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# HONG KONG'S EXTRADITION BILL: IMPLICATIONS & RAMIFICATIONS

## INTRODUCTION

Beginning in June 2019, millions of people marched in the streets of Hong Kong to protest against the proposed extradition bill of the Hong Kong Special Administrative Region (HKSAR) government.<sup>1</sup> The bill was introduced to amend Hong Kong's existing extradition laws, the Fugitive Offenders and the Mutual Legal Assistance in Criminal Matters Ordinance.<sup>2</sup> These peaceful demonstrations sparked by the proposed amendments were the largest in the history of Hong Kong since its 1997 handover to China from the United Kingdom (UK).<sup>3</sup> They have attracted worldwide attention and support.<sup>4</sup> Several foreign governments, including the United States (US), Canada, the UK, Germany, Japan, Australia, as well as the European Union (EU), have voiced grave concerns over the proposed extradition bill and its potentially far-reaching consequences.<sup>5</sup>

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1. Under its constitutional document, The Basic Law, Hong Kong is an autonomous Special Administrative Region of the People's Republic of China, except in defense and foreign affairs. *See generally* The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 29 I.L.M. 1521, art. 2 (1990) [hereinafter Basic Law].

2. Laignee Barron, *Why Hong Kong Protesters Aren't Calling it Quits After the Suspension of a Controversial Extradition Bill*, TIME (June 19, 2019, 2:08 AM EDT), <https://time.com/5607099/why-hong-kong-protests-extradition/>.

3. Amy Gunia, *A Brief History of Protest in Post-Handover Hong Kong*, TIME (June 20, 2019, 4:07AM EDT), <https://time.com/5606212/hong-kong-history-mass-demonstrations-protest/>. Until June 2019, the largest demonstrations in the history of postcolonial HK were the 2003 demonstrations against a proposed national security bill and the 2014 demonstrations against the refusal of the Central People's Government to grant genuine universal suffrage, a movement known as the "Umbrella Movement." *See* Cora Chan, *Demise of "One Country, Two Systems"? Reflections on the Hong Kong Rendition Saga*, 49 HONG KONG L.J. 447, 447–48 (2019).

4. Chris Horton, *Hong Kong's Protesters Are Outfoxing Beijing Worldwide*, ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/international/archive/2019/09/hong-kong-public-opinion-beijing/599059/>.

5. Mary Hui, *Why Foreign Governments are so Worried About Hong Kong's Extradition Law*, QUARTZ (June 14, 2019), <https://qz.com/1643858/foreign-governments-are-worried-about-hong-kongs-extradition-law/>.

In response, the Central People's Government (CPG) in Beijing labeled fugitive extradition arrangements as one of China's internal affairs and warned foreign governments not to intervene in the matter.<sup>6</sup>

Part I of this Note will discuss the history surrounding the enactment of the Fugitive Offenders Ordinance (FOO), the development of the legislative proposals and concessions the HKSAR government granted, the justifiable concerns of the protestors and members of the public, and Mainland China's serious human rights violations. Part II will explain the proposed changes to the existing extradition law and their concomitant legal ramifications, and examine ad hoc extradition laws in the UK. This Note will argue that the proposed extradition bill not only created a legal loophole in the existing system, but also violated international human rights and domestic law in light of mainland China's record of serious human rights violation. Both the HKSAR government and the People's Republic of China (PRC) should cooperate to create a transparent, special court to deal with the extradition requests arising from the most serious crimes. The special court should be composed of distinguished foreign judges as well as domestic judges voted in by members of the public to ensure a fair trial and judicial transparency. Decisions by the court should be published online and available for the public's view.

#### I. THE ENACTMENT OF THE FUGITIVE OFFENDERS ORDINANCES

Before the handover of Hong Kong from the UK to China on July 1, 1997, Hong Kong's extradition law largely consisted of statutes passed by the British Parliament and a series of orders in council issued by the British sovereign pursuant to those statutes.<sup>7</sup> Hong Kong mainly conducted extradition pro-

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6. Clarence Fernandez, *China State Media Criticize Foreign 'Hypocrisy' over Hong Kong After Climbdown*, REUTERS (June 16, 2019, 7:48 PM), <https://www.reuters.com/article/us-hongkong-extradition-china/china-state-media-criticize-foreign-hypocrisy-over-hong-kong-after-climbdown-idUSKCN1TH0W5>.

7. See Janice M. Brabyn, *Extradition and the Hong Kong Special Administrative Region*, 20 CASE W. RES. J. INT'L L. 169, 172 (1988). These include the 1870 Extradition Act and the 1967 Fugitive Offenders Act. See *Id.*

ceedings with other Commonwealth jurisdictions.<sup>8</sup> Extradition proceedings were not conducted between Hong Kong and mainland China.<sup>9</sup> The FOO was enacted in March 1997 shortly before the handover in an effort to localize British laws,<sup>10</sup> and its provisions “incorporated many principles of the United Nations (UN) Model Treaty on Extradition and London Scheme on Extradition Within the Commonwealth.”<sup>11</sup> Since its enactment, Hong Kong has signed mutual extradition agreements with nineteen jurisdictions.<sup>12</sup>

The “one country, two system” framework underpinned by the 1984 Sino-British Joint Declaration (Joint Declaration) and enshrined in the Basic Law, the post-handover constitution for the HKSAR guaranteed that Hong Kong will enjoy a “high degree of autonomy.”<sup>13</sup> It also ensured that the HKSAR government would be vested with “executive, legislative and independent judicial power.”<sup>14</sup> Specifically, the Joint Declaration guaranteed that the HKSAR would have an independent criminal justice system and that the Hong Kong courts shall “exercise judicial power independently and free from any interfer-

8. Albert H.Y. Chen, *A Perfect Storm: How the Proposed Law on Hong Kong-Mainland China Rendition was Aborted*, VERFASSUNGBLOG (June 19, 2019), <https://verfassungsblog.de/a-perfect-storm/>.

9. *Id.* In 1889, The Chinese Extradition Ordinance was enacted, but subsequently fell into disuse because the law was put in place to give effect to Article XXI of the Treaty of Tientsin 1858 which marked China’s humiliating loss in the Second Opium War. Hong Kong officials have indicated that PRC authorities were reluctant to invoke the extradition ordinance because of reference to the unequal Treaty of Tientsin. See Brabyn, *supra* note 7, at 184–85; see also Mary Hui, *China Used to Find it Too Humiliating to Send Hong Kong Extradition Requests*, QUARTZ (June 10, 2019), <https://qz.com/1639648/british-hong-kong-used-to-extradite-suspects-to-imperial-china/>.

10. Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, LC Paper No. CB(2) 1578/18-19(01) ¶ 2 (May 31, 2019) [hereinafter Fugitive Offenders Paper].

11. Chen, *supra* note 8.

12. *List of Surrender of Fugitive Offenders Agreements*, HKSAR DEP’T JUST., <https://www.doj.gov.hk/eng/laws/table4ti.html>.

13. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, U.K.–P.R.C., 23 I.L.M. 1366, ¶ 3 (1984) [hereinafter Joint Declaration]; see also Basic Law, *supra* note 1, art. 2.

