and effect at all times relevant to the extradition proceedings;

4) The Peter M. Taylor whose extradition is sought by the Government of Japan, and the Peter M. Taylor who was arrested in this District and who appeared before the Court in the instant extradition proceedings are one and the same person;

5) Japan seeks Peter M. Taylor's extradition for the following offense: Enabling the escape of criminals under Article 103 of the Japanese Penal Code. That offense is included in the Japanese arrest warrant for Peter M. Taylor that Japan submitted in support of its extradition request;

6) The above-referenced Treaty between the United States and Japan encompasses the offense for which the Government of Japan seeks Peter M. Taylor's extradition; and

7) There is probable cause to believe that Peter M. Taylor committed the offense for which extradition is sought.

ACCORDINGLY, I certify the extradition of Peter M. Taylor to Japan on the offense for which extradition was requested and commit him to the custody of the United States Marshals Service pending further decision on extradition and surrender by the Secretary of State pursuant to 18 U.S.C. § 3186.

FURTHER, I order that the Clerk of this Court forward a certified copy of this Certification and Committal for Extradition to the Secretary of State via the below address.

ATTN: Amber Kluesener
U.S. Department of State
Office of the Legal Adviser for Law Enforcement and Intelligence
2201 C Street, NW, Room 4331
Washington, D.C. 20520

SO ORDERED.

/s/ Donald L. Cabell
DONALD L. CABELL, U.S.M.J.

DATED: September 14, 2020

ATTACHMENT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF THE EXTRADITION OF MICHAEL L. TAYLOR	No. 20-mj-1069-DLC
IN THE MATTER OF THE EXTRADITION OF PETER M. TAYLOR	No. 20-mj-1070-DLC

CERTIFICATION OF MICHAEL L. TAYLOR AND COMMITTAL FOR EXTRADITION

WHEREAS, on August 28, 2020, this Court held an extradition hearing in the above-captioned extradition proceedings; and

WHEREAS, on September 4, 2020, this Court issued an Extradition Certification and Order, after considering the evidence, including the certified and authenticated documents submitted by the Government of Japan, and the pleadings and the arguments of the parties.

NOW THEREFORE, the Court formally certifies to the Secretary of State for the United States as follows:

1) This Court has jurisdiction over, and the undersigned is authorized to conduct, extradition proceedings pursuant to 18 U.S.C. § 3184 and Rule 1(e) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts;

2) This Court has personal jurisdiction over Michael L. Taylor pursuant to 18 U.S.C. § 3184. On May 6, 2020, this Court signed a complaint filed by the United States in response to the request of the Government of Japan for Michael L. Taylor's provisional arrest with a view towards his extradition and issued a warrant for his arrest based on the complaint. On May 20, 2020, Michael L. Taylor was found and arrested in this District pursuant to the warrant and complaint. On June 29, 2020, Japan submitted to the United States Department of State its formal request for Michael L. Taylor's extradition;

3) The extradition treaty between the United States and the Government of Japan, Treaty on Extradition Between the United States of America and Japan, U.S.-Japan, Mar. 26, 1980, 31

U.S.T. 892 ("Treaty"), has been in full force and effect at all times relevant to the extradition proceedings;

4) The Michael L. Taylor whose extradition is sought by the Government of Japan, and the Michael L. Taylor who was arrested in this District and who appeared before the Court in the instant extradition proceedings are one and the same person;

5) Japan seeks Michael L. Taylor's extradition for the following offense: Enabling the escape of criminals under Article 103 of the Japanese Penal Code. That offense is included in the Japanese arrest warrant for Michael L. Taylor that Japan submitted in support of its extradition request;

6) The above-referenced Treaty between the United States and Japan encompasses the offense for which the Government of Japan seeks Michael L. Taylor's extradition; and

7) There is probable cause to believe that Michael L. Taylor committed the offense for which extradition is sought.

ACCORDINGLY, I certify the extradition of Michael L. Taylor to Japan on the offense for which extradition was requested and commit him to the custody of the United States Marshals Service pending further decision on extradition and surrender by the Secretary of State pursuant to 18 U.S.C. § 3186.

FURTHER, I order that the Clerk of this Court forward a certified copy of this Certification and Committal for Extradition to the Secretary of State via the below address.

ATTN: Amber Kluesener
U.S. Department of State
Office of the Legal Adviser for Law Enforcement and Intelligence
2201 C Street, NW, Room 4331
Washington, D.C. 20520

SO ORDERED.

/s/ Donald L. Cabell
DONALD L. CABELL, U.S.M.J.

DATED: September 14, 2020

ATTACHMENT C

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 1/15/2021 at 3:19 PM EST and filed on 1/15/2021

Case Name:	USA v. Taylor
Case Number:	4:20-mj-01070-DLC
Filer:	
Document Number:	60(No document attached)

Docket Text:
Magistrate Judge Donald L. Cabell: ELECTRONIC ORDER entered denying [57] Motion for Reconsideration as to Peter Maxwell Taylor (1).

Respondent Peter M. Taylor seeks reconsideration of this court's September 4, 2020 determination that there was probable cause to believe that he violated Article 103 of the Japanese Penal Code. (D. 51). The respondent contends that "newly discovered evidence" warrants reconsideration, namely evidence indicating that Carlos Ghosn did not need a key card to operate his hotel elevator, which if true might call into question the reliability of the factual allegation that Peter Taylor necessarily provided Ghosn with a key card.

As a threshold matter, it is not clear whether this court has authority or jurisdiction to consider the respondent's motion where (1) the court months ago issued a Certification and Committal for Extradition and transmitted the matter to the State Department (D. 53); (2) the State Department subsequently determined the respondent should be extradited and issued a warrant of surrender; and (3) the respondent has since sought relief from extradition through a habeas proceeding pending in another session which does not challenge any of this court's prior factual findings. To be sure, the respondent cites to case law reflecting that an extradition court may on motion reconsider a determination of extraditability where the request comes before the extradition court has made its finding and issued a Certification. As noted above, though, the request for reconsideration in this case comes months after the Certification and moreover after the State Department has determined that extradition is appropriate and issued a warrant for surrender.

But even assuming the motion is properly before the court, the court finds that the motion fails for the reasons noted in the government's opposition. First, and as the government has explained, the impetus for the motion - the recanting of a factual assertion the respondent deemed to be material, no longer provides a possible basis for relief where further investigation by Japanese authorities has revealed that a key card was in fact needed to access the hotel's elevator. (D. 59 at 6-7). Second, even assuming for the sake of argument that Peter Taylor did not provide Ghosn with an elevator key card, the remainder of the evidence in the court's view, none of which moreover was disputed, still provides probable cause to believe that the respondent assisted in the planning, financing, and execution of Ghosn's escape as alleged. (Id. at 9). As such, the court would anew find probable cause to support the respondent's extradition even assuming he did not provide Ghosn with a key card. Accordingly, the motion for reconsideration is DENIED. (Russo, Noreen)

4:20-mj-01070-DLC-1 Notice has been electronically mailed to:

Paul V. Kelly paul.kelly@jacksonlewis.com, bostondocketing@jacksonlewis.com, donna.decoste@jacksonlewis.com, paul-kelly-3412@ecf.pacerpro.com

James P. Ulwick julwick@kg-law.com, tlewis@kg-law.com

Abbe David Lowell adlowell@Winston.com, abbe-lowell-7082@ecf.pacerpro.com

ATTACHMENT D

Stephen W. Hassink stephen.hassink@usdoj.gov, USAMA.ECF@usdoj.gov, eric.mccarthy@usdoj.gov, stephen.hassink@gmail.com

Philip A. Mirrer-Singer philip.mirrer-singer@usdoj.gov

4:20-mj-01070-DLC-1 Notice will not be electronically mailed to:

ATTACHMENT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL L. TAYLOR and PETER M. TAYLOR,	*	
Petitioners,	*	
v.	*	Civil No. 4:20-cv-11272-IT
JEROME P. MCDERMOTT, Sheriff, Norfolk County, Massachusetts, and JOHN GIBBONS, United States Marshal, District of Massachusetts,	*	
Respondents.	*	

MEMORANDUM AND ORDER

January 28, 2021

TALWANI, D.J.

On January 24, 2021, Petitioners Michael Taylor and Peter Taylor filed a Motion to Amend the Habeas Petition [#79] pursuant to 28 U.S.C. § 2242 and Rule 15 of the Federal Rules of Civil Procedure. They seek leave to amend their Verified Second Emergency Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Injunctive Relief ("Second Habeas Petition") [#47] to request that this court review the sufficiency of the factual allegations supporting probable cause to believe that Peter Taylor violated Article 103 of the Japanese Penal Code and the Magistrate Judge's denial of Petitioner Peter Taylor's motion for reconsideration. Mot. to Amend [#79]. Although 28 U.S.C. § 2242 and Rule 15 are the proper vehicle for this request, the Motion to Amend the Habeas Petition [#79] is DENIED.

Under Rule 15, leave to amend a pleading shall be freely granted "when justice so requires." Fed. R. Civ. P. 15(a). Nevertheless, a motion for leave to amend may be denied for reasons such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated

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failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962); see also Hatch v. Dep't for Children, Youth & Their Families, 274 F.3d 12, 19 (1st Cir. 2001).

Here, the Taylors had ample opportunity last summer to contest the factual basis for the Magistrate Judge's finding of probable cause that Peter Taylor violated Article 103, but they did not do so. The Taylors were first arrested on May 20, 2020, and moved to quash their arrest warrants or for release from detention on June 8, 2020. See Mot. to Quash Arrest Warrants or for Release from Detention, In the Matter of the Extradition of Peter Taylor, No. 20-mj-01070-DLC (June 8, 2020), ECF No. 17. There, they did not dispute the facts of the case but rather argued that the facts as alleged did not constitute a crime under Article 103. Id. They made the same argument when they filed their first Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 ("First Habeas Petition") [#1] with this court on July 6, 2020; at their extradition hearing before the Magistrate Judge on August 28, 2020; in their Second Habeas Petition [#47], filed on October 29, 2020; and at the hearing on that second petition before this court on November 5, 2020.

On December 17, 2020, the Japanese government informed the United States that Carlos Ghosn did not need a key card to operate the hotel elevator as the Japanese government had alleged and from which it had inferred that Peter Taylor provided Ghosn with the key card. See Motion to Stay Habeas Proceeding and Remand to Extradition Magistrate to Address Motion for Reconsideration of Probable Cause Findings [#68].[1] Based on this "newly discovered evidence,"

[1] On December 31, 2020, the Japanese government withdrew this assertion, concluding that a room key *was* required to operate the elevator. Letter to U.S. Dept. of Justice [#70-1].

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the Taylors sought to stay these proceedings and remand the matter to the Magistrate Judge, see id., while also seeking relief from the Magistrate Judge without waiting on a remand. The Magistrate Judge denied relief, as did this court. Elec. Order, United States v. Peter Maxwell Taylor, No. 4:20-mj-01070-DLC (Jan. 15, 2021), ECF No. 60, reprinted as Ex. A – U.S. Notice [#74-1]; Elec. Order [#76].

The Taylors contend that the Magistrate Judge's denial of Peter Taylors' motion for reconsideration renders their Motion to Amend the Habeas Petition [#79] timely. It does not. Peter Taylor's time to challenge the facts proffered by the Japanese government as to his assistance to Ghosn in escaping from Japan was at his extradition hearing. The Japanese government's statement that a room key was not needed to operate the hotel elevator does not provide cause for Taylor's eight-month delay in raising any factual challenge. The Motion to Amend the Habeas Petition [#79] is therefore DENIED as untimely.

IT IS SO ORDERED.

January 28, 2021

/s/ Indira Talwani
United States District Judge

ATTACHMENT E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL L. TAYLOR and PETER M. TAYLOR,	*	
Petitioners,	*	
v.	*	Civil No. 4:20-cv-11272-IT
JEROME P. MCDERMOTT, Sheriff, Norfolk County, Massachusetts, and JOHN GIBBONS, United States Marshal, District of Massachusetts,	*	
Respondents.	*	

MEMORANDUM AND ORDER

January 28, 2021

TALWANI, D.J.

Before the court are the Petitioners Michael Taylor and Peter Taylor's Verified Second Emergency Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Injunctive Relief ("Second Habeas Petition") [#47]. The Taylors seek writs of habeas corpus halting their transfer to the custody of the Japanese government; finding the decision of the Secretary of State ("Secretary") to surrender them for extradition arbitrary and capricious and in violation of United States law; and reversing the decisions of the Magistrate Judge certifying their extraditability. Id. at 10 (prayer for relief). The Taylors also seek a stay of the transfer of their custody to the Japanese government until they have had "a full and fair opportunity to receive and review the State Department administrative record." Id. at ¶ 13. For the following reasons, the Second Habeas Petition [#47] is DENIED.

