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The Law Extradition and Michael and Peter Taylor: Carlos Ghosn's Escape Helpers

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I. Introduction

The law of extradition is complicated and deals with issues of law and politics. On March 26, 1980, Japan and the United States launched the Treaty on Extradition Between the United States of America and Japan.

The basic law of extradition requires that any offense be a serious crime in both countries. At the end of the treaty there is a list of crimes that are extraditable offenses. The one relevant to this case is Crime No. 38, "An offense relating to the obstruction of justice, including harboring criminals or suppressing or destroying evidence." As you will see below, the relevant sections of the Penal Code of Japan is Article 103, Harboring, and Article 97, Escape.

II. Facts

On November 19, 2018, Tokyo District Prosecutors arrested Ghosn at 4:30 p.m. upon his re-entry into Japan aboard a private jet that had come from Lebanon for questioning over allegations of false accounting and under reporting income. Greg Kelly, a Nissan director and former head of human resources, was also arrested upon his arrival from the U.S. that day.

On December 21, 2018, Ghosn was re-arrested on suspicion of shifting to Nissan personal losses of US\$16.6 million related to a personal swap contract in October 2008 (during the global financial crisis). The introduction of those charges prevented Ghosn's release on bail later the same day, because the new charges permitted an additional 10–20 days of incarceration prior to a bail hearing. Subsequent reporting linked this charge to Ghosn's dealings

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with Sheikh Khaled al-Juffali, the vice chairman of one of Saudi Arabia's largest conglomerates and majority owner of a company which owns half of a regional joint venture called Nissan Gulf, with the other half held by a wholly owned Nissan subsidiary. In return for a personal letter of credit from Juffali to Ghosn during the 2008 crisis, which served as bank-demanded collateral for Ghosn's swap contract, Nissan indirectly paid \$14.7 million from an internal discretionary fund known as the "CEO Reserve" to a wholly owned Juffali company in four installments between 2009 and 2012, although the internal documentation did not specify the ultimate recipient. According to Tokyo prosecutors, Kelly was not involved in this transaction and so was released on bail on December 25th.

On January 30, Ghosn said the charges were "plot and treason" by executives at Nissan who opposed the relationship with Renault and a future plan that was in the works to integrate Nissan, Mitsubishi and Renault. In mid-February, Ghosn's lead counsel Motonari Otsuru stepped down and was replaced by Jun'ichirō Hironaka, who has a record of persistence in obtaining acquittals in a number of high-profile cases.

In early March, Ghosn was granted a request for bail in a Tokyo court. This was his third bail request, and the first by his new legal team under Hironaka. The court set bail at 1 billion yen (about US\$9 million) subject to stringent conditions. He was not allowed to travel abroad, and had to remain at a given address under 24-hour camera surveillance, with no internet access. He was released on March 6, 2019.

On April 3, Ghosn tweeted that he was "ready to tell the truth" and that he would hold a conference on 11 April. He was re-arrested for the fourth time early on April 4 over new suspicions of financial misconduct concerning alleged dealings via Oman. Until that point in time he had been held for 108 days since he was first arrested in November 2018.

He was released in late April, but confined to strict house arrest, including having no contact with his wife.

On December 30, 2019, numerous media outlets reported that Ghosn had escaped from Japan and arrived in Beirut, Lebanon. Ghosn later confirmed these reports through a statement released by his press representative in New York. In his statement, Ghosn claimed that he would no longer be held

hostage by a rigged Japanese justice system where guilt is presumed, discrimination is rampant and basic human rights are denied.

Arrest warrants issued by Japanese prosecutors on January 30, 2020 claimed that the escape operation was orchestrated by former United States Army Special Forces soldier Michael Taylor, a private-security contractor with extensive contacts in Lebanon. The warrants also claimed that Michael was assisted by his son Peter Maxwell Taylor and a third American, George Antoine Zayek. Michael Taylor had conducted similar international rescue operations in the past and has also served time in prison in the United States. On May 20, 2020, United States authorities arrested Michael and Peter Taylor on suspicion of helping Ghosn escape. Extradition of the two to Japan was sought by Japan.