14. Basic Law, *supra* note 1, art. 2.

ence.”<sup>15</sup> The provisions in the Basic Law also authorized the HKSAR government to make “reciprocal judicial assistance” arrangements with foreign jurisdictions,<sup>16</sup> including extradition treaties.<sup>17</sup>

*A. The Murder Case that Led to the Legislative Proposals*

In February 2018, Chan Tong-kai, a Hong Kong resident was suspected of murdering his pregnant girlfriend, Poon Hiu-wing, after returning to Hong Kong alone from a trip to Taiwan.<sup>18</sup> He was subsequently arrested for murder and confessed to the crime when the Taiwanese authorities found Poon’s body in a suitcase on the outskirts of Taipei.<sup>19</sup> Unfortunately, Chan was only prosecuted for money laundering<sup>20</sup> because the Hong Kong courts only have jurisdiction to handle that offense in Hong Kong.<sup>21</sup> Under the existing law, Hong Kong courts have no jurisdiction to sentence Chan to prison for murder when the crime has been committed outside of Hong Kong.<sup>22</sup> The usual procedure would be to send the criminal back to the jurisdiction where the crime was committed; given that the FOO is not applicable to “any other part of the PRC,”<sup>23</sup> however, the HKSAR government could not grant the Taiwanese authorities’ request to extradite Chan to Taiwan.<sup>24</sup>

To address the injustice inflicted on the victim’s family<sup>25</sup> caused by this loophole in the existing legislative scheme,<sup>26</sup> Hong Kong Chief Executive (CE) Carrie Lam introduced “spe-

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15. Joint Declaration, *supra* note 13, at Annex 1.

16. Basic Law, *supra* note 1, art. 96.

17. Erik Alexander Rapoport, *Extradition and the Hong Kong Special Administrative Region: Will Hong Kong Remain a Separate and Independent Jurisdiction After 1997*, 4 ASIAN AM. L.J. 135, 149 (1997).

18. *Hong Kong Extradition Law: the Murder Behind the Bill*, S. CHINA MORNING POST (June 12, 2019, 7:06 AM), <https://m.yp.scmp.com/news/hong-kong/article/113292/chan-tong-kai-murder-story?amp=1>.

19. *Id.*

20. *Id.* Chan admitted stealing HK \$20,000 from his girlfriend’s ATM card after murdering her. *Id.*

21. Cooperation between Hong Kong and Other Places on Juridical Assistance in Criminal Matters, LC Paper No.CB(2) 767/18-19(03) ¶ 3 (Feb. 15, 2019) [hereinafter Cooperation on Juridical Assistance].

22. Chen, *supra* note 8.

23. Fugitive Offenders Ordinance, (1997) Cap. 503, 1, § 2(1)(a) (H.K.).

24. Cooperation on Juridical Assistance, *supra* note 21, ¶ 3.

25. *Id.*

26. See Fugitive Offenders Paper, *supra* note 10, ¶ 1.

cial surrender arrangements” in the extradition bill.<sup>27</sup> The bill proposes to allow Hong Kong to enter into ad hoc extradition arrangements with any jurisdiction that has no formal long-term extradition agreements with Hong Kong, including mainland China, Taiwan, and Macau.<sup>28</sup> The proposed legislative changes to the extradition laws, if adopted, would not only provide the legal basis for Chan’s extradition to Taiwan to face a murder trial and potential prosecution,<sup>29</sup> but would also permit anyone living in, visiting, or passing through Hong Kong to be removed and stand trial or serve criminal sentences in mainland China.<sup>30</sup>

The HKSAR government’s justification for the legislative proposals to uphold justice<sup>31</sup> and to plug loopholes in the existing legal system<sup>32</sup> is undercut by Taiwan’s criticism of the extradition bill.<sup>33</sup> Taiwan’s Mainland Affairs Council<sup>34</sup> and Ministry of Justice had indicated that they would not cooperate with Hong Kong authorities on Chan’s extradition to Taiwan if it was to be conducted under the ad hoc extradition arrangements

27. *Id.*, at n.1.

28. *A Brief Guide to Issues Arising from the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, HONG KONG BAR ASS’N (June 6, 2019), <https://www.hkba.org/sites/default/files/A%20Brief%20Guide%20to%20issues%20arising%20from%20the%20Fugitive%20Offenders%20And%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20Legislation%20%28Amendment%29%20Bill%202019%20%28The%20Bill%29.pdf>.

29. Chen, *supra* note 8.

30. *See generally* CONG. RSCH. SERV., HONG KONG’S PROPOSED EXTRADITION LAW AMENDMENTS, (2019), <https://crsreports.congress.gov/product/pdf/IF/IF11248/2>.

31. *See* Fugitive Offenders Paper, *supra* note 10, ¶ 16.

32. *Id.* ¶ 10.

33. *Youguan Xianggang Zhengfu Xuanbu Zanhuan Taofan Tiaoli Xiuding, Benbu shuoming Ruxia*: (有關香港政府宣布暫緩「逃犯條例」修訂，本部說明如下:) [Regarding the Announcement of the Hong Kong Government to Suspend the Amendments to the Fugitive Offenders Ordinance: Statement of the Taiwan Ministry of Justice], TAIWAN MINISTRY JUST. (June 15, 2019), <https://www.moj.gov.tw/cp-21-117152-73809-001.html> (translation by author) [hereinafter Statement of the Taiwan Ministry of Justice]

34. Teng Pei-ju, *Taiwan’s Mainland Affairs Council Warns of Hong Kong Travel Risks*, TAIWAN NEWS (June 11, 2019, 21:58), <https://www.taiwannews.com.tw/en/news/3721978>.

proposed by the HKSAR government.<sup>35</sup> Such an extradition proposal not only puts Taiwanese citizens at risk of being extradited to mainland China,<sup>36</sup> but also encroaches on Taiwan's national sovereignty by implying that Taiwan is part of China and violates human rights.<sup>37</sup>

Furthermore, the lack of a long-term extradition arrangement with mainland China is not an oversight. Former Foreign Secretary Sir Malcolm Rifkind has confirmed that at the time of the enactment of the FOO in consideration of the subsequent reunification of Hong Kong with the mainland, the handover negotiators made a deliberate decision to exclude the PRC from the FOO.<sup>38</sup> This was necessary in order to protect Hong Kong's separate legal system, safeguard its judicial independence, and maintain its robust rule of law.<sup>39</sup> After the reunification, the detention, conviction, and execution of two individuals in main-

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35. *Fawu Bu Duiyu Xianggang Taofan Tiaoli Xiulie Lichang De Shuoming* (法務部對於香港逃犯條例修例立場的說明) [Position Statement of the Taiwan Ministry of Justice on the Amendments of the Hong Kong Fugitive Offenders Ordinance], TAIWAN MINISTRY JUST. (June 14, 2019), <https://www.moj.gov.tw/2204/2795/2796/58942/> (translation by author).

36. *Lixing Jizhehui Zhong Zhendui Gangfu Wuyue Qiri Jizhehui Guanshu Xiufa Lichang Zhi Kanfa, Yiji Shifou Tongyi Yu Gangfang Zhankai Goutong Zhi Huiying* (例行記者會中針對港府5月7日記者會闡述修法立場之看法, 以及是否同意與港方展開溝通之回應) [Responses to the HKSAR Government's May 7 Press Conference Regarding its Amendments of the Fugitive Offenders Ordinance, and Whether Taiwan would Agree to a Discussion on Extradition], TAIWAN MAINLAND AFF. COUNCIL (May 9, 2019), <http://ws.mac.gov.tw/Download.ashx?u=LzAwMS9VcGxvYWQvMjk1L2NrZmlsZS9hZjU2MzAwOC1iOTdkLTQ4YTYtODBhOC0wNDhmZWRRhZjVjNDkucGRm&n=MTA4MDUwOeS%2bi%2bihjOiomOiAheacg%2bS4remHneWwjea4r%2bW6nDXmnIg35pel6KiY6ICF5pyD6Zeh6L%2bw5L%2bu5rOV56uL5aC05LmL55yL5rOV77yM5Lul5Y%2bK5piv5ZCm5ZCM5oSP6IiH5riv5pa55bGV6ZaL5rqd6YCa5LmL5Zue5oeJLnBkZg%3d%3d> (translation by author).