ATTACHMENT F

I. Procedural Background

In 2018, Carlos Ghosn Bichara ("Ghosn") was indicted by a Japanese court for financial crimes allegedly committed during his tenure as the CEO and/or Chairman of the Board of Directors at Nissan Motor Co., Ltd. Ex. F – Extradition Req. for Michael Taylor at Part IV, ¶¶ 1-2 [#41-6].[1] Ghosn was later released on bond and conditions, including that he was forbidden from leaving Japan. Id. at Part IV, ¶ 4.

On January 30, 2020, and February 28, 2020, a Japanese court issued and reissued warrants for the Taylors' arrest for "harboring of criminals and accessoryship of violation of the Immigration Control and Refugee Recognition Act (Article 71, 25 II)" based on allegations that they had provided assistance to Ghosn in escaping from Japan. Ex. I – Original Arrest Warrants [#41-9]; Ex. J – Renewed Arrest Warrants [#41-10].

The government of Japan subsequently requested that the United States issue provisional arrest warrants pursuant to the treaty governing extradition between the United States and Japan. Ex. K – Extradition Req. Transmittal [#41-11]; see also Ex. E – Treaty on Extradition, United States-Japan, effective Mar. 26, 1980, 31 U.S.T. 892 ("Treaty") [#41-5]. The United States thereafter filed complaints pursuant to 18 U.S.C. § 3184 in this district, asserting that the Taylors had violated Article 103 of the Japanese Penal Code. Ex. A – Michael Taylor Compl. [#38-2]; Ex. B – Peter Taylor Compl. [#38-3]. The Magistrate Judge to whom the matter was assigned issued the requested warrants, and the Taylors were arrested on May 20, 2020.

[1] The full proceedings before the Magistrate Judge are docketed at In the Matter of the Extradition of Michael L. Taylor, No. 20-mj-1069-DLC (D. Mass) ("Michael Taylor MJ Docket"), and In the Matter of the Extradition of Peter Taylor, No. 20-mj-1070-DLC (D. Mass.). For convenience, where those dockets are referenced, and the same or similar documents are filed on both dockets, (albeit with slightly different numbering), the court has cited to the Michael Taylor MJ Docket.

The United States moved for detention, and the Taylors were detained pending a request for a detention hearing. See United States' Mot. for Detention, Michael Taylor MJ Docket (May 20, 2020), ECF No. 9; Elec. Clerk Notes, Michael Taylor MJ Docket (May 20, 2020), ECF No. 11. The Taylors have been held since that date at the Norfolk County Correctional Facility.

The Taylors subsequently moved to quash their arrest warrants or for release from detention. See Mot. to Quash Arrest Warrants or for Release from Detention, Michael Taylor MJ Docket (June 8, 2020), ECF No. 17. While the motions were pending, Japan submitted its formal extradition request. See Notice of Japan's Submission of Req. for Extradition, Michael Taylor MJ Docket (July 2, 2020) ECF No. 37; Ex. K – Extradition Req. Transmittal [#41-11]; see also Ex. F – Extradition Req. for Michael Taylor [#41-6]. The Magistrate Judge denied the motions, finding the Taylors' challenge to the provisional arrests mooted by Japan's formal extradition request and further finding that bail was not warranted, as the Taylors pose a flight risk and failed to establish special circumstances warranting bail. Elec. Order, Michael Taylor MJ Docket (July 7, 2020) ECF No. 40; Magistrate Judge's Mem. on Resps.' Mot. to Quash Arrest Warrants or for Release from Detention, Michael Taylor MJ Docket (July 10, 2020) ECF No. 41.

Meanwhile, on July 6, 2020, the Taylors filed with this court their first Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 ("First Habeas Petition") [#1] and a Motion for Temporary Restraining Order and Preliminary Injunction [#2]. This court denied the requested temporary restraining order on July 9, 2020, Elec. Order [#33], and denied the motion for preliminary injunction and the First Habeas Petition [#1] on August 7, 2020, Mem. & Order 22 [#44]. The court found that the Magistrate Judge's decision denying bail was properly challenged prior to the extradition hearing via a petition for a writ of habeas corpus but that the Taylors had not established special circumstances justifying release on bail or error in the Magistrate Judge's

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finding that the Taylors posed a flight risk. Id. at 8-18. Pursuant to 28 U.S.C. § 2241, the court also considered and rejected the Taylors' contention that they were being improperly held "in violation of the Constitution or laws or treaties of the United States." Id. at 19-20. Although the court found that the Taylors had not presented grounds demonstrating that they were being unlawfully held, the court did not preclude them from raising these same issues in the extradition proceedings before the Magistrate Judge. Id. at 21. Finally, the court rejected the Taylors' allegation that the government had been deliberately indifferent to the risk they face from COVID-19 and had therefore violated their constitutional rights. Id. at 22.

The Magistrate Judge held an extradition hearing pursuant to 18 U.S.C. § 3184 on August 28, 2020, and issued a written decision finding the Taylors extraditable on September 4, 2020. Extradition Certification and Order of Commitment [#50-1]. The Magistrate Judge found that the terms of the Treaty and 18 U.S.C. § 3184 had been satisfied with respect to the extradition request, and specifically: (1) that the court had subject matter jurisdiction over the proceedings and the Taylors; (2) that the Treaty was in full force and effect between the United States and Japan; (3) that the charges for which extradition was sought were crimes pursuant to both Japanese and United States law and covered by the Treaty; and (4) that there was probable cause to believe that the Taylors had committed the offenses charged. Id. at 3-10. On September 14, 2020, the Magistrate Judge certified his findings and submitted them to the State Department. Certifications of Michael and Peter Taylor and Committals for Extradition [#50-3].

On October 28, 2020, the Assistant Legal Adviser for Law Enforcement and Intelligence at the State Department wrote to the Taylors that, on October 27, 2020, the Deputy Secretary of State ("Deputy Secretary") had authorized the Taylors' surrender to Japan. Ltr. From K. Johnson [#50-4]. The letter explained that this decision was reached "[f]ollowing a review of all pertinent

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information, including the materials submitted directly to the Department of State" and material submitted to this court, and that the Department "carefully and thoroughly considers all claims submitted by a fugitive." Id. The Assistant Legal Advisor also wrote that "[a]s the official responsible for managing the Department's responsibilities in cases of international extradition," she "confirm[ed] that the decision to surrender the Taylors to Japan complie[d] with applicable international obligations as well as domestic statutes and regulations." Id.

The Taylors filed this Second Habeas Petition [#47] the next day. They also filed an Emergency Motion to Stay [#48], which the court granted, pending further order of the court, to allow the court time to review the Second Habeas Petition [#47]. Order [#49]. The court did not address the Taylors' further request for a stay until they "had a full and fair opportunity to receive and review the State Department administrative record." Elec. Order [#54].

The government subsequently filed its Opposition to Petitioners' Emergency Motion for Stay and Response to Second Emergency Petition for Habeas Corpus ("U.S. Mem.") [#50], and the court held an expedited hearing on the Second Habeas Petition [#47] on November 5, 2020. The court permitted supplemental filings, and the government filed the Declaration of Deputy Secretary Stephen E. Biegun, see U.S. Supplemental Exhibit [#60-1], while the Taylors filed additional briefing and exhibits, including the submission made on their behalf to the Department of State, see Supplemental Exhibits in Support of Verified Second Emergency Petition [#59]; Petitioners' Notices of Filing Supplemental Declarations and Exhibits [#61], [#63]; and Petitioners' Response to U.S. Supplemental Exhibit [#62].

The Taylors subsequently sought to stay these proceedings and remand the matter to the Magistrate Judge, see Motion to Stay Habeas Proceeding and Remand to Extradition Magistrate to Address Motion for Reconsideration of Probable Cause Findings [#68], while also seeking

relief from the Magistrate Judge without waiting on a remand. The Magistrate Judge denied relief, as did this court. Elec. Order, United States v. Peter Maxwell Taylor, No. 4:20-mj-01070-DLC (Jan. 15, 2021), ECF No. 60, reprinted as Ex. A – U.S. Notice [#74-1]; Elec. Order [#76]. Most recently, the Taylors have filed a Motion to Amend Habeas Petition [#79] which the court has also denied as untimely. Order [#80].

II. Factual Background

The Magistrate Judge has recounted the facts as follows:

> Factually speaking, the parties agree, and the court finds support in the record, that the respondents committed the conduct underlying the charges against them. Specifically, the court finds that there is probable cause to believe that Peter Taylor traveled to Japan at least three times and visited Ghosn on at least seven occasions in the months preceding the escape. Then, on December 28, 2019, Peter Taylor arrived in Tokyo and checked into a room at the Grand Hyatt. Ghosn then arrived at the Grand Hyatt and met with Peter Taylor for about an hour. On December 29, 2019, Michael Taylor and a third individual, George-Antoine Zayek, traveled on a private jet from Dubai, United Arab Emirates, to Japan's Kansai International Airport. At Kansai, Michael Taylor and Zayek carried large black audio equipment-style cases and told airport workers that they were musicians. From Kansai, Michael Taylor and Zayek checked into the Star Gate Hotel Kansai. After placing the cases in one of their rooms, they caught a train bound for Tokyo at about noon. At 2:30 p.m., also on December 29th, Ghosn left his home without luggage and walked to the Grand Hyatt, where he apparently changed into clothing from luggage that had been dropped off and received by Peter Taylor earlier in the day. Michael Taylor and Zayek arrived in Tokyo at about 3:30 p.m. and went to Peter Taylor's room at the Grant Hyatt.
>
> Shortly thereafter, the Taylors, Ghosn, and Zayek left Peter Taylor's room at the same time, each carrying luggage. Peter Taylor then traveled to the Narita Airport to catch a flight to China. However, Ghosn, Michael Taylor, and Zayek caught a train back to the Kansai Airport area and returned to the Star Gate Hotel Kansai at approximately 8:15 p.m. At about 10:00 p.m., Michael Taylor and Zayek left the hotel with luggage, including the two audio-style cases, and went to Kansai Airport. Surveillance footage did not show Ghosn leaving the hotel. Once at the airport, the baggage of Michael Taylor and Zayek was loaded onto their private jet without being checked. The jet departed for Turkey at about 11:00 p.m. On December 31, 2019, Ghosn announced that he was in Lebanon.

Extradition Certification and Order of Commitment 6-7 [#50-1]. As the Magistrate Judge noted in his decision following the extradition hearing, the parties did not dispute the facts of the case at the extradition hearing. Id. at 6.[2]

III. Discussion

Count I of the Second Habeas Petition [#47] challenges the Secretary's authorization of the Taylors' surrender to Japan as arbitrary and capricious and in violation of United States law. The Taylors assert that their extradition to Japan would violate the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 ("Convention Against Torture" or "CAT"); the International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 95–20, 999 U. N. T. S. 176 ("ICCPR"); § 2242 of the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105–227, Div. G., § 2242(b), 112 Stat. 2681–761, 2681–822 (1998) ("FARR Act"); and other "fundamental notions of due process," "including the right to a speedy trial, the right not to be subjected to lengthy and coercive interrogation in the absence of counsel, protection

[2] Peter Taylor's motion for reconsideration of the Magistrate Judge's determination asserted that, based on "newly discovered evidence," Carlos Ghosn did not need a key card to operate the hotel elevator as the Japanese government had alleged and from which it had inferred that Peter Taylor provided Ghosn with the key card. Motion to Stay Habeas Proceeding and Remand to Extradition Magistrate to Address Motion for Reconsideration of Probable Cause Findings [#68]. In opposition, the government contends that further evidence establishes that the Japanese government's original finding regarding the key card was correct. U.S. Opposition 3 [#70] and attached exhibits [#70-1], [#70-2]. The Magistrate Judge concluded that the impetus for the motion for reconsideration "no longer provides a possible basis for relief where further investigation by Japanese authorities has revealed that a key card was in fact needed to access the hotel's elevator" and that "even assuming for the sake of argument that Peter Taylor did not provide Ghosn with an elevator key card, the remainder of the evidence in the court's view, none of which moreover was disputed, still provides probable cause to believe that [Peter Taylor] assisted in the planning, financing, and execution of Ghosn's escape as alleged." Elec. Order, United States v. Peter Maxwell Taylor, No. 4:20-mj-01070-DLC (Jan. 15, 2021), ECF No. 60, reprinted as Ex. A – U.S. Notice [#74-1].

against cruel and unusual punishment, the presumption of innocence, and the right against self-incrimination." Second Habeas Petition ¶ 23 [#47]. Count II asserts that the Taylors' arrest and confinement was without probable cause in violation of the Fourth Amendment to the Constitution. Id. at ¶¶ 26-32; see also First Habeas Petition ¶¶ 36-42 [#1]. Count III asserts that the arrest and confinement violate the Treaty. Second Habeas Petition ¶¶ 33-41; see also First Habeas Petition ¶¶ 43-51 [#1]. Count IV asserts that the arrest and confinement violate 18 U.S.C. § 3184. Second Habeas Petition ¶¶ 42-45 [#47]; see also First Habeas Petition ¶¶ 52-55 [#1]. And finally, the Taylors allege that their arrest and confinement violate the Fifth Amendment to the Constitution in light of the dangers posed by COVID-19. Second Habeas Petition ¶¶ 46-52 [#47]; see also First Habeas Petition ¶¶ 56-61 [#1].