III. The Law of Escape

Article 97 of the Penal Code of Japan provides that, “When a sentenced or unsentenced person confined on a judge’s order escapes, imprisonment for not more than 1 year shall be imposed.

Violating one’s bail conditions, 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. 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.

Justice Minister Masako Mori on Jan. 7, 2020, 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.²⁾

IV. The Law of Harboring a Fugitive

Article 103 of the Penal Code provides that, “A person who harbors or enables the escape of another person who has either committed a crime punishable with a fine or heavier punishment or has escaped from confinement is punished by imprisonment for not more than 3 years or a fine of not more than 300,000 yen.”

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 confinement.

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.

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.

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. Simply put, it would be incongruous for the

2) The Asahi Shimbun, January 8, 2020

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.

The case law makes it clear that the meaning of “harboring” in Article 103 is restricted to the interference with an investigation. For example, in one fatal accident case in Sapporo, a 19 year old passenger of the vehicle lied to the police and said that he was driving the car at the time of collision. (Sapporo High Court August 18, 2005, Ko-shu vol. 58, No 3, p. 40). This person was found guilty of violating Article 103.

In a second case, the defendant provided cash and SIM cards to a suspect who had committed the crime of intimidation in order to evade police apprehension. In other words, the defendant was impeding an investigation. (Nagoya District Court, October 15, 2013, Hanreihisho L06850550).

In Ghosn’s case the investigation had been completed and therefore he had been released on bail. Article 103 has only been applied to those people who interfere or impede and investigation. It has never been applied to someone who interferes with a trial.

V. The Law of Extradition and Michael and Peter Taylor

The Assistant United States Attorney, District of Massachusetts, on May 6, 2020, filed with the District Court a Complaint For Provisional Arrest with a View Towards Extradition. It describes in detail how the escape allegedly occurred.

On December 29, 2019, Michael Taylor and other individuals helped Ghosn flee from Japan while he was released on bail pending trial for financial crimes. In the months leading up to the escape, Peter Taylor traveled to Japan at least three times in 2019. During these visits he met with Ghosn at least seven times as reflected in the meetings records that Ghosn was required to maintain as a condition for his release on bail.

On December 28, 2019, Peter Taylor arrived in Japan and proceeded to the Grand Hyatt Tokyo. Hotel records indicate that he checked into Room 333 at approximately 11:49 a.m. According to the hotel’s video camera surveillance images, Ghosn arrived at the hotel and met with Peter for about one hour.

On December 29, 2019, the day of the escape, Michael Taylor and Zayek traveled on a private jet from Dubai to Kansai International Airport in Japan. They entered the country with two large black boxes, that looked like they were for audio equipment. They landed at around 10:00 a.m. and went to the Star Gate Hotel at the airport and checked into rooms 4009 and 4609 at around 11:00 a.m.

Thereafter the two men traveled by Shinkansen to Tokyo. Ghosn walked to the Grand Hyatt Hotel Tokyo around 2:30 p.m. leaving his home without any luggage. His luggage had been transported to the hotel early in the day and received by Peter Taylor. Apparently, Peter had given a room key to Ghosn who operated the elevators by himself. Michael and Zayek went to the hotel around 3:30 p.m. and they all met together, including Peter.

Peter then split from the group and took a flight to China from Narita. Ghosn and his helpers went to the hotel at the Kansai airport. Michael and Zayek left the hotel around 10:00 p.m. with luggage including the two black boxes, and departed from Japan. Ghosn was never seen again and it is assumed that he was hiding in one of the boxes.

Two days later, Ghosn make a public announcement that he was in Lebanon. The same day, the Tokyo District Court revoked his bail.

VI. Conclusion

On September 4, 2020, Federal District Court Judge Donald Cabell ruled against the Taylors and the matter is currently before the State Department. Secretary of State, Mike Pompeo, will make the final decision whether to allow the extradition to proceed. Judge Cabell rejected the Taylor's legal reasoning and held that Article 103 does indeed apply to their conduct when they help Carlos Ghosn escape on December 29, 2019.