37. *MAC Calls on Hong Kong to Jointly Protect Rule of Law and Human Rights and Create a Vision of Hope for the Younger Generations as the Hong Kong Government Suspends the Extradition Law*, TAIWAN MAINLAND AFF. COUNCIL (June 15, 2019), [https://www.mac.gov.tw/en/News\\_Content.aspx?n=A921DFB2651FF92F&sm\\_s=37838322A6DA5E79&s=B94C83F068D5F7F4](https://www.mac.gov.tw/en/News_Content.aspx?n=A921DFB2651FF92F&sm_s=37838322A6DA5E79&s=B94C83F068D5F7F4).

38. Malcolm Rifkind, *There is no 'Loophole' in Hong Kong's Current Extradition Law. Rather, it Provides a Necessary Firewall to Protect the Legal System*, S. CHINA MORNING POST (June 4, 2019), <https://www.scmp.com/comment/opinion/article/3012853/there-no-loophole-hong-kongs-current-extradition-law-rather-it>.

39. *Id.*

land China under the Criminal Law of the PRC for offenses committed solely in Hong Kong<sup>40</sup> attracted public criticism against the HKSAR government.<sup>41</sup> This prompted widespread discussion in Hong Kong of the need for an extradition arrangement with the mainland.<sup>42</sup> The then-Secretary for Security, Regina Ip, admitted that although the HKSAR government has continued its efforts to discuss the possibility of an extradition arrangement with the relevant mainland authorities, reaching a feasible agreement proved to be difficult.<sup>43</sup> This is due to the immense differences in the legal and judicial systems between the two jurisdictions, such as their conflicting policy on the death penalty.<sup>44</sup> The government also promised to consult with the public on any substantive extradition arrangement proposals following its conclusion of discussions with the mainland authorities.<sup>45</sup>

### *B. Developments of the Legislative Proposals*

The legislative proposals were originally submitted by Hong Kong's Security Bureau to the Legislative Council (LegCo) and were discussed in the LegCo's Panel on Security on February 15, 2019.<sup>46</sup> After drawing backlash from Hong Kong's usually pro-Beijing business community, the HKSAR government narrowed the scope of the legislative proposals<sup>47</sup> to exclude nine

40. See Cheung Tze-Keung (The Big Spender Case) and Li Yuhui Case, documented in Chau Pak-kwan & Stephen Lam, *Research Study on the Arrangement between Hong Kong and Mainland concerning Surrender of Fugitive Offenders*, LEGIS. COUNCIL SECRETARIAT (March 2001), <https://www.legco.gov.hk/yr00-01/english/library/erp05.pdf>.

41. *Arrangements with the Mainland on Fugitive Offenders*, LC Paper No. CB(2) 748/98-99(02) ¶ 10 (Nov. 23, 1998).

42. Shirley Chan Mi-ching, *A Review of the Problem of the Agreement between Hong Kong and the Mainland on the Surrender of Fugitive Offenders: Case Study, the Trial of the Big Spender Cheung Tze-Keung*, HKU 1, 11 (2006).

43. *Panel on Security (Minutes) 3 Dec 98*, LC Paper No. CB(2) 1258/98-99 ¶ 4 (Dec. 3, 1998).

44. See *Arrangements with the Mainland on Fugitive Offenders*, *supra* note 41, ¶ 7.

45. See *Panel on Security (Minutes) 3 Dec 98*, *supra* note 43, ¶ 6.

46. See generally *Cooperation on Juridical Assistance*, *supra* note 21.

47. ETHAN MEICK, *US-CHINA ECON. & SEC. REV. COMM'N, HONG KONG'S PROPOSED EXTRADITION BILL COULD EXTEND BEIJING'S COERCIVE REACH: RISK FOR THE UNITED STATES* 4 (2019).



white-collar offenses.<sup>48</sup> Subsequently, the extradition bill was published in the Gazette, the official publication of the Hong Kong government, on March 29th<sup>49</sup> and formally introduced into the LegCo on April 3rd.<sup>50</sup> On May 30th, the Secretary for Security, John Lee Ka-chiu, announced further concessions to the extradition bill amidst growing protests.<sup>51</sup> These additional safeguards include: (1) raising the imprisonment threshold for extraditable offenses such that the special surrender arrangements would only apply to persons accused of crimes punishable by seven years or more in jail;<sup>52</sup> (2) permitting the CE to add provisions in the extradition arrangement such as requiring the requesting jurisdiction to respect the “presumption of innocence, open trial, legal representation, right to cross-examine witnesses, no coerced confession and right to appeal;”<sup>53</sup> (3) enhancing protection for the extradited fugitives by only allowing the HKSAR government to process extradition requests made by central authorities in a jurisdiction, which in mainland China’s case would mean the Supreme People’s Procuratorate (SPP) and the Supreme People’s Court (SPC);<sup>54</sup> and (4) requiring the requesting jurisdiction to provide assurance that the statute of limitations for the relevant offenses had not passed to ensure that there will not be retrospective extradition requests.<sup>55</sup>

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48. *Id.* These white-collar offenses relate to: “(1) bankruptcy, (2) corporate law, (3) securities and futures trading, (4) intellectual property, (5) environmental pollution or protection of public health, (6) imports and exports or international transfer of funds, (7) use of computers, (8) taxes and duties, and (9) trade descriptions.” *Id.*

49. See *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 to be Submitted to LegCo*, GovHK (Mar. 26, 2019), <https://www.info.gov.hk/gia/general/201903/26/P2019032600708.htm>.

50. MEICK, *supra* note 47, at 1.

51. Holmes Chan, *Hong Kong Gov’t Announces New Concessions to Extradition Bill After Pressure from Pro-Beijing Camp*, HONG KONG FREE PRESS (May 30, 2019), <https://www.hongkongfp.com/2019/05/30/breaking-hong-kong-security-chief-john-lee-announces-concessions-extradition-bill-pressure-pro-beijing-camp/>.

52. See *Fugitive Offenders Paper*, *supra* note 10, ¶ 12(I)(1).

53. *Id.* ¶ 12(II)(2).

54. *Id.* ¶ 12(III)(4).

55. *Id.* ¶ 12(II)(3).

*C. Concerns of Members of the Public in Hong Kong*

The legislative proposals sparked widespread fear among Hong Kong's populace,<sup>56</sup> with many worrying that they would be hauled to mainland China for trial and left at the mercy of the mainland judicial system where basic standards of judicial fairness are not met and human rights are not guaranteed.<sup>57</sup> Such grave concerns have been exacerbated by Taiwan's outspoken condemnation of the extradition bill, citing the HKSAR government's refusal to answer multiple Taiwanese requests for mutual criminal assistance on cross-border crimes, including the recent murder case of Poon Hiu-wing, and calling for the establishment of a judicial cooperation mechanism with Hong Kong that guarantees human rights protections.<sup>58</sup>

Hong Kong citizens' concerns over the deficiencies of mainland China's judicial system are well-founded in light of frequent incidents of unlawful and arbitrary detention, imprisonment, and enforced disappearances, often accompanied by torture and various forms of human rights abuses.<sup>59</sup> Wang Quanzhang, a human rights lawyer, was arbitrarily detained in July 2015 and denied access to legal counsel amid an infamous nationwide "709 crackdown" that targeted hundreds of human rights lawyers and activists.<sup>60</sup> After repeatedly suffering electric shock torture,<sup>61</sup> he was imprisoned for "subversion of state power."<sup>62</sup> Liu Xia, the widow of Liu Xiaobo, a peaceful human rights activist and Nobel Peace Prize winner who succumbed to cancer in the middle of a lengthy prison sentence due to inadequate medical treatment, was placed under arbitrary and un-

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56. Chan, *supra* note 3, at 448.