The government argues that the filing of the Second Habeas Petition [#47] is an abuse of the writ of habeas corpus; that review of the Magistrate Judge's decision should have been sought when that decision issued, rather than after the Secretary made his determination; and that this court is without jurisdiction to consider the claims in Count I. U.S. Mem. 3-4 [#50].

The court agrees that the Taylors' reiteration of the challenges to their confinement in light of the dangers posed by COVID-19 and to their initial arrest deserve no further scrutiny or reconsideration of the court's decision on their First Habeas Petition [#1]. However, the Taylors are not barred by virtue of the earlier habeas petition from challenging the Magistrate Judge's subsequent extradition decision. See e.g., United States v. Kin-Hong, 110 F.3d 103, 107-08 & n.3 (1st Cir. 1997) (recounting that petitioner, who had filed a pre-certification writ of habeas corpus, "filed an amended petition for writ of habeas corpus," and noting that the writ of habeas corpus was "the only avenue by which a fugitive sought for extradition . . . may attack the magistrate judge's decision"). And although the government may have preferred that the Second

Habeas Petition [#47] be filed immediately after the Magistrate Judge's decision, the Taylors offer some authority for considering a habeas petition after the Secretary's decision, see Pet. Mem. 18 [#57] (citing Venckiene v. United States, 929 F.3d 843 (7th Cir. 2019)), and the court has found no contrary authority barring consideration now. Accordingly, the court turns first to the Taylors' claim that their confinement violates the Treaty and 18 U.S.C. § 3184 based on a lack of probable cause that they committed an extraditable offense and then to their claims under Count I, as well as the government's challenge to this court's jurisdiction to consider those claims.

A. Challenges Under 18 U.S.C. § 3184

The statutory scheme governing extradition, 18 U.S.C. § 3181 *et seq.*, sets forth "a two-step procedure which divides responsibility for extradition between a judicial officer and the Secretary of State." Kin-Hong, 110 F.3d at 109. Pursuant to 18 U.S.C. § 3184, the Magistrate Judge was obligated (1) to determine if the crime charged was covered by the Treaty; (2) to conduct a hearing to determine if the evidence was sufficient to sustain the charge under the Treaty; and, if so, (3) to "certify" to the Secretary that a warrant for the surrender of the relator "may issue." 18 U.S.C. § 3184; see also Kin-Hong, 110 F.3d at 109.

The Taylors did not dispute in the proceedings before the Magistrate Judge or in their Second Habeas Petition [#47] that there is probable cause to find that they assisted Ghosn in leaving Japan[3] or that, at the time, Ghosn was charged with a crime. They argue instead that, at the time of the alleged crime, Article 103 of the Japanese Penal Code did not make it unlawful to assist someone charged with a crime but released on bail in escaping from Japan. Pet. Mem. 20-

[3] As set forth above, Petitioners have belatedly sought to challenge the probable cause determination as to Peter Taylor, but this challenge is untimely. See Order [#80].

24 [#57]. They further contend that the Magistrate Judge erroneously gave "conclusive weight" to the Japanese government's interpretation of its laws and failed to consider the arguments offered by the Taylors. Id. at 25. In the Taylors' view, "such deference would render judicial review a meaningless exercise in the extradition context, where a foreign government always will argue that something is prosecutable under its law, and it would strip United States citizens of their right to have their constitutional rights protected by Article III courts." Id.

But "extradition proceedings are not vehicles for United States federal courts to interpret and opine on foreign law," Noeller v. Wojdylo, 922 F.3d 797, 805 (7th Cir. 2019), and the Taylors' unsupported assertion that the court must delve deeply into foreign law in order to protect United States citizens in extradition proceedings is misplaced. Citizens are protected from the threat that a foreign government will simply "argue that something is prosecutable under its laws" not by the court's opining on foreign law but by the dual criminality provisions in extradition treaties. See Kin-Hong, 110 F.3d at 114. A "dual criminality requirement" ensures "that extradition is granted only for crimes that are regarded as serious in both countries." Id. (citing United States v. Saccoccia, 58 F.3d 754, 766 (1st Cir. 1995); Restatement (Third) of the Foreign Relations Law of the United States § 476, cmt. d (1987); id. § 475, cmt. c). "'[U]nless a plausible challenge is raised by the person sought, the authorities in the requested state will presume that the acts alleged constitute a crime under the law of the requesting state, and will consider whether the acts alleged constitute a crime under the law of the requested state.'" DeSilva v. DiLeonardi, 125 F.3d 1110, 1113–14 (7th Cir. 1997) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 476, cmt. D); see also In re Assarsson, 635 F.2d 1237, 1244 (7th Cir.1980) (discussing dangers of delving into foreign law).

Here, the Magistrate Judge found:

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> that the charges for which extradition is sought are crimes pursuant to both Japanese and United States law and covered by the Treaty. Article I of the Treaty provides for the return to Japan of persons found in the United States who are sought by Japan for prosecution, trial or to execute punishment for any offense specified in Article II of the Treaty. Article II of the Treaty provides for extradition for offenses listed in an annexed schedule which includes an offense relating to obstruction of justice, including harboring criminals. The [Taylors] have been charged for their involvement in harboring or enabling the escape of someone charged with a crime, in violation of Article 103 of the Japanese Penal Code. This offense would also be subject to criminal prosecution under various United States statutes, including among others 18 U.S.C. § 1073 and 18 U.S.C. §§ 3148(a) and 401.

Extradition Certification and Order of Commitment 5 [#50-1].[4] The Taylors do not dispute that the actions they are accused of amount to a crime under United States law, as well as obstruction of justice under the Treaty. Accordingly, their fear that "foreign government always will argue that something is prosecutable under its law" and that the court must therefore deeply analyze Japanese law is unfounded.

In any event, the Taylors' complaint is misplaced, where the Magistrate Judge did engage in the limited review of Japanese law necessary to ensure that the requirements of the extradition statute and treaty were satisfied. See Skaftouros v. United States, 667 F.3d 144, 156 (2d Cir. 2011) ("Judicial officers considering extradition requests—and, by extension, district judges considering habeas petitions challenging extradition orders—should not engage in an analysis of the demanding country's laws and procedure, except to the limited extent necessary to ensure that the requirements of the federal extradition statute and the applicable extradition treaty have been satisfied"). Here, the Magistrate Judge explained that Article 103, as written, "makes it a

[4] Article II also defines crimes covered by the Treaty as those "punishable by the federal laws of [the United States and by the laws of Japan] by death, by life imprisonment, or by deprivation of liberty for a period of more than one year." Ex. E – Treaty [#41-5]. Individuals convicted of violating Article 103 face a maximum imprisonment of 3 years. See Ex. Q – Masayuki Yoshida Decl. ¶ 6 n.1 [#41-17].

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crime to 'harbor or enable[] the escape of another person who has . . . committed a crime,'" and that "the Government of Japan has through declarations and case citations presented a reasonable interpretation of Article 103 under which the [Taylors'] conduct would constitute a violation of that provision." Extradition Certification and Order of Commitment 10 [#50-1].

The Taylors object that the Magistrate Judge should also have considered the arguments of their expert, Professor William Cleary of Hiroshima Shudo University. See Pet. Mem. 19-24 [#57]; see also Ex. C – William Cleary Decl. [#57-4]; Ex. D – Suppl. William Cleary Decl. [#57-5]; Ex. E – Second Suppl. William Cleary Decl. [#57-6]. Notably, the Taylors offer no authority for the more piercing inquiry into Japanese law that they seek.

Nor do Professor Cleary's arguments that Japan is misinterpreting its own law by applying Article 103 to the Taylors' conduct raise a plausible challenge to a finding of an extraditable offense. As noted above, Article 103 "makes it a crime to 'harbor or enable[] the escape of another person who has . . . committed a crime.'" It also punishes a person who harbors or enables the escape of a person "who has escaped from confinement." Ex. O – Japanese Treatise [#41-15]. Professor Cleary argues that the verb *toso*, translated to "escape from confinement" in the latter part of Article 103, refers to an "escape from a place of physical confinement, such as a jail, prison or detention center" and therefore does not apply to jumping bail. Ex. E – Second Suppl. William Cleary Decl. ¶ 6 [#57-6]. But this explanation is of little moment where the Taylors are charged with harboring or enabling the escape of a person alleged to have "committed a crime."

Professor Cleary further asserts that the statute does not apply here because bail jumping is not, on its own, a crime under Japanese law. Ex. C – William Cleary Decl. ¶¶ 10-11, 15 [#57-4]. However, whether "bail jumping" is a crime under Japanese law does not matter where the

Taylors are not charged with "bail jumping" and Ghosn's alleged crime that positions him as "another person who has . . . committed a crime" is not bail jumping but the financial crimes for which he was indicted. See Ex. Q – Masayuki Yoshida Decl. ¶ 7 [#41-17] (stating that the phrase "another person who has . . . committed a crime" is understood to either mean an individual convicted of a crime or an individual being investigated for committing a crime).

Professor Cleary also argues that the verb used in the first part of Article 103—*inpi*—encompasses both to "harbor" and to "enable the escape of" but that this verb applies to "a single concept that describes working against law enforcement authorities' active pursuit of a criminal to arrest him." Ex. E – Second Suppl. William Cleary Decl. ¶ 5 [#57-6]. That interpretation appears consistent with both sides' understanding of the statute, as well as that set forth in material provided by the Japanese prosecutor. Ex. Q – Masayuki Yoshida Decl. ¶ 6 [#41-17] (citing Judgment of Japanese Supreme Court, May 1, 1989, Kei-shu vol. 43, No. 5, p. 405) (Article 103 is a statute that "intends to punish a person who interferes with the criminal justice system *in a broad sense*, such as investigations, court proceedings and executions of sentences") (emphasis added). However, the further limitation offered by Professor Cleary—that the statute applies only to those who assist someone seeking to "flee from a scene of a crime or an arrest or to escape confinement," see Ex. C – William Cleary Decl. ¶ 14 [#57-4]; Ex. D - Second Suppl. William Cleary Decl. ¶¶ 5, 10 [#57-4]—is an unsupported claim delving well beyond the inquiry to be made by the extradition court. And while Professor Cleary cites cases where defendants were charged under Article 103 for assisting others evade imminent arrest, his broad assertion that *inpi* can apply only to such circumstances is contradicted by the Japanese legal treatise originally submitted by the Taylors that states that *inpi*, in the sense of an act to "enable the escape," covers acts that hinder "arrest *or* discovery" by law enforcement, therefore extending to

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situations when arrest is not law enforcement's present aim. Ex. O – Japanese Treatise [#41-15] (emphasis added). The United States has thus sufficiently established that the actions the Taylors are alleged to have committed amount to an extraditable offense under then-existing Japanese law and that the Taylors' challenge to the Magistrate Judge's certification of extradition fails.

Under the extradition statute, the Secretary "has the authority to review the judicial officer's findings of fact and conclusions of law de novo, and to reverse the judicial officer's certification of extraditability if [he] believes that it was made erroneously." [5] The Taylors have no right to review of the Secretary's decision not to reverse the Magistrate Judge's certificate of extraditability, however, for under the extradition statute, once a Magistrate Judge has certified the extradition "[i]t is then within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited." Kin-Hong, 110 F.3d. at 109.

B. Remaining Challenges

Count I of the Taylor's Second Habeas Petition [#47] challenges the Secretary's authorization of their surrender to Japan as violations of the Convention Against Torture, as implemented by the FARR Act, and the ICCPR, as well as "other fundamental notions of due process," "such as a right to a speedy trial and the right to counsel during interrogations." Pet. Mem. 3-4, 8 [#57].

The Taylors' objection that their detention would violate "notions of due process" is exactly the kind of claim that falls beyond the scope of the court's review under the rule of non-

[5] The Secretary may also "decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations. The State Department alone, and not the judiciary, has the power to attach conditions to an order of extradition. Of course, the Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator." Id. at 109-10 (internal citations omitted).

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inquiry. See Neely v. Henkel, 180 U.S. 109, 123 (1901) ("When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States"); see also Hilton v. Kerry, 754 F.3d 79, 84–85 (1st Cir. 2014).