57. Greg Torode & James Pomfret, *Exclusive: Hong Kong Judges see Risks in Proposed Extradition Changes*, REUTERS (May 28, 2019), <https://www.reuters.com/article/us-hongkong-politics-extradition-judges/exclusive-hong-kong-judges-see-risks-in-proposed-extradition-changes-idUSKCN1SZ09U>.

58. See Statement of the Taiwan Ministry of Justice, *supra* note 33.

59. See generally HUMAN RIGHTS WATCH, WORLD REPORT 2019 1, 135–40 (2019).

60. *China: Release Human Rights Lawyers*, HUM. RTS. WATCH (Feb. 15, 2018), <https://www.hrw.org/news/2018/02/15/china-release-human-rights-lawyers>.

61. HUMAN RIGHTS WATCH, *supra* note 59, at 137.

62. *Get Wang Quanzhang Home to his Family*, AMNESTY INT'L, <https://www.amnesty.org/en/get-involved/take-action/free-chinese-lawyer-wang-quanzhang/>.

just house arrest without charge for years before finally being allowed to leave the country.<sup>63</sup> In 2018, to give its brutal and opaque detention procedure a legal façade to justify further crackdowns on peaceful dissent, the PRC government, through its rubber-stamp congress, amended China's constitution to establish the National Supervision Commission (NSC).<sup>64</sup> The PRC government also replaced the notoriously abusive<sup>65</sup> *Shuanggui* system with a new retention in the *liuzhi* (custody) system.<sup>66</sup> Unlike the *Shuanggui* system that only applied to Chinese Communist Party (CCP) members, the *liuzhi* system broadened its potential targets<sup>67</sup> and legally empowered the NSC to interrogate and detain virtually anyone working in the public sector.<sup>68</sup> The detentions could last up to six months without granting the detainees access to legal counsel and basic fair-trial protections.<sup>69</sup> Meng Hongwei, the former president of the Interpol and former vice-minister of China's Ministry of Public Security, was presumably detained under the new *liuzhi* system<sup>70</sup> following his sudden disappearance.<sup>71</sup>

The PRC government has extended its use of arbitrary detention and enforced disappearances beyond its borders. In 2015, five owners of the Causeway Bay bookstore, who sold politically

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63. Yu-Jie Chen & Jerome A. Cohen, *Freedom from Arbitrary Detention in Asia: Lessons from China, Taiwan and Hong Kong*, in OXFORD HANDBOOK CONST. L. IN ASIA 1, 2 (David Law, Holning Lau & Alex Schwartz eds.) (forthcoming).

64. *Id.* at 7.

65. Interrogations were often accompanied by torture and coerced confessions that had driven some Party members to commit suicide. See Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFO. 7, 19–20 (2008).

66. *China: New Supervision Law a Systemic Threat to Human Rights*, AMNESTY INT'L (Mar. 20, 2018), <https://www.amnesty.org/en/latest/news/2018/03/china-new-supervision-law-threat-to-human-rights/>.

67. Yu-Jie Chen, *Human Rights in the Chinese Administration of Justice*, in CHINA HUM. RTS. REP. 83, 96 (2018).

68. See *China: New Supervision Law a Systemic Threat to Human Rights*, *supra* note 66.

69. Chen, *supra* note 67, at 95.

70. On Oct 7, 2018, China's Central Commission for Discipline Inspection (CCDI) announced in a short post on its website that Meng was "under the investigation of the NSC on suspicion of violating the law." See Chen, *supra* note 69.

71. *Id.*

sensitive books that criticized the CCP and its leaders, mysteriously disappeared from various places, such as Hong Kong and Thailand, only to resurface months later in mainland custody.<sup>72</sup> Gui Minhai, who disappeared in Thailand, reemerged on Chinese state television tearfully confessing to a 2003 drunk-driving incident and stating that he had voluntarily returned to the mainland to surrender himself to mainland authorities.<sup>73</sup> Lam Wing-kee, the manager of the bookstore, was permitted to travel back to Hong Kong to turn in a hard-drive full of data on customers to the mainland authorities<sup>74</sup> and revealed details about his abduction; his prolonged solitary confinement; his coerced, scripted confession; and his involuntary signing of a waiver of the right to counsel.<sup>75</sup> These incidents not only revealed the deep-rooted flaws in mainland China's party-dominated judicial system, but also exposed the PRC government's aggressive encroachment on Hong Kong's rule of law and freedom of expression, overriding the city's autonomy guaranteed by the 1984 Sino-British Joint Declaration.

#### *D. The Extradition Process Under the FOO*

Under the existing extradition system, an individual can only be extradited to another jurisdiction if Hong Kong has entered into a bilateral extradition agreement<sup>76</sup> or an ad hoc, case-based arrangement with that jurisdiction.<sup>77</sup> To implement and effectuate an ad hoc extradition arrangement, the CE must

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72. *China/Hong Kong: Free 'Disappeared' Booksellers*, HUM. RTS. WATCH (Feb. 10, 2016), <https://www.hrw.org/news/2016/02/10/china/hong-kong-free-disappeared-booksellers>.

73. *Id.*

74. Alan Wong, *Defying China, Hong Kong Bookseller Describes Detention*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/world/asia/hong-kong-bookseller-lam-wing-kee.html>.

75. William Nee, *China's Disturbing Detention of Hong Kong Booksellers*, AMNESTY INT'L (July 8, 2016), <https://www.amnesty.org.nz/china's-disturbing-detention-hong-kong-booksellers>.

76. *Observations of the HKBA on the Security Bureau's Proposal to Amend the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 ("MLAO") and the Fugitive Offenders Ordinance, Cap. 503 ("FOO")*, HONG KONG BAR ASS'N ¶ 18 (Mar. 4, 2019) [hereinafter *Observations of the HKBA on the Security Bureau's Proposal*].

77. Fugitive Offenders Ordinance, *supra* note 23, § 2(4).

first introduce and publish an order in the Gazette,<sup>78</sup> specifying the terms of the arrangement.<sup>79</sup> The order must then be subjected to the scrutiny of the LegCo to establish a legislative basis for the arrangement,<sup>80</sup> and can be repealed by the LegCo within a specified timeframe—28 days.<sup>81</sup> Once the order passes legislative scrutiny, the CE may, via an “authority to proceed” order,<sup>82</sup> authorize a magistrate to issue a warrant to arrest the individual wanted for extradition.<sup>83</sup> After the individual is brought before a magistrate,<sup>84</sup> the Court of Committal hears the case and decides whether to detain the individual and grant the extradition.<sup>85</sup> If the Court of Committal refuses to extradite the individual on reasonable grounds pursuant to Section 5 of the FOO, the jurisdiction seeking the extradition may appeal to the Court of First Instance,<sup>86</sup> and if denied again, to the Court of Final Appeal.<sup>87</sup> If the Court of Committal approves the extradition request, the individual can file an application for a writ of habeas corpus<sup>88</sup> and will not be extradited until the application has been disposed of.<sup>89</sup>

## II. PROPOSED CHANGES TO THE EXISTING EXTRADITION PROCESS

The proposed changes to the extradition bill would have negative ramifications compared to the existing extradition process. Specifically, the “special surrender arrangements” introduced by the extradition bill proposes to remove important procedural safeguards without providing adequate justifications. Additionally, such removal is not accompanied by any broadening of the court’s power to ensure the HKSAR government’s compliance with human rights obligations.

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78. *Id.* § 3(2).

79. *Id.* § 3(1)(a).

80. *Id.* § 3(2).

81. *Id.* § 3(3).

82. *Id.* § 6(2).

83. *Id.* § 7(1)(a).

84. *Id.* § 10(1).

85. *Id.* § 10(2)(a).

86. *Id.* § 11(1).

87. *Id.* § 11(6)(d).

88. *Id.* § 12(1)(a).

89. *Id.* § 12(2)(b).

*A. Removal of Legislative Scrutiny for Ad Hoc Extradition Arrangements*

Under the “special surrender arrangements” proposed by the Security Bureau, the CE is empowered to issue a certificate to activate the processing of ad hoc extradition requests from jurisdictions with which Hong Kong have no bilateral extradition treaties with.<sup>90</sup> The extradition bill, in effect, prevents the LegCo from repealing an order made by the CE, by way of a resolution,<sup>91</sup> seeking to remove an important level of legislative review.<sup>92</sup> This essentially leaves a magistrate sitting in the Court of Committal as the only safeguard against the extradition of an individual to mainland China.<sup>93</sup> Such removal of legislative scrutiny is problematic given that the magistrate must extradite an individual if the extradition request submitted by the requesting jurisdiction has met all of the formalities set forth in the FOO, and there exists no reasonable grounds for refusing extradition.<sup>94</sup> The magistrate is not entitled to receive evidence that proves the individual wanted for extradition has not engaged in unlawful conduct,<sup>95</sup> and thus cannot scrutinize whether that individual is guilty of the offense stated in the extradition request.<sup>96</sup> Likewise, the magistrate is not authorized to examine the quality of the judicial system of the requesting jurisdiction or of the justice the individual will receive once extradited back to the requesting jurisdiction.<sup>97</sup> Consequently, the procedural protections laid down in the existing extradition mechanism that is designed to protect the fundamental human rights of extradited individuals and ensure

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90. See generally Amendments to Fugitive Offenders Ordinance (Cap. 503), § 3A (H.K.).

91. Fugitive Offenders Ordinance, *supra* note 23, § 3(3).

92. Johannes Chan, *Ten Days that Shocked the World: The Rendition Proposal in Hong Kong*, 49 HONG KONG L.J. 431, 436 (2019).

93. See Observations of the HKBA on the Security Bureau’s Proposal, *supra* note 76, ¶ 22.

94. See *A Brief Guide to Issues Arising from the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, *supra* note 28, ¶ 19.

95. Fugitive Offenders Ordinance, *supra* note 23, § 23(4).

96. See *A Brief Guide to Issues Arising from the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, *supra* note 94.

97. *Id.*

HKSAR government's compliance with human rights obligations would be severely weakened and undermined.<sup>98</sup>

The HKSAR government's justification for the proposed removal of legislative scrutiny is also weak. It seeks to remove legislative scrutiny on the grounds that a delay in the LegCo scrutiny process accompanied by unpreventable public disclosure of the relevant case details of the ad hoc extradition request would alarm the fugitive and prompt him or her to flee the country to avoid arrest.<sup>99</sup> Risk of unlawful flight to avoid prosecution during the LegCo scrutiny period, however, can easily be mitigated by shortening the time by which a provisional arrest warrant can be issued.<sup>100</sup> Such early issuance of provisional arrest warrants is already authorized in Hong Kong's extradition treaties with Canada, Indonesia, and the Czech Republic.<sup>101</sup> Under the relevant provisions, an individual can be provisionally arrested in urgent situations as long as the application submitted by the requesting jurisdiction satisfied all of the requirements.<sup>102</sup> The requesting jurisdiction must submit supporting documents that contain detailed description of the case, the nature of the offense, the type of sentence that can be imposed for the offense, and the length of the sentence to be served.<sup>103</sup> The FOO can be amended to allow for the issuance of arrest warrants to mimic these provisions in the extradition treaties. Under the existing extradition system, an arrest warrant can only be issued by a magistrate after the LegCo scrutiny period has expired and an authority to proceed has been received.<sup>104</sup> To deal with this problem, an amended

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98. See Observations of the HKBA on the Security Bureau's Proposal, *supra* note 93.

99. See Cooperation on Juridical Assistance, *supra* note 21, ¶ 7(a).

100. See Observations of the HKBA on the Security Bureau's Proposal, *supra* note 76, ¶ 26.

101. Fugitive Offenders (Canada) Order, (1997) Cap. 503, art. 11 (H.K.); Fugitive Offenders (Czech Republic) Order, (2015) Cap. 503, art. 12 (H.K.); Fugitive Offenders (Indonesia) Order, (2001) Cap. 503, art. 14 (H.K.).

102. Fugitive Offenders (Canada) Order, (1997) Cap. 503, art. 11(1) (H.K.); Fugitive Offenders (Czech Republic) Order, (2015) Cap. 503, art. 12(1) (H.K.); Fugitive Offenders (Indonesia) Order, (2001) Cap. 503, art. 14(1) (H.K.).

103. Fugitive Offenders (Canada) Order, (1997) Cap. 503, art. 11(2) (H.K.); Fugitive Offenders (Czech Republic) Order, (2015) Cap. 503, art. 12(2) (H.K.); Fugitive Offenders (Indonesia) Order, (2001) Cap. 503, art. 14(2) (H.K.).

104. Fugitive Offenders Ordinance, *supra* note 23, §§ 3(4), 7(1)(a).

provision should allow an arrest warrant to be issued once an extradition request is received and the ad hoc arrangement with the requesting jurisdiction is submitted to LegCo for legislative scrutiny.<sup>105</sup> Additional constraints on the requesting jurisdiction such as those outlined in the extradition treaties with Canada, Indonesia and the Czech Republic should also be imposed.<sup>106</sup>

Furthermore, the HKSAR government's removal of legislative scrutiny is not accompanied by any new provisions that expand the power of the courts.<sup>107</sup> Courts are not authorized to refuse extradition requests if the requesting jurisdiction does not comply with provisions under the Hong Kong Bill of Rights Ordinance<sup>108</sup> and human rights obligations under the International Covenant on Civil and Political Rights (ICCPR), such as being unable or unwilling to afford a fair trial and guarantee fundamental human rights.<sup>109</sup>

The ability of the courts to decline extradition on grounds of non-compliance with human rights obligation is crucial. In Section 87 of the UK's 2003 Extradition Act, judges are expressly required to decide whether an individual's extradition would be compatible with the European Convention on Human Rights (ECHR), within the meaning of the 1998 Human Rights Act.<sup>110</sup> If extradition would not be compatible with that individual's human rights set out in the ECHR and incorporated into UK's domestic law by the 1998 Human Rights Act, then the judge must discharge the individual and decide whether he or she is to be extradited in the negative.<sup>111</sup> The equivalent in Hong Kong would be to require a magistrate to discharge an individual if extradition would not be compatible with his or her human rights under the ICCPR, which is incorporated in Article

105. *Observations of the HKBA on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, HONG KONG BAR ASS'N ¶ 14–16 (Apr. 2, 2019) [hereinafter *Observations of the HKBA on the Fugitive Offenders and Mutual Legal Assistance*].

106. See *Fugitive Offenders (Canada) Order*, *supra* note 103, art. 11(2); *Fugitive Offenders (Czech Republic) Order*, *supra* note 103, art. 12(2); *Fugitive Offenders (Indonesia) Order*, *supra* note 103, art. 14(2).

107. See *Observations of the HKBA on the Fugitive Offenders and Mutual Legal Assistance*, *supra* note 105, ¶ 20.

108. *Id.*

109. *Id.* ¶ 35.