The Taylors' claim that their extradition would violate the Secretary's obligations under the ICCPR, Pet. Mem. 13 [#57], fairs no better. The ICCPR is not a self-executing treaty, see Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004), and has not been implemented domestically by statute. It is therefore not binding as a matter of domestic law and does not constitute federal law that is judicially enforceable. See Igartúa–De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

The Convention Against Torture claim, however, requires greater scrutiny. The Taylors argue that the Convention Against Torture, as implemented by the FARR Act, creates an independent substantive basis on which they can challenge the legality of the Secretary's decision to extradite them and, therefore, the legality of their detention pending that extradition. Pet. Mem. 5 [#57]. The government counters that, to the extent such claims exist, Congress has stripped federal courts' jurisdiction over them. U.S. Mem. 9 [#50]. The court considers first whether such a claim exists, then turns to the jurisdictional issue and the scope of habeas review before considering the merits of this claim.

1. Existence of the Claim

Article 3 of the Convention Against Torture provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT Art. 3, § 1. Following

Senate ratification in 1990, the Convention Against Torture entered into force in November 1994 for the United States. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999). The Convention Against Torture is not self-executing and, by its own force, does not confer any judicially enforceable rights on individuals. See Saint Fort v. Ashcroft, 329 F.3d 191, 202 (1st Cir. 2003). However, Congress domestically implemented most of the United States' obligations under the Convention Against Torture, including Article 3, through the FARR Act.

To that end, the FARR Act reiterates the Convention Against Torture's prohibition against extraditing to torture, stating that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." FARR Act § 2242(a) (codified at 8 U.S.C. § 1231 note). It also directs the "heads of the appropriate agencies"—here, the State Department—to "prescribe regulations to implement the obligations of the United States under Article 3" of the Convention Against Torture. Id. at § 2242(b).

By "incorporate[ing] the language of CAT itself, enacting as U.S. domestic policy the international obligation the United Sates undertook in ratifying CAT" and then "direct[ing] the Executive 'to implement the obligations of the United States under' CAT and specif[ying] how such implementation ought to occur," "the text and structure of the FARR Act confirm that it *does* impose a binding obligation on the Secretary State not to extradite individuals likely to face torture." Trinidad y Garcia v. Thomas, 683 F.3d 952, 987-88 (9th Cir. 2012) (en banc) (Berzon, C.J., concurring in part and dissenting in part) (emphasis original); see also id. at 988 ("The FARR Act's mandate to agencies that they 'implement' the United States' obligations under

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CAT is a direction to put into practice the mandatory Article 3 obligations undertaken by signing CAT and incorporated into U.S. law by the FARR Act. . . . [This subsection] compels the conclusion that the FARR Act imposes upon the Executive an obligation to abide by CAT"). For these reasons, "the duty imposed upon the Secretary extends beyond simply *considering* whether [the relator] is more likely than not to face torture. [The Secretary] is required not to extradite [the relator] if there are substantial grounds to believe that he is more likely than not to face torture." Id. at 996 (emphasis original).[6] This requirement creates a substantive right against extradition if it is "more likely than not" that the petitioner will be tortured. See Saint Fort, 329 F.3d at 202 (citing Wang v. Ashcroft, 320 F.3d 130, 141 (2d Cir. 2003)).

2. Jurisdiction

The court turns next to the question of whether it has jurisdiction to consider the Taylors' claim that, on the information available to the Secretary, they *are* more likely than not to be tortured in Japan and that the Secretary's decision to extradite them is therefore illegal under the FARR Act. Pet. Mem. 8-14 [#57]. If their extradition is illegal under the FARR Act, it follows that there is no basis for their continued detention. This is exactly the type of claim that is addressed through habeas corpus: the writ's very foundation is as a check on the arbitrary exercise of executive discretion. See Boumediene v. Bush, 533 U.S. 723, 744-45, 785, 794, 797 (2008).

A petition for a writ of habeas corpus seeks judicial review of the legality of a prisoner's detention, and this "Great Writ" has been much celebrated as foundational to modern principles of liberty. See, e.g., Fay v. Noia, 372 U.S. 391, 402 (1963), overruled in part by Wainwright v.

[6] For purposes of the State Department regulations implementing the FARR Act, the term "Secretary" is defined to mean the Secretary or the Deputy Secretary. 22 C.F.R. 95.1(d).

Sykes, 433 U.S. 72 (1977) (noting that the history of the habeas corpus is "inextricably intertwined with the growth of fundamental rights of personal liberty"). But unlike in some state constitutions, see, e.g., Massachusetts Constitution of 1780, pt. 2, ch. 6, art. VII, the federal Constitution does not explicitly guarantee the availability of habeas corpus; rather, it presupposes the existence of the writ by limiting the circumstances in which Congress may suspend it. See U.S. CONST. art. I, § 9, cl. 2.

The Suspension Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Id. The text of the Suspension Clause does not, itself, guarantee any content to the writ, but it is more than a negative restraint on Congress: "'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified." Boumediene, 553 U.S. at 746 (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 313 (2001), superseded on other grounds by statute, REAL ID Act of 2005, Pub. L. No. 109–13, Div. B., § 106(a)(1)(B), 119 Stat. 231, 310 (2005) ("REAL ID Act"), as recognized in Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020)). Much has been written about the history of habeas corpus, see, e.g., Fay, 371 U.S. at 399-415; Boumediene, 553 U.S. at 739-46, and it suffices to say here that the writ, as it existed when the Constitution was ratified, was available to those who sought to challenge their transfer beyond the jurisdiction of the habeas court. See Kiyemba v. Obama, 561 F.3d 509, 523 (D.C. Cir. 2009) (Griffith, C.J., concurring in the judgment in part and dissenting in part) ("The bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas"); see also Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 12 (Eng.) ("[N]o subject . . . may be sent . . . into parts, garrisons, islands or places beyond the seas . . . within or without the dominions of his Majesty").

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The government argues that federal courts lack jurisdiction to entertain challenges to extradition based on the FARR Act and the REAL ID Act. Although Congress may not suspend habeas corpus, it may restrict access to the writ so long as it provides an "adequate and effective" substitute. Swain v. Pressley, 430 U.S. 372, 381 (1977). The court therefore considers whether Congress restricted access to the writ and provided an adequate and effective substitute that would revoke the court's jurisdiction over the Taylors' FARR Act claims.

Section 2242(d) of the FARR Act states:

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [Convention Against Torture] or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

FARR Act § 2242(d) (codified at 8 U.S.C. § 1231 note). The government would have the court read this section to limit review of Convention Against Torture claims to the review process available for final orders of removal. But in Saint Fort v. Ashcroft, the First Circuit foreclosed the argument that this provision bars habeas review. See 329 F.3d at 201. The court held that the FARR Act's failure to *provide* jurisdiction had no impact on habeas cases, since a different federal statute—28 U.S.C. § 2241—already conferred the federal courts jurisdiction over habeas cases in which a petitioner claimed detention "in violation of the Constitution or laws of treaties of the United States." Id. Neither did the FARR Act *revoke* that jurisdiction because, where the statute did not "expressly refer to 28 U.S.C. § 2241 or to habeas review," the court declined to "imply an intent to repeal habeas jurisdiction from silence." Id. To do so "would give rise to grave constitutional concerns" given the "lack of an alternative forum" in which the claim could be raised. Id. But see Omar v. McHugh, 646 F.3d 13, 23 n.10 (D.C. Cir. 2011) (suggesting that the Suspension Clause applies only to the statutory claims available in 1789).

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The government's reliance on the REAL ID as divesting this court of jurisdiction over the Taylors' FARR Act claim suffers from the same deficiencies. The REAL ID Act amended § 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252, to expressly bar habeas review of final orders of removal. See Ishak v. Gonzales, 422 F.3d 22, 28 (1st Cir. 2005). In relevant part, the REAL ID Act provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment.

8 U.S.C. § 1252(a)(4). The government is correct that the REAL ID Act expressly strips habeas jurisdiction from the federal courts. But the stripping of jurisdiction must be limited to its context.

The REAL ID Act is an immigration statute that affects specified immigration proceedings. It prescribes that the "sole and exclusive means for judicial review of an order of removal" is by way of a petition for review in the appropriate court of appeals. 8 U.S.C. § 1252(a)(5). As other courts have noted, it is highly improbable that Congress intended the REAL ID Act—the point of which was to consolidate review of immigration claims into a direct review process—to revoke the courts' jurisdiction in non-immigration cases where direct review is unavailable. See Trinidad y Garcia, 683 F.3d at 956. But, more fundamentally, such a revocation would violate the Suspension Clause. In removal proceedings, individuals can invoke the Convention Against Torture and the FARR Act as a basis to challenge deportation and to have the executive agency's factual determinations about the likelihood of torture reviewed by a federal court of appeals. See Nasrallah, 140 S. Ct. at 1694. No such alternative process exists for those detained pending extradition. Accordingly, to avoid a construction that violates the

Suspension Clause, the court concludes that it has jurisdiction to hear the Taylors' claims brought under the Convention Against Torture, as implemented by the FARR Act.

3. Scope of Review

The government also claims that the so-called "rule of non-inquiry" prevents the court from considering the Taylors' FARR Act claims. U.S. Mem. 9 [#50]. However, the rule of non-inquiry is not a jurisdictional rule. See Kin-Hong, 110 F.3d at 112 ("None of these principles, including non-inquiry, may be regarded as an absolute"); see also Aguasvivas v. Pompeo, No. 19-1937, 2021 WL 58142, at *3 n.6 (1st Cir. Jan. 7, 2021). Rather, it relates to the scope of the court's habeas review.

The rule of non-inquiry "bars courts from evaluating the fairness and humaneness of another country's criminal justice system, requiring deference to the Executive Branch on such matters." Hilton, 754 F.3d at 84–85 (quoting Khouzam v. Att'y Gen., 549 F.3d 235, 253 (3d Cir. 2008)). That is not to say that a foreign nation's ability and willingness to provide justice is irrelevant to the extradition decision but rather that these are issues for the executive and legislative branches. Consideration of the procedural protections in the country requesting extradition is therefore not within the scope of this court's habeas review. See Hilton, 754 F.3d at 89 (quoting Holmes v. Laird, 459 F.2d 1211, 1219 (D.C. Cir. 1972)) ("[I]t is well settled that 'surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials'").

But while the rule of non-inquiry mandates deference insofar as a petitioner's allegations concern the constitutionality of the conduct of a *foreign* jurisdiction, "it is indubitably the role of courts to ensure that *American* officials obey the law." Trinidad y Garcia, 683 F.3d at 995

(Berzon, C.J., concurring in part and dissenting in part) (emphasis added). Where a petitioner claims that the Secretary has violated his statutory obligations under the FARR Act, the court has both the authority and the responsibility to ensure that his discretion to extradite—and, therefore, to detain the petitioners pending extradition—is being exercised within the parameters of the law established by Congress. See Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) ("[T]he Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions"). See also Trinidad y Garcia, 683 F.3d at 995 (collecting cases). The court therefore considers the scope of that review.

Development of habeas corpus has long been linked, historically and conceptually, to due process. See, e.g., Hamdi, 542 U.S. at 529 (the "most elemental" liberty interest protected by the Due Process Clause is "the interest in being free from physical detention by one's own government"). At its core, due process requires that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). It follows, then, that in the context of executive detention, the primary concern under a due process analysis is the adequacy of the procedures employed by the executive branch in subjecting an individual to detention. The one appellate court to have considered the Convention Against Torture in the context of extradition has thus concluded that "the scope of habeas review allows courts to examine whether the Secretary has complied with her non-discretionary obligations" under the FARR Act and its implementing regulations. Trinidad y Garcia, 683 F.3d at 961 (Thomas, J., concurring). In effect, this approach treats claims brought under the FARR Act as creating a liberty interest that triggers due process considerations, which are satisfied if the Secretary certifies to the court that he has

"considered" whether the petitioner is more likely than not to face torture. See id. at 957 (plurality opinion).

If the Due Process Clause, alone, governed habeas review, the Ninth Circuit's approach in Trinidad y Garcia would suffice. However, the Supreme Court has held that the Suspension Clause necessitates more than due process; it requires "a meaningful opportunity to contest the factual basis for [the] detention before a neutral decisionmaker." Hamdi, 542 U.S. at 510. "Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant." Boumediene, 553 U.S. at 785.

The adequacy of this "meaningful opportunity" to demonstrate that one's detention is unlawful depends on "the rigor of any earlier proceedings": for example, "when a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is more pressing." Id. at 782-83. Under such circumstances, for the habeas corpus "to function as an effective and proper remedy . . . the court that conducts the habeas proceeding must have the means to correct errors that occur during the [prior] proceedings." Id. at 786. And "[i]f a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court." Id. at 790. In short, the Suspension Clause provides an independent basis for habeas corpus with its own scope of review.

As explained above, the FARR Act creates a *substantive* right not to be extradited to torture, and accordingly, under the Suspension Clause, that substantive right requires the court to consider more than procedural adequacy on habeas review. In this case, where the Taylors have had no opportunity to contest the factual basis of the Secretary's determination that they will not be tortured in Japan, this court's review "must extend not only to determining whether the

Secretary *considered* [the petitioners'] claim that [they] would be tortured but to ascertaining that []he complied with [his] obligation not to extradite where, on the available information, torture is more likely than not." Trinidad y Garcia, 683 F.3d at 996 (Berzon, J., concurring in part and dissenting in part).

The government counters that the Supreme Court's decision in Munaf v. Geren, requires absolute deference to the Secretary's determination regarding the likelihood of torture under the FARR Act and its enacting regulations, U.S. Mem. 10 [#50]; however, Munaf reserved that issue, and the court declines to read Munaf as settling a question that it explicitly did not, 553 U.S. 674, 703 n.6 (2008) ("We hold that these habeas petitions raise no claim for relief under the FARR Act and express no opinion on whether Munaf and Omar may be permitted to amend their respective pleadings to raise such a claim on remand"). Munaf involved habeas petitions brought by two United States citizens who had voluntarily traveled to Iraq and allegedly committed crimes there. Id. at 679. The petitioners were detained by the United States military in Iraq, the Iraqi government requested that they be transferred to Iraqi criminal custody, and they objected to transfer on the grounds that they would be tortured. Id. The court held that the federal district court could not enjoin the United States military from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign to that sovereign for criminal prosecution. Id. at 689. And it emphasized that "prudential concerns," such as international comity and respect for the sovereignty of foreign states, "render[ed] invalid attempts to shield citizens from foreign prosecution" in such circumstances. Id. at 693, 699.

Munaf contained two important caveats, though. First, the petitioners claimed that they should not be transferred to Iraqi criminal custody because they were "innocent civilians who ha[d] been unlawfully detained by the United States in violation of the Due Process Clause." Id.

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at 692. They did not raise a claim for relief under the FARR Act, and the Court explicitly declined to consider the merits of such a claim. Id. at 703 n.6. So, while the Court in Munaf required deference to the executive branch based on the facts of that case, it did not address whether that deference could be overcome by a meritorious FARR Act claim. But see Omar, 646 F.3d at 21 ("[T]he inquiry [pursuant the FARR Act] that Omar asks this Court to undertake in this habeas case . . . is the precise inquiry that the Supreme Court in Munaf already rejected").

Second, Munaf affirmatively left open the question of whether the result would change in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." Id. at 702. And Justice Souter, joined by Justices Ginsburg and Breyer, suggested that he "would extend the caveat to a case in which the probability of torture [wa]s well documented, even if the Executive fail[ed] to acknowledge it." Id. at 706 (Souter, J., concurring). Given these caveats, this court declines to interpret Munaf as sharply narrowing the Supreme Court's decision in Boumediene—particularly where the two cases were decided on the same day.

While Boumediene entitles the Taylors to a "meaningful opportunity" to demonstrate that they are being detained pursuant to the erroneous application or interpretation of relevant law, the harder question is what that meaningful opportunity looks like here. The Taylors claim that, to conduct its review, the court should order the State Department to produce the entire administrative record on which the Secretary's decision is based. Pet. Mem. 14 [#57]. But the Supreme Court has emphasized the importance of judicial restraint in cases with "potential implications for the foreign relations of the United States." Sosa, 542 U.S. at 727. There needs to be an appropriate balance between a level of executive deference that recognizes the executive's primary role in foreign relations and constitutionally required judicial review. That balance falls

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well short of the Taylors' proposal that the court conduct a full review of the Secretary's decision.

Instead, the court follows a "rule of limited inquiry" "designed to ensure against blatant violations of the Secretary's CAT obligations as implemented by the FARR Act." See Trinidad y Garcia, 683 F.3d at 997, 1001 (Berzon, C.J., concurring in part and dissenting in part). Under this rule of limited inquiry, a petitioner bears the burden of demonstrating through "strong, credible, and specific evidence" that, notwithstanding the Secretary's determination to the contrary, the petitioner is "more likely than not" to be tortured upon extradition. Id. at 1001; see also Kiyemba, 561 F.3d at 525 (Griffith, C.J., concurring in the judgment in part and dissenting in part) ("Critical to ensuring the accuracy of the government's representations is an opportunity for the detainees to challenge their veracity. The rudimentaries of an adversary proceeding demand no less"). To establish a prima facie case, the petitioner must demonstrate that "no reasonable factfinder could find otherwise." Trinidad y Garcia, 683 F.3d at 1001 (Berzon, C.J., concurring in part and dissenting in part). If and only if the petitioner makes this showing, the burden shifts to the Secretary to "submit evidence, should []he so choose and *in camera* where appropriate, demonstrating the basis for [his] determination that torture is not more likely than not." Id.

This "highly deferential, limited" review "minimize[s] the burden on the State Department" and "protect[s] its legitimate interest in conducting foreign affairs." Id. It ensures that, in the vast majority of cases, the reviewing court will not need to conduct a searching evaluation of the Secretary's decision to extradite, thereby maintaining a healthy level of executive deference, while reflecting the fact that "the Executive's authority to extradite is neither inherent nor unlimited." Id. at 995.

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4. Merits

Having addressed the questions of jurisdiction and scope of review, the court finally turns to the merits of the Taylors' claims, and reviews (1) whether the Secretary considered the Taylors' claim and determined that it is not "more likely than not" that they will face torture if extradited to Japan, and, if so, (2) whether the Taylors have demonstrated that no reasonable factfinder could find other than that they are more likely to face torture than not.

The State Department's regulations implementing the United States' obligations under the Convention Against Torture state that:

> In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:
>
> (i) The intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (iii) The threat of imminent death; or
>
> (iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

22 C.F.R. § 95.1(b)(2). The regulations go on to explain that "[n]oncompliance with applicable legal procedural standards does not per se constitute torture" and that "[t]orture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment." 22 C.F.R. §§ 95.1(b)(3), (b)(7).

In accordance with the Convention Against Torture and the procedures set forth in State Department regulations, the Deputy Secretary determined that the surrender of the Taylors for

extradition was not more likely than not to result in their being tortured in Japan. Declaration of Deputy Secretary [#60-1]. The burden therefore shifts to the Taylors to demonstrate that no reasonable factfinder could have made this determination.

The Taylors have submitted multiple exhibits purporting to demonstrate that they are "more likely than not" to be tortured if extradited to Japan. Many of these exhibits are news articles and reports discussing the Japanese criminal justice system's use of prolonged pretrial confinement and interrogation to coerce confession. See, e.g., AP News Article [#59-8]; BBC News Article [#59-9]; Reuters Article [#59-15]. There are also accounts claiming that Japanese prisons often place detainees in small cells, fail to provide adequate heating, dim the lights but never fully turn them off, and lack Western-style bedding. See Reuters Article [#59-15]; Gohsn Declaration [#61-2]; McIntyre Declaration [#61-3].

But although the prison conditions in Japan may be deplorable and although the criminal procedures that the Taylors may be subjected to may not satisfy American notions of due process, those allegations do not constitute the "severe physical or mental pain or suffering" contemplated by the enacting regulations. The Taylors have not claimed that they are more likely than not to suffer "severe physical pain and suffering," to be subjected to "procedures calculated to disrupt profoundly the senses or the personality," or to be threatened with death. See 22 C.F.R. § 95.1(b)(2). They have therefore failed to establish that no reasonable factfinder could find anything other than that they are more likely than not to be subjected to torture in Japan. This ends the court's inquiry.

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IV. Conclusion

Accordingly, the Taylors' Second Petition for Writ of Habeas Corpus [#47] is DENIED, and the Emergency Stay [#49] is lifted.

IT IS SO ORDERED.

January 28, 2021

/s/ Indira Talwani
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL L. TAYLOR and PETER M. TAYLOR,	*	
Petitioners,	*	
v.	*	Civil No. 4:20-cv-11272-IT
JEROME P. MCDERMOTT, Sheriff, Norfolk County, Massachusetts, and JOHN GIBBONS, United States Marshal, District of Massachusetts,	*	
Respondents.	*	

MEMORANDUM & ORDER

February 1, 2021

TALWANI, D.J.

On January 28, 2021, this court denied Petitioners Michael Taylor and Peter Taylor's Second Petition for Writ of Habeas Corpus [#47] and Motion to Amend the Habeas Petition [#79]. Mem. & Order [#80]; Mem. & Order [#81]. The Taylors promptly appealed, Notice of Appeal [#83], and have now filed an Emergency Motion to Stay Pending Exercise of Appellate Rights [#86]. The Taylors ask this court to stay their extradition and/or surrender to Japan "pending the conclusion of appellate proceedings in the First Circuit (including any *en banc* review) and review by the Supreme Court on a petition for a writ of certiorari." Id. at 15. They request that in the alternative, if the court denies the requested relief, the court enter a temporary stay allowing the Taylors to file a motion a motion to stay with the First Circuit and staying their extradition until the First Circuit rules on such a motion. Id.

In determining whether to grant a stay pending appeal, courts consider the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on

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the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The first two factors—likelihood of success and irreparable harm—are "the most critical," and when, as here, the government is the opposing party, the third and fourth factors merge. Id. at 434-35.

Beginning with the first factor, the court finds that the Taylors have not shown a substantial likelihood of success on the merits. Insofar as the Taylors frame the issue for appeal as whether their conduct was a crime under Article 103 of the Japanese Penal Code, the court inquired into Japanese law to the extent permissible and concluded that the government had met its burden of establishing that the charges against the Taylors, if true, amount to an extraditable offense under the United States-Japan Treaty on Extradition. Mem. & Order 9-14 [#81]. No legal authority supports the more piercing inquiry into Japanese law sought by the Taylors. The court also found that Peter Taylor did not provide cause for his eight-month delay in raising *any* challenges to the factual allegations against him and that the Taylors' Motion to Amend the Habeas Petition [#79] was therefore untimely. Mem. & Order [#80]. Finally, the court carefully considered and rejected the Taylors' challenges to the Secretary of State's authorization of the Taylors' surrender, concluding that the Taylor's extradition complied with the United States' treaty obligations under the Convention Against Torture. Mem. & Order 14-28 [#81].

Turning to the second factor, the court finds that the Taylors have not shown that they are likely to be irreparably injured by this court's denial of a stay. The government has confirmed that it will not surrender the Taylors to the Japanese government before February 12, 2021. U.S.

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Opp. 2 [#88]. To the extent that the Taylors seek further judicial review, they have sufficient time to file a motion to stay with the First Circuit.

Where the Taylors have not shown a likelihood of success on the merits or of irreparable injury absent a stay, the court need not consider the third and fourth factors. The Emergency Motion to Stay Pending Exercise of Appellate Rights [#86] is accordingly DENIED.

IT IS SO ORDERED.

February 1, 2021

/s/ Indira Talwani
United States District Judge

ATTACHMENT G

United States Court of Appeals
For the First Circuit

No. 21-1083

MICHAEL L. TAYLOR; PETER MAXWELL TAYLOR,

Petitioners - Appellants,

v.

JEROME P. MCDERMOTT, Sheriff, Norfolk, County, Massachusetts; JOHN GIBBONS, United States Marshal, District of Massachusetts,

Respondents - Appellees.

Before

Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

ORDER OF COURT

Entered: February 11, 2021

Petitioners-appellants have filed an "emergency motion to stay their surrender and extradition to Japan pending appellate review," which defendants-appellees oppose. Petitioners-appellants have failed to demonstrate a likelihood of success on the merits and, more generally, have failed to demonstrate that a stay is in order. See Nken v. Holder, 556 U.S. 418, 426 (2009) (stay standard and factors). The motion is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Paul V. Kelly, Robert L. Sheketoff, Abbe David Lowell, Daniel Marino, Tillman James Finley, James P. Ulwick, Stephen W. Hassink, Philip Mirrer-Singer

ATTACHMENT H

Exhibit C

ATTACHMENT I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

IN THE MATTER OF THE EXTRADITION OF MICHAEL L. TAYLOR	)	Case No. 20-mj-1069-DLC
IN THE MATTER OF THE EXTRADITION OF PETER MAXWELL TAYLOR	)	Case No. 20-mj-1070-DLC

DECLARATION OF DR. WILLIAM B. CLEARY

Pursuant to 28 U.S.C. § 1746, I, William B. Cleary, hereby declare as follows:

1. My name is William B. Cleary. I am an adult citizen of the United States, and a practicing attorney and law professor in Japan. I reside in Hiroshima, Japan. I have lived and worked continuously in Japan since 1993. Prior to that, from October 1983 until June 1990, I lived in Sapporo, Japan as a Japanese Government (Monbusho) Scholarship recipient. I am making this declaration in connection with the above-captioned matters, not as an advocate, but to assist the Court in understanding Japanese criminal law which is relevant to these cases.