110. Extradition Act 2003, c. 41, § 87(1) (Eng.).

111. *Id.* § 87(2).



39 of the Basic Law and in the Hong Kong Bill of Rights Ordinance.<sup>112</sup> The HKSAR government also has a duty under Article 4 of the Basic Law to “safeguard the rights and freedoms of the residents of the HKSAR and of other persons in the Region in accordance with law.”<sup>113</sup> To effectively ensure an individual would not be subjected to human rights abuses, courts must be required to refuse an extradition request if such a risk exists.<sup>114</sup>

*B. Removal of Judicial Oversight in the Requesting Jurisdiction*

Under Section 23(2)(a) of the FOO, supporting documents must be signed or certified by a judge or magistrate and sealed with the official seal of a competent authority of the requesting jurisdiction.<sup>115</sup> The HKSAR government seeks to amend the FOO by adding a new subsection to the existing Section 23.<sup>116</sup> Under the “special surrender arrangements,” any supporting documents is deemed to be sufficiently authenticated if it is claimed to be signed, certified, sealed, or authenticated by any means stated in the ad hoc extradition request submitted by the requesting jurisdiction.<sup>117</sup> This new provision essentially bypasses the requirement that any supporting documents be authenticated by a competent judicial authority, removing judicial oversight as required by Section 23(2)(a) of the FOO.<sup>118</sup> By broadening the scope of the admissibility of evidence, the amendment also violates Hong Kong’s existing case law.<sup>119</sup> Under *See Cherk Ching v. Superintendent of Lai Chi Kok Reception Centre & Another*, an agreement between Hong Kong and other foreign jurisdictions on the manner in which evidence on extradition will be supplied will only control if it is more restrictive than the requirements set out in the FOO.<sup>120</sup> The prescribed method of authenticating supporting documents out-

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112. *Additional Observations of the HKBA on the HKSAR Government’s Proposed Further Changes to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2009*, HK BAR ASS’N ¶15 (June 6, 2019) [hereinafter *Additional Observations of the HKBA*].

113. Basic Law, *supra* note 1, art. 4.

114. *See* *Additional Observations of the HKBA*, *supra* note 112, ¶ 17.

115. *Fugitive Offenders Ordinance*, *supra* note 23, § 23(2).

116. *Amendments to Fugitive Offenders Ordinance*, *supra* note 90, § 2(A).

117. *Id.*

118. *See* *Additional Observations of the HKBA*, *supra* note 112, ¶ 24.

119. *See Cherk Ching v. Superintendent of Lai Chi Kok Reception Centre & Another*, [2005] 4 H.K.L.R.D 105, ¶ 96 (C.A).

120. *Id.*

lined in the current FOO is thus the minimum standard for extradition of an individual and cannot be violated by any means.<sup>121</sup>

### III. NO RELIABLE SAFEGUARD INTRODUCED BY THE PROPOSED FURTHER CONCESSIONS TO ALLAY PUBLIC CONCERNS

The further concessions introduced by the HKSAR government provide no additional or legitimate safeguards. In a special meeting of the Panel on Security in LegCo held on June 1, 2019, the Secretary for Security, John Lee Ka-chiu, confirmed that only raising the imprisonment threshold to seven years will be written into the Extradition Bill. All other proposed concessions will be in the form of policy statements and practices.

#### *A. Raising Extradition Threshold to Crimes Punishable by Seven Years*

The HKSAR government's proposal to raise the imprisonment threshold for extraditable offenses from the original three years to seven years will likely provide only illusory protection. Increasing the threshold for punishable offenses by four years would still exclude a considerable amount of broadly defined offenses, such as economic offenses, that could be easily molded to fit in any allegations.<sup>122</sup> For example, any individual who commits theft or burglary, or attempts to commit burglary in Hong Kong, will be imprisoned for ten years or fourteen years respectively.<sup>123</sup>

For European countries, the frequent use of the European Arrest Warrant system, designed to facilitate extradition between member states, to request the extradition of individuals for seemingly trivial matters raised widespread public concerns.<sup>124</sup> European courts were flooded with extradition re-

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121. *Id.*

122. *Joint Observations on the Human Rights Implications of Hong Kong's Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, BAR HUM. RTS. COMM. ENG. & WALES, HUM. RTS. COMM. L. SOC'Y ENG. & WALES, INT'L BAR ASS'N HUM. RTS. INST., DEF. EXTRADITION LAW. F., INT'L F. EXTRADITION SPECIALISTS & FAIR TRIALS ¶ 45 (June 14, 2019).

123. Theft Ordinance, (1968) Cap. 210, §§ 9, 11(4) (H.K.).

124. SELECT COMMITTEE ON EXTRADITION LAW, EXTRADITION: UK LAW & PRACTICE, 2014-15, HL 126-I, at 35 (UK).

quests for trivial offenses.<sup>125</sup> It was this precise phenomenon that prompted some EU member states to amend their domestic legislation to empower their courts to deny disproportionate extraditions.<sup>126</sup> In the UK, a proportionality bar was introduced to the 2003 Extradition Act through Section 157 of the 2014 Anti-social Behavior, Crime and Policing Act to allay public concern.<sup>127</sup> Under Section 21A of the 2003 Extradition Act, the judge must order the discharge of a requested individual if the extradition would be disproportionate,<sup>128</sup> taking into account factors such as: (1) the seriousness of the conduct alleged to constitute the extradition offense; (2) the likely penalty that would be imposed if the requested individual was found guilty; and (3) the possibility of the relevant foreign authorities taking measures that would be less coercive than extradition.<sup>129</sup> In addition, a proportionality check was introduced into the 2003 Extradition Act to filter out the most obvious disproportionate cases at the beginning of the extradition process.<sup>130</sup> The absence of even a proposal to introduce a proportionality check to the FOO to weed out extradition requests for trivial matters illustrates not only the lack of adequate procedural protection under Hong Kong's existing extradition system, but also the lack of any additional safeguard put in place by setting a higher imprisonment threshold for extraditable offenses.

### *B. Setting A Time Limit for Extradition Offenses*

The HKSAR government's proposal to set limitations for retrospective extradition requests would provide limited protections for individuals requested for extradition to mainland China. Although Article 87 of the PRC Criminal Law stipulates that individuals would not be prosecuted for the crimes they have committed if a designated period of time has elapsed,<sup>131</sup>

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125. *Revising the European Arrest Warrant*, EUR. PARL. RES. SERV. 1, 19 (2014).

126. *See generally* SELECT COMMITTEE ON EXTRADITION LAW, *supra* note 124.

127. Anti-Social Behavior, Crime and Policing Act 2014, c.12, § 157 (Eng.).

128. Extradition Act 2003, *supra* note 110, § 21A(4)(b).

129. *Id.* § 21A(3).

130. SELECT COMMITTEE ON EXTRADITION LAW, *supra* note 124, at 35.

131. Xingfa (刑法) [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 87, 1997 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter P.R.C. Criminal Law].

such limitation on prosecution is subject to various exceptions. For example, no limitation on the period for prosecution would be imposed if: (1) the individual escaped from investigation or trial after a public security organ placed his or her case on file and conducted an investigation on him or her;<sup>132</sup> (2) the public security organ failed to place the case on file after the victim submitted a complaint against the individual within the limitation period;<sup>133</sup> and (3) the individual committed another crime during the limitation period.<sup>134</sup> If the individual commits a new crime, the limitation period for the prosecution of the old crime would begin from the date the new crime is committed.<sup>135</sup> This essentially means that “the limitation period for an ‘old crime’ can be extended indefinitely so long as there is an accusation of a new [crime] within that period.”<sup>136</sup> Furthermore, even if the longest applicable limitation period for prosecution has passed—twenty years for life imprisonment or death—the SPP could still approve the prosecution for such crime.<sup>137</sup> Given the number of exceptions spelled out in the PRC Criminal Law and the broad and discrete power granted to the SPP, it is uncertain whether setting a time limit for extradition requests would provide any reliable assurances that an individual would escape prosecution for a time-barred offense.