2. I have a bachelor's degree from the United States International University and a juris doctor from California Western School of Law, both located in San Diego, California. I also hold L.L.M. and Ph.D. degrees in Japanese Public Law from Hokkaido University in Sapporo, Japan. The focus of my doctoral work was Japanese criminal law and procedure.

3. Since April 2008, I have been employed as a Tenured Professor of Comparative and Foreign Law at Hiroshima Shudo University in Hiroshima. Prior to my tenure at Hiroshima Shudo University, I served as a professor at Iwate University in Morioka, Japan, and the College of International Studies at the University of Tsukuba in Ibaraki, Japan. As a professor, I have taught courses in, among other things, Japanese criminal procedure, a subject I have taught for

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four years. It is to be noted that the subject of criminal procedure is an important subject and is tested on the Japanese bar examination. I was a tenured associate professor at Iwate University at the time, 2004 to 2008.

4. In addition to my academic work, I have practiced law as an attorney with various firms, including Blakemore & Mitsuki in Tokyo and Fried Frank Harris Shriver and Jacobson in New York. From 2000 to 2002, I served as a Japanese law expert advising and assisting the U.S. Forces Japan command at Yokota Air Force Base. I also previously worked as an Assistant Attorney General in the Civil Division for the Government of Guam. In that capacity, I served as an administrative hearing officer and adviser to several government agencies.

5. A copy of my *curriculum vitae* is attached hereto as Exhibit A.

6. I have been asked to review the facts alleged in these matters and to provide an expert legal opinion to assist the Court in understanding relevant provisions of Japanese law, including how those provisions are understood and interpreted.

7. Specifically, I have been asked to render an opinion on whether the allegations against Michael L. Taylor and Peter M. Taylor—who allegedly assisted Carlos Ghosn in traveling from Japan to Lebanon—would, if true, constitute a violation of Article 103 of the Japanese Penal Code. As detailed more fully herein, they do not. In fact, Mr. Ghosn's act of breaching the terms of his release in Japan is not an offense under Japanese criminal law.

8. The Complaints in these matters assert that the Taylors have "been charged under Article 103 of the Japanese Penal Code with enabling the escape of Carlos Ghosn Bichara ('Ghosn'), who was indicted in Japan for financial crimes and had been released on bail pending his trial." (Complaint ¶ 5.)

9. With respect to the status of Mr. Ghosn at the time of the alleged events, the

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Complaints allege specifically as follows:

> On April 25, 2019, the Tokyo District Court released Ghosn on bond with conditions that included, among other things, (i) living in the house in Tokyo specified by the bail conditions; (ii) when summoned, reporting to a designated location or notifying the court, in advance, of the reasons that he is unable to report; (iii) not hiding or fleeing; (iv) obtaining advance approval for the court for any domestic trips lasting three days or more; and (v) not taking any overseas trips. By fleeing Japan pending trial, Ghosn violated his bail conditions.

(Complaint ¶ 7(b).)

10. Violating one's bail conditions, such as those alleged in the Complaint, or "jumping bail," as Mr. Ghosn is alleged to have done, is not a criminal offense in Japan. Articles 97 (titled "Escape") and 98 (titled "Aggravated Escape") of the Japanese Penal Code make it a criminal offense for a person *who is confined* on a judge's order (or, under Article 98, held under a subpoena) to escape, but these statutory provisions apply to persons who are confined or detained in a prison, jail, or other such detention facility. These statutes do not apply—nor have they ever been applied—to individuals who are released on bail.

11. The fact that "jumping bail" is not a crime in Japan has been widely recognized by Japanese officials, legal commentators, and the Japanese media. In fact, in the wake of Mr. Ghosn's departure from Japan in December 2019, there have been a number of articles on this very subject, discussing the fact that bail jumping is not illegal in Japan and that the Japanese government is considering adopting new laws that *would* make bail jumping a criminal offense. I have attached as Exhibits B through F examples of articles on this subject, from both before and after Mr. Ghosn's departure, all of which clearly acknowledge that bail jumping is not a crime in Japan.

12. Article 103—the provision that Japan apparently alleges that the Taylors violated—makes it a crime to harbor or enable the escape of another person who has either committed a crime punishable with a fine or greater punishment or has escaped from

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confinement.

13. To my knowledge, prior to the arrest warrants issued for the Taylors, the Japanese government has never attempted to apply Article 103 to any situation involving violation of bail conditions. Article 103 has never been interpreted or understood to encompass such a charge. Indeed, I have not been able to identify a single prior case where Japanese prosecutors charged a person (successfully or unsuccessfully) with enabling another person to violate his or her bail conditions.

14. Article 103 does not apply to assisting a person to violate the terms of his bail conditions. It only applies to harboring or enabling a person *to escape* from either confinement (that is, like Article 97, confinement within a prison, jail or other detention facility) or being arrested by the police, or harboring or enabling a person to avoid arrest *after they have escaped* from confinement.

15. Article 103 simply does not prohibit assisting someone to violate his bail conditions. That is not within the scope of the "escape" which Article 103 prohibits harboring or enabling, which follows from the fact that bail jumping is itself not prohibited by Article 97 or any other provision of the Japanese Penal Code. It would be Illogical to criminalize assisting someone to do something that is not criminal. It would also be inconsistent with Article 63 of the Japanese Penal Code, which provides that an accessory to a crime must receive a lesser punishment than the principal. Simply put, it would be incongruous for the law to impose a criminal punishment on the Taylors for assisting Mr. Ghosn in doing something for which he could not personally be held criminally liable.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

ATTACHMENT I

Executed on May 25, 2020

William B. Cleary

ATTACHMENT I

William Bernard Cleary

Education

Ph.D. (1990 March). *Japanese Public Law*-Hokkaido University. Three-year course in Japanese Public Law under the direction of the late Dr. Hiroyuki Nose; major field of study - Japanese criminal procedure, minor field of study - Japanese civil law and comparative law. Title of dissertation: "The Law of Criminal Procedure in Contemporary Japan."

LL.M (1987 March). *Japanese Public Law*-Hokkaido University. Major research: The law of negligence, both criminal and civil; professional negligence, products liability, and industrial accidents.

J.D (1978 May), California Western School of Law, San Diego, California.
Apprentice for the Appalachian Research and Defense Fund, Charleston, West Virginia; major field of practice - mental health law and the right to treatment for mental patients in West Virginia.

B.A (1975 June). United States International University, Diversified Major, San Diego, California.

Teaching Experience

Hiroshima Shudo University, Tenured Professor of Comparative and Foreign Law, April 2008 to present. Subjects taught: Comparative Law, Foreign Law, and American Law (in Japanese).

Iwate University, Tenured Associate Professor of Comparative Law, April 2004 to March 2008.
Subjects taught: Japanese Criminal Procedure (in Japanese).

College of International Studies, University of Tsukuba, Ibaraki, Japan; Visiting Professor of Law, April of 1993 to March 2000. Subjects included Introduction to Law and U.S./Japan Comparative Law. Also taught Debating, Discussion Seminar 11, International Political Economy, and Human Rights and Refugees, Also, conducted seminars on Japanese Law, and student advisor for foreign and Japanese students.

Attorney Experience

2000 to 2012 Blakemore & Mitsuki, Tokyo, Japan . Handling international corporate matters, contracts, securities, securitizations, litigation, and labor related matters.

2000 to 2002 USFJ-Yokota Air Force Base-Japanese Law Expert providing in depth research and reporting to the Command.

1993 to 2000, Tokyo City Law and Tax Partners; Of Counsel, providing international legal support for a variety of international business transactions, including: real estate matters, business matters, international licensing agreements, personnel and litigation issue, and motion picture production matters.

1991-93 Associate Attorney, Klemm, Blair, Sterling and Johnson, Agana, Guam. Specialized in real estate transactions and construction law matters for several major Japanese construction companies and banks. In addition, worked as consultant to Sumitomo Construction Company on various corporate matters, including employment discrimination, recruitment and termination issues, and government relations and public relations.

1990-91 Associate Attorney, Fried Frank Harris Shriver and Jacobson, N.Y.C. Worked with Japanese companies on various real estate transactions and development projects in the New York area. Assisted

officials at Japan Airlines Inc. concerning negotiating a long term lease with the Port Authority of New York & New Jersey for a state of the art cargo handling facility at John F. Kennedy International Airport.

1981-83 Assistant-Attorney General, Civil Division, Government of Guam. Served as an administrative hearing officer and adviser to several government agencies, including the Contractor's Licensing Board and Civil Service Commission.

1979-81 Legislative Counsel, Kosrae State Legislature, Federated States of Micronesia, and advisor to the Honourable Gaius F. Nedlic. Duties included the drafting of new legislation dealing with a variety of local matters, writing committee reports, and organizing the State and National Leadership Conference for the Federated States of Micronesia.

Attorney Qualifications

California, New York, FSM - Micronesia, & Guam

Public Presentations-Conferences

July 1999, Tokyo, Japan; The Kabuto Yama Case; a comparison of Japanese and U. S. criminal procedure with particular emphasis on racial discrimination and racial hoax. (In Japanese)

January 1999, Osaka, Japan, The Kabuto Yama Case; a comparison of Japanese and U.S. criminal procedure with particular emphasis on the right of prosecutorial appeals. (In Japanese)

November 1997, The 24th International Student Seminar at Inter-University Seminar House (Hachioji, Tokyo); title of conference, "The Expected Role of the United Nations in the 21st Century," - co-chaired with Dr. Hideo Sato a three-day discussion seminar focusing on United States - Japan relations in the United Nations system.

May 1997, Tsukuba Institute, lbaraki, Japan; conducted a three-hour lecture on United States and Japanese patent law with a detailed comparison of recent trends and landmark cases. (In Japanese)

June 1996, Sandoz Pharmaceuticals, Ltd., Tsukuba Research Institute; delivered a two-hour presentation concerning cross-cultural differences to a group of 40-50 physicians, pharmacologists, toxicologist, and biologists, etc.

August 1996, The European Institute of Japanese Studies, Stockholm, Sweden; Title of conference, "Japanese Influences in Asia." Invited as a guest participant to deliver a paper entitled, " The Legal System of Japan and Its Influences in the Region," which described in detail the historical influence of the Japanese legal systems on other Asian countries, particularly South Korea, Taiwan, and China.

February 1995, Tokyo Bar Association; made a two-hour presentation to a group of Japanese attorneys on attorney ethics and matters related to attorney discipline in the United States. (In Japanese)

January 1995, Sapporo Bar Association; made a two-hour presentation to a group of Japanese attorneys on attorney ethics and matters related to attorney discipline in the United States. Included in the presentation was a discussion of engagement letters, declination letters, fees, and areas of legal specialization. (In Japanese)

Publications (Articles) -in English

1. The Use of GPS Tracking Devices for Criminal Investigations in Contemporary Japan. Hiromira Law Review, Hiroshima Shudo University (December 2017)
2. The Law of Liability in Contemporary Japan to Third-Parties for Damages Caused by People with Dementia: A Review of the Tokai JR Supreme Court Case of March 1, 2016. Shudo Hogaku (Shudo Law Review) Vol. 39 No.2 (February 2017)
3. Parental Kidnapping and Multiculturalism: A Focus on Japan. Shudo Hogaku Vol. 35 No. 2, pp. 127-143. February 2013.
4. The Use of Confessions in Contemporary Japan. Shudo Hogaku Vol. 33 No. 1, pp. 39 - 54. September 2010.
5. The Law of Criminal Negligence in Contemporary Japan, Part III. Artes Liberales No. 79, Iwate University, Faculty of Humanities and Social Sciences, June 2006.
4. The Law of Criminal Negligence in Contemporary Japan, Part II; Artes Liberales No. 78, Iwate University, Faculty of Humanities and Social Sciences, December 2006.
5. The Law of Criminal Negligence in Contemporary Japan, Part I; Artes Liberales No. 77, Iwate University, Faculty of Humanities and Social Sciences, December 2005.
6. The Law of Double Jeopardy in Contemporary Japan; Artes Liberales No. 76, Iwate University, Faculty of Humanities and Social Sciences, June 2005.
7. The Law of Entrapment in Contemporary Japan, Part I; Artes Liberales No. 75, Iwate University, Faculty of Humanities and Social Sciences, December 2004.
8. Lawyers' Ethics and the Mass Media, August 1, 2003, (Publication in Memorial of Dr. Hiroyuki Nose); Shinyama Publishing, ISBN: 4797230711
9. Police, Prosecution, and Violence in Contemporary Japan, International Criminal Justice Review, Volume 13, 2003, pp. 181-186.
10. The Law of Criminal Procedure in Contemporary Japan Part III, Hokkaido University Law Review, January 1991, Volume 42 No. 1. Pp. 360-404 December 1991.
11. The Law of Criminal Procedure in Contemporary Japan Part II, Hokkaido University Law Review, Volume 41 No. 4. March 1991.
12. The Law of Criminal Procedure in Contemporary Japan Part I. Hokkaido University Law Review, November 1991, Volume 41- 3. Pp. 454 – 512. January 1991.
13. Criminal Investigation in Japan, California Western Law Review, Volume 26, Number 1, 1989-1990.
14. Problems with U.S. Jury System and the Americanization of Japan, Comparative Law Journal, Volume 56, December 1994.

Publications-in Japanese

1. Attorneys and the Mass Media *("bengonin no media e no ikenhyomei wa douarubekika?')* Quarterly Keiji-Bengo, No. 3 1, Autumn. 2002, p. 128.

2. Translation of "Death Row - AIDS is Turning a Prison Term into a Potential Death Sentence," by Harmeen Rowe, published by Ushio, October 1988, pp. 136-141.

3. Translation of "Police Taping of Investigative Interviews," published in Hanrei Jiho, August 11, 1986, No. 1195.

4. Translation of "Euthanasia in the Netherlands," published in the Sapporo Gakuin Law Review, February 1995, Volume 11-2.

Chapters in Books

1. Title of Book: Women in Law, published by Greenwood Press 1996, Edited by Rebecca Mae Salokar and Mary L. Volcansek. Contributed the chapter on Takako Doi, an account of her life and accomplishments.

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2. Title of Book: Constitutional Systems in Late Twentieth Century Asia, edited by Lawrence W. Beer, published by University of Washington Press, 1992. A translation of Professor Nobuyoshi Ashibe's manuscript entitled, "The United States Constitution and Japan's Constitutional Law."

Languages: Japanese

ATTACHMENT I

The Japan News
by The Yomiuri Shimbun

ALL GENRES

Evident flaws in system for releasing offenders on bail before prison

7:56 pm, June 25, 2019

The Yomiuri Shimbun

The latest case of a fugitive criminal must be criticized as extremely deplorable. The incident was the fault of the prosecution.

Despite his sentence of imprisonment having been finalized after he was released on bail, the man in question fled to avoid being jailed. The fugitive was arrested by the Yokohama District Public Prosecutors Office on suspicion of obstructing the discharge of an official duty. It took as many as four days to apprehend him after his flight.

While he was on the run in Kanagawa Prefecture, public elementary and junior high schools run by local governments in areas surrounding the scene of his escape were forced to suspend classes for two days. The incident also affected the day-to-day lives of local residents, as shown by the fact that weekend events were canceled.

Public prosecutors must bear a grave responsibility for having caused anxiety among community residents. They should seriously reflect on their mistake.

After his unsuspended prison sentence was finalized in February, the man did not abide by the prosecution's demand that he present himself. On one occasion, he attempted to use violence against personnel from the district prosecutors office when they came to imprison him.

Nevertheless, they did not wear knife-proof vests when they attempted to imprison him, and police officers accompanying them had no guns with them. It is safe to say that such a lenient attitude allowed the knife-wielding man to escape.

The prosecution's response to the situation following his flight was not at all timely, either.

More than three hours after the man's escape, the district prosecutors office informed local governments in the area. There were also delays in the police authorities' emergency measure of deploying officers, which happened during a period of time that coincided with the hour when children go home from school. Local residents had every reason to raise their voices in anger.

Review legislation

There is also room for controversy over the appropriateness of a court decision to release the man on bail.

The man had been charged with such crimes as theft, bodily injury and a violation of the Stimulants Control Law. During his trial in the court of first instance, the man was released on bail. He was given an unsuspended prison sentence and was taken into custody. However, he was released on bail again after appealing to a higher court.

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From the standpoint of defending their rights, there is a growing tendency to flexibly permit defendants to be released on bail. Unnecessarily detaining defendants must be avoided as a matter of course. However, courts should judge whether each defendant deserves to be released on bail by closely examining the possibility of them escaping or destroying evidence.

This latest case has illustrated institutional problems related to the action of imprisoning people whose unsuspended prison sentences have been confirmed. As of the end of last year, there were a total of 26 people who had fled to avoid imprisonment.

The administrative work aimed at sending those found guilty to prison is based on the view that human nature is fundamentally good — that is, it is thought they will abide by demands for them to present themselves. Even if they go missing, it is not compulsory to inspect related matters such as records of their incoming and outgoing mobile phone calls.

If defendants or convicted prisoners run away from such institutions as detention houses and prisons, they are charged with the crime of escape. However, this does not apply to offenders who have escaped before being imprisoned. There is no penalty for those who have not abided by a demand to present themselves, either. All of these points can be described as flaws in the legislation.

If offenders whose unsuspended prison sentences have been finalized can avoid the execution of their penalties, the foundation of criminal justice will be shaken. The Supreme Public Prosecutors Office has established an inspection team with a view to preventing a repeat of the incident. The team should examine whether the current system has any problems that must be reviewed.

(From The Yomiuri Shimbun, June 25, 2019)

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The Asahi Shimbun | Asia & Japan Watch

Ghosn with the wind: Ministry to tighten laws to nix bail jumps

By HIROYOSHI ITABASHI/ Staff Writer

January 8, 2020 at 18:10 JST

A security camera captures the moment a woman on bail flees in a car to avoid being taken into custody and the car hits a prosecutors office official in Kishiwada, Osaka Prefecture, in October. (Provided by a resident)

The clandestine escape from Japan by Carlos Ghosn was a factor in a decision by the Justice Ministry to accelerate efforts to prevent bail jumping by making it easier to investigate and charge escapees.

The beleaguered former Nissan Motor Co. chief slipped out of his monitored home in Tokyo on Dec. 29 and fled to Lebanon by private jet, apparently by hiding in oversized luggage.

It was an embarrassing cap to a string of bail-jumping incidents last year in Osaka and Kanagawa prefectures.

Justice Minister Masako Mori on Jan. 7 indicated planned legal reforms that would expand the application of "crime of escape" under the Criminal Law to accused individuals out on bail.

Under current law, "crime of escape" only applies to jail or detention facility escapees, not those who flee while out on bail.

Mori said the ministry will soon ask the Legislative Council, an advisory panel to the justice minister, to discuss the issue and submit proposals. The ministry plans to submit a bill to revise relevant laws to the Diet based on the discussions.

Last year marked a series of getaways by defendants whose prison terms were finalized or bail was forfeited while they were free on bail.

In one case last June, a man in Kanagawa Prefecture who received a jail sentence while on bail but had not been taken into custody for more than four months, threatened officials of the prosecutors office with a kitchen knife after they arrived at his home and fled in a car.

Ghosn's dramatic escape also prompted the ministry to strengthen measures to monitor defendants released on bail.

The Legislative Council is expected to discuss ways to grant authority to law enforcement officials to investigate bail jumpers, search their homes and confiscate call logs.

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The council is also expected to consider a policy to make such defendants wear a global positioning system (GPS) device.

Ghosn was awaiting trial over alleged financial misconduct at the time of his disappearance.

Under the Code of Criminal Procedure, defendants are not required to appear for an appeals court decision, making it impossible for prosecutors to immediately detain a defendant even if a prison sentence is served.

Figures show that as of the end of 2018, 26 individuals fled from authorities after their prison terms were finalized while they were out on bail.

In light of this, the Justice Ministry plans to make it obligatory for defendants to be present for an appeals court decision.

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Japan :Ministry eyes ways to stop bail jumpers

by The Yomiuri Shimbun

TOKYO (The Japan News/ANN) - Following a series of escapes by defendants and others while out on bail, the Justice Ministry plans to strengthen measures to prevent such flights, The Yomiuri Shimbun has learned.

Following a series of escapes by defendants and others while out on bail, the Justice Ministry plans to strengthen measures to prevent such flights, The Yomiuri Shimbun has learned.

According to sources, the ministry is considering expanding the scope of so-called crimes of escape, which currently apply only to people who flee from jail and other facilities, and establishing such measures as penalties for accused persons who refuse to obey court summons while out on bail.

The ministry will consult in February at the earliest with the Legislative Council, an advisory body to the justice minister, about revisions to laws including the Penal Code.

Under the Penal Code, “crimes of escape” apply only to the escapes of suspects, defendants and others who are confined in penal facilities such as jails and detention facilities at police stations. The penalty is a maximum of one year in jail.

Since people who run away while out on bail cannot be prosecuted for their crimes, the Legislative Council will apparently discuss the application of the crime of escape to such cases.

In addition, the Criminal Procedure Code stipulates that a person who is summoned by the court as a witness but does not appear in court without a justifiable reason will be punished by imprisonment for up to a year or other penalties. However, there are no penalties for defendants and others who do not respond to court summons while out on bail.

The Legislative Council is expected to discuss the revision of the Criminal Procedure Code to establish similar penalties for defendants out on bail, the sources said.

On Dec. 31, it was learned that former Nissan Motor Co. Chairman Carlos Ghosn, 65, had fled Japan. If the laws are revised as planned, crimes of escape will apply to cases like that of Ghosn, who had been out on bail.

However, it is difficult to physically detain a foreigner who has fled overseas. Some say accused persons should be required to wear global positioning system (GPS) devices, in order to strengthen the monitoring of their movements after being released on bail. The Legislative Council likely will consider such issues.

In recent years, the courts have tended to actively release accused persons on bail. According to the Supreme Court, the percentage of cases in which an accused person was granted bail by a lower court before the ruling increased from 14% in 2008 to 32% in 2018.

The number of cases in which defendants out on bail were indicted in other cases has been also on the rise. According to a white paper on crime, the number of such cases increased from 102 in 2008 to 258 in 2018, an increase of about 2.5 times.

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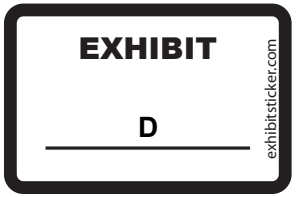

In Kanagawa Prefecture, a man whose prison sentence was finalized after being released on bail swung a kitchen knife at officials of the Yokohama District Public Prosecutor's Office, who had gone to detain him, and escaped in a car in June last year. After that case, the Justice Ministry began considering the necessity to revise relevant laws.

Photos

No photos has been attached.

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Japan to make escapes by defendants on bail punishable

07 Jan 2020

Japan's Justice Minister Masako Mori speaks during a press conference on former auto tycoon Carlos Ghosn after he fled Japan to avoid a trial, in Tokyo on January 6, 2020. (AFP)

Short Url: https://arab.news/czhrm

TOKYO: Japan will make escapes by defendants out on bail punishable following a series of such getaways, notably by former Nissan Motor Co. Chairman Carlos Ghosn, informed sources said Tuesday.

The Justice Ministry is considering revising the Penal Code to expand the scope of the crime of escape and take other measures. It plans to consult the Legislative Council, which advises the justice minister, as early as next month.

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"It's extremely important to prevent escapes by defendants out on bail," Justice Minister Masako Mori told a press conference. "We'll consider so we can consult the Legislative Council as early as possible."

The crime of escape covers prison inmates as well as detained defendants and suspects. A violator faces a prison term of up to a year.

But defendants out on bail, such as international fugitive Ghosn, are not subject to the punishment.

The council will discuss whether it is appropriate for those cases to be covered, the sources said.

Plans to oblige defendants to wear Global Positioning System tracking devices while on bail are also expected to be discussed. Other expected topics include how to monitor defendants fitted with such devices and how to protect their privacy.

Also on Tuesday, the ruling Liberal Democratic Party held a joint meeting of its judicial and foreign affairs divisions and discussed responses to Ghosn's departure to Lebanon. According to a participant, some lawmakers called for using GPS devices.

The ministry was considering preventive measures after a man on bail escaped in Kanagawa Prefecture, south of Tokyo, after his prison sentence became final last year and defendants fled in Osaka Prefecture, western Japan, after seeing their bail revoked.

Jiji Press

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The Japan News
by The Yomiuri Shimbun

ALL GENRES

Prosecution measures insufficient for preventing recurrence of escapes

7:26 pm, August 08, 2019

The Yomiuri Shimbun

It can be said that the prosecution as an organization was not up to the task of jailing a defendant whose sentence of imprisonment had been finalized after being released on bail.

The prosecution has compiled a report that examines a case in which a man who, in attempting to avoid being jailed, fled with a knife from his house in Kanagawa Prefecture.