### *C. Requiring the Highest Authority to Issue Extradition Requests*

Similarly, requiring the extradition requests to be issued by the highest authorities of the requesting jurisdiction offers dubious safeguard. Even when the SPP or the SPC, the highest authorities in mainland China, issue an extradition request, the individual could still be subjected to human rights abuses after being extradited back to mainland China, given the frequent denial of due process, the lack of fair trial proceedings in PRC courts, and the broad discretion afforded to the SPP by the PRC Civil Procedure Law and the Criminal Procedure Law. For example, the SPP can appeal against the legally effective judgments rendered by a People’s Court at any level and seeks

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132. *Id.* art. 88.

133. *Id.*

134. *Id.* art. 89.

135. *Id.*

136. *See* Additional Observations of the HKBA, *supra* note 112, ¶ 21.

137. P.R.C. Criminal Law, *supra* note 131, art. 87(4).

the reopening of final judgments it deemed erroneous.<sup>138</sup> Furthermore, even though the time limit for detaining a criminal suspect is two months,<sup>139</sup> the SPP can extend the detention period by one month for cases it deems “complex”<sup>140</sup> and by two months for cases it deems “grave and complex,” such that the relevant crime involves a cross-border dimension<sup>141</sup> or that evidence is difficult to obtain.<sup>142</sup>

*D. Allowing the CE to Include Human Rights Provisions in HK's Ad Hoc Extradition Arrangements with Foreign Jurisdictions*

Finally, the HKSAR government's proposal to permit the CE to include terms in the ad hoc extradition arrangement, such as requiring the requesting jurisdiction to respect the presumption of innocence, open trial, legal representation, the right to appeal, and to ban coerced confessions, is not likely to lead to real human rights protections. Securing human rights compliance in an ad hoc extradition arrangement depends not only on the CE's negotiation skills and the HKSAR's relationship with the requesting jurisdiction,<sup>143</sup> but also on the goodwill and generosity of that jurisdiction.<sup>144</sup> Granting the CE the sole power to secure human rights assurance from mainland China is problematic in light of the nature of her appointment and the HKSAR's asymmetrical relationship with the mainland.<sup>145</sup> Under Article 43 and 45 of the Basic Law, the CE is appointed by the CPG of the PRC<sup>146</sup> and is accountable to it.<sup>147</sup> The CE is re-

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138. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended June 27, 2017) art. 185, 1982 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

139. Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1997, amended Mar. 14, 2012) art. 124, 1979 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

140. *Id.*

141. *Id.* art. 126(3).

142. *Id.* art. 126(4).

143. Additional Observations of the HKBA, *supra* note 112, ¶ 12.

144. *Id.* ¶ 11.

145. *Id.* ¶¶ 12, 16; RALF HORLEMANN, HONG KONG'S TRANSITION TO CHINESE RULE: THE LIMITS OF AUTONOMY 73–75 (2002).

146. Basic Law, *supra* note 1, art. 45.

147. *Id.* art. 43.

quired to implement the directives issued by the CPG<sup>148</sup> and to report to the CPG for the appointment of important executive officers.<sup>149</sup> This raises a concern over the CE's ability to deny extradition requests unless there is absolute human rights compliance in mainland China such as guaranteeing extradited individuals the right to legal counsel, the right to a fair trial, the right to humane facilities and conditions, and the protection against coerced confessions.<sup>150</sup> This also poses a question of whether the CE possesses the necessary impartiality and independence to adjudicate any extradition issues with mainland China, such as a fair assessment of the human rights situation there.<sup>151</sup> Furthermore, *R (Kashamu) v. Governor of Brixton Prison* made clear that human rights protection and supervision should be vested in a jurisdiction's independent judiciary, rather than in its interest-riddled executive power.<sup>152</sup>

Another problem is that the HKSAR government only suggested that the CE "may" require the requesting jurisdiction to comply with human rights obligations in an ad hoc extradition arrangement, not that the CE is compelled to do so.<sup>153</sup> Because such commitment is vague and will not be written into the extradition bill, their failure or refusal to elicit any human rights compliance assurance from the requesting jurisdiction may not be reviewable by any Hong Kong court.<sup>154</sup> The list of human rights safeguards that the CE may include in an extradition arrangement is also inconclusive and missing essential considerations as guaranteed under the Hong Kong Bill of Rights Ordinance, such as whether the requesting jurisdiction will ensure humane prison conditions,<sup>155</sup> and whether the extradited individual will be at risk of being tortured or treated poorly.<sup>156</sup> Even if the list is all-encompassing, Section 3A, proposed under

148. *Id.* art. 48(8).

149. *Id.* art. 48(5).

150. *See generally* Additional Observations of the HKBA, *supra* note 143.

151. *See Joint Observations on the Human Rights Implications of Hong Kong's Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, *supra* note 122, ¶ 47.

152. *See generally* Regina (Kashamu) v. Governor of Brixton Prison [2001] EWHC 980.

153. *See* Fugitive Offenders Paper, *supra* note 10, Annex 2.

154. Chan, *supra* note 92, at 437.

155. For comparisons, *see* The Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, art. 6 (H.K.).

156. *Id.* art. 3.

the “special surrender arrangements,” would vest sole power in the CE to determine whether diplomatic assurances given by the requesting jurisdiction are reliable, trustworthy and capable of being met in practice, and allow the CE to conclusively certify her satisfaction on the kind of assurances she received.<sup>157</sup>

This is problematic in light of the recent decision passed by the New Zealand Court of Appeals in *Kim v. Minister of Justice*.<sup>158</sup> The PRC government sought to extradite a fugitive back to mainland China for murdering a Chinese national in Shanghai.<sup>159</sup> The diplomatic assurance issued by the PRC provided comprehensive guarantees, including the rights to fair trial, legal counsel, family visitation, and to not be tortured.<sup>160</sup> However, the court held that it has jurisdiction to review both the diplomatic assurances offered and the prevalent human rights compliance in the requesting jurisdiction.<sup>161</sup> Although torture is illegal in mainland China, it remains widespread due to the systemic features of the PRC criminal justice system.<sup>162</sup> There were also existence of political interference in the judicial system and evidence of persecution of criminal defense lawyers.<sup>163</sup>

#### *E. Ad Hoc Extradition Arrangements in the UK*

The HKSAR justified the introduction of an ad hoc extradition arrangement between Hong Kong and mainland China in the extradition bill on the ground that similar ad hoc arrangements have been practiced in the UK for years.<sup>164</sup> Although Section 194 of the UK's 2003 Extradition Act allows the Secretary of State to agree to case-specific extradition arrangements,<sup>165</sup> this power has only been used in rare and exceptional circumstances. For example, the Secretary of State signed orders to extradite four suspects allegedly involved in the Rwan-

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157. See Observations of the HKBA on the Fugitive Offenders and Mutual Legal Assistance, *supra* note 105, ¶ 7.

158. *Kyung Yup Kim v. Minister of Justice of the NZ* [2019] NZCA 209 at [8] (N.Z.).

159. *Id.* at [2].

160. *Id.* at [26].

161. *Id.* at [68, 71].

162. *Id.* at [274].