He did not abide by the prosecution's repeated demands that he present himself and was expected to be resistant to the prosecution. However, the Yokohama District Public Prosecutors Office did not sufficiently consider assigning personnel and also did not make any arrangements with the police. Despite receiving reports of his flight, the prosecution delayed informing local governments, believing that "the police would decide" on the announcement of his escape.

It is reasonable that the prosecution's report summarized the incident as being caused by insufficient measures on the part of the prosecution and its lack of risk awareness.

To prevent the recurrence of such an incident, the Supreme Public Prosecutors Office cited steps such as preparing and improving manuals and equipment for when the prosecution imprisons a defendant, and establishing a liaison system with local governments. These are all basic measures that the prosecution should already have addressed. It is unlikely that it will really be able to prevent such an incident occurring only with these countermeasures.

In the background of this escape is an increasing number of defendants being released on bail.

The number of defendants — who, like the man in this case, were released on bail until a ruling in the court of second instance was handed down, after being given an unsuspended prison sentence in the court of first instance — was 546 in 2013. But the figure was more than double that in 2018 at 1,109. It included defendants in such serious cases as murders and robberies resulting in bodily injury.

Review conventional steps

There is a view that there is a higher risk of flight if a defendant who has been given an unsuspended prison sentence in the court of first instance is released on bail after appealing to a higher court. As a defendant is not obliged to appear in the court of second instance, unlike the court of first instance, it is expected that he or she could escape and not appear on the date of the ruling.

Courts should more carefully decide on the appropriateness of and conditions for whether a defendant who has been given an unsuspended prison sentence is released on bail. It should also consider obliging a defendant to appear on the date of a ruling in the court of second instance, and make it possible to jail the defendant on the spot when they are given an unsuspended prison sentence.

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It is problematic that it takes too much time to jail a defendant after they are given an unsuspended prison sentence. There were 60 defendants in 2018 who were not jailed until more than three months after their sentences of imprisonment were finalized in a higher court. There were also not a few former defendants who were temporarily missing for reasons such as fleeing overseas.

The longer the period after finalizing a sentence of imprisonment is, the smaller the effect of reflection on their crime and the higher the hurdles for imprisonment become. The prosecution must make efforts to swiftly bring defendants into custody.

There is a flaw in the legislation in that the crime of escape in the Criminal Code, which is intended for convicted prisoners and others, is not applied to defendants released on bail.

Some states in the United States and Canada make it obligatory, as a condition for release on bail, for the defendant to wear a global positioning system tracking device. In order to prevent escapes, it is hoped that effective steps will be made with reference to overseas examples.

(From The Yomiuri Shimbun, Aug. 8, 2019)

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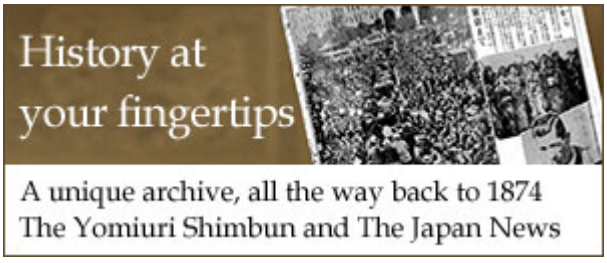

Opinion & Analysis

Comic Strip: Neko Pitcher

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Exhibit D

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

IN THE MATTER OF THE EXTRADITION OF MICHAEL L. TAYLOR	)	Case No. 20-mj-1069-DLC
IN THE MATTER OF THE EXTRADITION OF PETER MAXWELL TAYLOR	)	Case No. 20-mj-1070-DLC

SUPPLEMENTAL DECLARATION OF DR. WILLIAM B. CLEARY

Pursuant to 28 U.S.C. § 1746, I, William B. Cleary, hereby declare as follows:

1. I write this statement to supplement my earlier declaration, dated May 25, 2020 (ECF No. 18) and in response to the declaration of Public Prosecutor Naoki Watanabe, which the Government offered in opposition to Michael and Peter Taylor's motion to quash their arrest warrants or, alternatively, to be released from detention during the extradition proceedings against them (ECF No. 22-2 ("Watanabe Decl.")).

2. My only objective in submitting my declarations is to share my understanding of Japanese law with the Court. I recognize that this is an important and complicated case, and I want to assist the Court in understanding the complexity of the issues at stake. If my more than 30 years of experience and education dealing with Japanese law can be helpful to the Court, I am honored to help.

3. The Government's opposition brief and Mr. Watanabe's supporting declaration raise important issues under Japanese criminal law that call into question the legitimacy of the charges against the Taylors under Article 103 of the Japanese Penal

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Code.

4. Mr. Watanabe's declaration confirms what I stated in my prior declaration: that Article 103 has never been used to prosecute someone for assisting another in jumping bail. Rather, in support of his contention that Article 103 applies to the Taylors, Mr. Watanabe cites three cases that are factually dissimilar to the case at bar. (*See* Watanabe Decl. ¶¶ 9, 12 (citing cases).)

a. In Judgment of Tokyo District Court, February 16, 1999, hanji vol. 1000, p. 325 (Watanabe Decl.¶ 9), the defendants—members of a cult group that used sarin poisonous gas to kill people—were convicted under Article 103 because they created fabricated documents that enabled their fellow gang members to escape arrest.

b. In Judgment of Supreme Court, March 17, 1960, Kei-Shu vol. 14, No. 3, p. 351 (Watanabe Decl.¶ 9), the defendant violated Article 103 by helping his friend evade arrest.

c. In Judgment of Osaka District Court, May 10, 2000 (Watanabe Decl. ¶ 12), which the Government features in its opposition brief (ECF No. 22 at 28–29), the defendant was convicted under Article 103 for aiding a fugitive. At the time of the defendant's crime, the individual he was convicted of assisting had his bail revoked and therefore was subject to arrest.

5. Contrary to what the Government submits, the Taylors' prosecution is not "supported by Japanese caselaw." The cases cited by the Government have nothing to do with bail jumping. (ECF No. 22 at 28.) Instead, they stand for the proposition that the

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first part of Article 103—*i.e.*, the clause which Mr. Watanabe asserts the Taylors have violated—applies to instances where one enables another person to escape apprehension by law enforcement. To my knowledge, Article 103 has never been used to prosecute assisting another in the act of jumping bail—and apparently Mr. Watanabe is not aware of such an instance either.

6. As I wrote in my prior declaration, this is not mere happenstance. Rather, Japan does not criminalize bail jumping. It is difficult to comprehend how Japan can charge someone under Article 103 for assisting someone with engaging in conduct that is itself not a crime. Any suggestion that charging the Taylors under Article 103 represents a typical application of the statute is wrong.

7. I am not the only expert in Japanese criminal law that believes that the Taylors have not violated Article 103. As recently reported in Bloomberg News, a professor of criminal law at Hitotsubashi University named Yunhai Wang similarly concluded that "Helping someone jump bail isn't a crime in Japan." *See, e.g.*, Robert Burnson, *Ghosn Alleged Escape Accomplices Deny Committing a Crime*, Bloomberg Law (June 9, 2020), https://news.bloomberglaw.com/white-collar-and-criminal-law/ghosn-alleged-escape-accomplices-deny-committing-a-crime-2. That same publication identified another person, a former Japanese prosecutor named Nobuo Gohara, who also doubts the legitimacy of the Article 103 charges against the Taylors. *Id.*

8. The Government writes, "Notably, the Taylors have not cited any case where a Japanese court held that Article 103 cannot apply to situations where the defendant enabled the scape of a person who had been released on bail." (ECF No. 22 at

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29.) That is for good reason. As detailed above, as far as I (and, ostensibly, Mr. Watanabe) know, the issue has never been litigated—precisely because this prosecution is unprecedented.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on June 20, 2020

William B. Cleary

William B. Cleary

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Exhibit E

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

IN THE MATTER OF THE EXTRADITION OF MICHAEL L. TAYLOR	)	Case No. 20-mj-1069-DLC
IN THE MATTER OF THE EXTRADITION OF PETER MAXWELL TAYLOR	)	Case No. 20-mj-1070-DLC

SECOND SUPPLEMENTAL DECLARATION OF DR. WILLIAM B. CLEARY

Pursuant to 28 U.S.C. § 1746, I, William B. Cleary, hereby declare as follows:

1. My name is William B. Cleary and I provide this declaration as a supplement to my two previous declarations, dated May 25, 2020 and June 20, 2020.

2. I reiterate my great respect for the Japanese legal system and my desire not to be an advocate for, or against, any party in these matters. I simply want to assist the Court to understand the Japanese laws, legal principles and cases that bear upon the issues presented by Japan's request to extradite the Taylors.

3. Initially, I note that the issuance of an arrest warrant does not constitute a formal charge of any kind. Instead, an arrest warrant is part of the investigative stage of a matter. An individual does not become a "defendant" until he or she is indicted, and it is that indictment that serves as the formal charge. In the Japanese system, it is the indictment that serves to let the defendant know for what crime he or she is being charged, and the facts which the government intends to prove in support of that charge. As I understand it, no indictment has been issued against the Taylors. As a result, under the Japanese legal system, the Taylors have not yet been charged with any offenses and are not yet even referred to as "defendants" in the Japanese system.

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4. I further wish to clarify the structure and terminology employed in Article 103 of the Japanese Penal Code so as to explain my previously-stated opinion that Article 103 simply does not prohibit the conduct that Japan's Requests for Arrest Warrant allege by the Taylors.

5. Article 103 has been translated into English as providing for a criminal offense when one "harbors or enables the escape of another person who has either committed a crime punishable with a fine or greater punishment or has escaped from confinement." While this English translation uses two verbs—"harbors or enables the escape of another"—to describe the operative conduct, the original Japanese text in fact employs a single verb—**蔵匿**, or "*inpi*." This word, "*inpi*," is translated to mean, alternatively, "harbors or enables the escape of another," but it is a single concept that describes working against law enforcement authorities' active pursuit of a criminal to arrest him.

6. While it is translated using the same English word "escape," *inpi* carries with it a separate and distinct meaning from the word **逃走**, or "*toso*." The word "toso" is the term used in Article 97 and it is the term used in the latter part of Article 103, which is translated to English as "has escaped from confinement." This word, "toso," has a very specific meaning in that it refers to escape from a place of physical confinement, such as a jail, prison or detention center.

7. The Japanese warrants for the Taylors' arrests do not themselves identify the offense or offenses for which the Taylors' arrests are authorized. Instead, they reference the Requests for Arrest Warrant. The Requests for Arrest Warrant in turn begin with a declaration, as translated to English, that a warrant is requested "on the alleged harboring of criminals and accessoryship of violation of the Immigration Control and Refugee Recognition Act (Article 71, 25 II) case." The original Japanese text that is translated to "harboring of criminals" is **犯人蔵匿**, which is the title of Article 103 though the Requests do not cite to Article 103. In any event,

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Annex 3 to the Requests for Arrest Warrant, which purports to describe the alleged facts of the crime, describes the actions of the Taylors with respect to Mr. Ghosn not with the verb 蔵匿, or "*inpi*," but rather using the word 逃走, or "*toso*." Therefore, as described in the Requests for Arrest Warrant, it is clearly alleged that the Taylors committed a crime by assisting or enabling Mr. Ghosn to 逃走, or "*toso*," with the restrictions from which Mr. Ghosn is escaping being specifically identified as the conditions under which he was bailed.

8. In his declaration, Mr. Watanabe acknowledges that the word 逃走, or "*toso*," "has the same concepts as 'escaped from confinement'" and thus "is irrelevant to the concept of 'escape' used in 'enables the escape' in Article 103, which is an English translation of "蔵匿" ("*inpi*")." I agree with this statement. But the problem is that the Requests for Arrest Warrant assert that the Taylors allegedly committed a crime by enabling the 逃走, or "*toso*," of Mr. Ghosn in reference to his bail conditions. This—the specific conduct alleged to constitute the crime—does not constitute a violation of Article 103.

9. As I explained in my previous declarations, while there is one case where an individual was prosecuted for assisting a defendant to avoid arrest after his bail had been revoked (Judgment of Osaka District Court, May 10, 2000), there is no prior instance in which Japan has ever even attempted to charge anyone under Article 103 (or any other provision) for assisting someone to violate their bail conditions.

10. Further, even if the Requests for Arrest Warrants had used the verb harboring—蔵匿, or "*inpi*"—to describe the Taylors' actions, that also would be an inaccurate use of the word (as employed in Article 103) because there is no allegation (and no evidence) that law enforcement authorities were actively seeking to arrest Mr. Ghosn when all of this occurred.

11. Accordingly, to the extent the Requests for Arrest Warrant allege that the Taylors

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violated Article 103, the facts which those Requests point to as the basis for that allegation constitute a completely unprecedented application of Article 103 that runs contrary to the manner in which that provision historically has been applied and interpreted.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on July 16, 2020

William B. Cleary

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