163. *Id.*

164. See Fugitive Offenders Paper, *supra* note 10, ¶ 5.

165. Extradition Act 2003, *supra* note 110, § 194(2).

dan genocide in response to Rwandan government's extradition request and a Magistrate's court approval to extradite.<sup>166</sup> Following the suspects' appeal, the High Court reversed the decision on the ground that there exists a substantial risk that the suspects would not receive a fair trial in Rwanda.<sup>167</sup> It re-examined the Rwandan justice system following the Rwandan government's appeal to decide whether there has been material changes in the system in recent years such that the suspects would not be at risk of unfair trial if returned to Rwanda.<sup>168</sup> The High Court ultimately concluded in the negative, highlighting the political pressures on the judicial system, the lack of independence of the judiciary, the difficulties and fears of the defense witnesses, and the incapability of the suspects to obtain and present evidence and be properly represented with adequate counsel.<sup>169</sup>

Such power was also invoked in respect of Bermuda's request for the extradition of a suspect who allegedly was involved in a premediated murder.<sup>170</sup> Bermuda relied on an ad hoc extradition request because of the UK's repeal of its 1989 Extradition Act, replacing it with the 2003 Extradition Act,<sup>171</sup> which in effect resulted in an inadvertent deletion of UK's extradition arrangements with its overseas territories. In 2016, the UK's 2003 Extradition Act was extended to the thirteen British Overseas Territories, rectifying that problem.<sup>172</sup> Finally, the UK signed a memorandum of understanding on extradition with Taiwan to enable an ad hoc extradition proceeding to be instituted to extradite Zain Taj Dean back to Taiwan to face

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166. Vincent Brown aka Vincent Bajinja & others v. Gov't of Rwanda & the Sec'y of State for the Home Dep't [2009] EWHC (Admin) 770 [1–4] (Eng.).

167. *Id.* [66].

168. Gov't of Rwanda v. Emmanuel Nteziryayo & others [2017] EWHC (Admin) 1912 [41–42] (Eng.).

169. *Id.* [57–59].

170. Simon Jones, *Murder Suspect Could be Extradited from UK*, BERMUDA SUN (Feb. 21, 2014, 7:00 AM), <http://bermudasun.bm/Content/NEWS/News/Article/Exclusive-Murder-suspect-could-be-extradited-from-UK/24/270/75223>.

171. Extradition Act 1877, LAWS OF BERMUDA tit. 8, Item 36 (1989 Rev.), <http://www.bermudalaws.bm/Laws/Consolidated%20Laws/Extradition%20Act%201877.pdf>.

172. The Extradition Act 2003 (Overseas Territories) Order 2016, No. 990, § 1(2) (Eng.).



manslaughter charges.<sup>173</sup> The UK has no extradition treaty with Taiwan because of its unwillingness to formally recognize Taiwan as a state for diplomatic and political reasons.<sup>174</sup> Dean challenged his proposed extradition under Section 103 of the 2003 Extradition Act.<sup>175</sup> He claimed that the prison conditions in Taiwan were so poor that his extradition would breach Article 3 of the ECHR, which prohibits torture, inhuman, or degrading treatment or punishment.<sup>176</sup> The Taiwanese authorities in response provided written assurances and guaranteed that Dean would not be held in overcrowded prison cells.<sup>177</sup> The Court of Appeals in *Lord Advocate v. Dean* held that even if the written assurances were fulfilled, a real risk of ill treatment still existed and thus his extradition to Taiwan would be incompatible with Article 3 of the ECHR.<sup>178</sup> Thus, although ad hoc extradition proceedings were permitted to be instituted in rare instances under Section 194 of the UK's 2003 Extradition Act, these individuals ultimately were not extradited. In both cases, the courts found a real risk of human rights abuses and violations in the requesting jurisdictions.

The 2003 Extradition Act also contains robust judicial protections against exposure to human rights violations. Section 82 protects individuals from extraditions rendered unjust or oppressive by the passage of time.<sup>179</sup> Section 85 stipulates that individuals who are entitled to a retrial due to being convicted in absentia must be afforded the right to adequate legal representation<sup>180</sup> and the right to examine witnesses.<sup>181</sup> Section 91 prohibits extradition where the individual's physical or mental health would render it unjust or oppressive.<sup>182</sup> Section 87 vests power in the UK's judiciary to prevent any extradition that exposes a person to human rights violations.<sup>183</sup>

The UK courts have refused extradition based on diverse matters such as inadequate medical care and abhorrent prison

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173. *Lord Advocate v. Dean* [2017] UKSC 44 [4, 6] (Eng.).

174. See SELECT COMMITTEE ON EXTRADITION LAW, *supra* note 124, at 11.

175. *Lord Advocate*, [2017] UKSC 44 [8].

176. *Id.* [1].

177. *Id.* [10].

178. *Id.* [1, 10].

179. Extradition Act 2003, *supra* note 110, § 82(a).

180. *Id.* § 85.

181. *Id.*

182. *Id.* § 91.

183. *Id.* § 87(1).

conditions. For example, in *LMN v. Government of Turkey*, the High Court refused to extradite the appellant to Turkey due to the over-crowdedness of Turkey's current prison conditions.<sup>184</sup> The judge concluded that extradition to Turkey would be a breach of the appellant's rights under Article 3 of the ECHR.<sup>185</sup> In *Lauri Love v. the Government of the United States of America and Liberty*, the High Court rejected demands from the US government to extradite the appellant,<sup>186</sup> citing the inability of US prisons to humanely and adequately treat his mental health problems.<sup>187</sup> The court ruled that extraditing the appellant to the US would be oppressive as it is likely that the US prison system would exacerbate his health issues and produce a substantial risk of him committing suicide.<sup>188</sup> The UK courts have also refused extradition based on the likelihood of exposure to violations of the right to liberty. In *the Government of United States of America v. Giese*, the High Court refused to extradite the appellant on the ground that he would be subjected to a real risk of civil commitment and indefinite detention that would breach his rights under Article 5 of the ECHR.<sup>189</sup> Most importantly, the UK courts can reject diplomatic assurances when the human rights situations is genuinely poor in the requesting jurisdiction.<sup>190</sup> Courts will assess the quality of the assurances given and determine whether they can be relied upon in light of the general practices in the requesting jurisdiction.<sup>191</sup> In doing so, courts will take into account a list of factors spelled out in *Othman (Abu Qatada) v. United Kingdom*.<sup>192</sup> In

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184. *LMN v. Gov't of Turkey* [2018] EWHC (Admin) 210 [50, 76] (Eng.).

185. *Id.* [82].

186. *Lauri Love v. Gov't of United States of America & Liberty* [2018] EWHC (Admin) 172 [122] (Eng.).

187. *Id.* [102].

188. *Id.* [57].

189. *Gov't of United States of America v. Giese* [2015] EWHC (Admin) 2733 [3, 4, 68] (Eng.).

190. *Othman (Abu Qatada) v. United Kingdom*, 55 Eur. Ct. H.R. ¶ 187–88 (2012).

191. *Id.* ¶ 189.

192. *Id.* The list of factors includes: “(1) whether the terms of the assurances have been disclosed to the Court”; (2) “whether the assurances are specific or are general and vague”; (3) “who has given the assurances and whether that person can bind the receiving State”; (4) “if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them”; (5) “whether the assurances concerns treatment which is legal or illegal in the receiving State”; (6) “whether

*Shmatko v. The Russian Federation*, the High Court held that extraditing the appellant would seriously violate his rights under Article 3 of the ECHR.<sup>193</sup> Applying the *Othman* factors, the court rejected Russian assurances as untrustworthy, in light of the absence of effective independent monitoring of prison conditions<sup>194</sup> and the lack of an independent, uncorrupt judicial system.<sup>195</sup>

In contrast, the FOO and its amendments possess none of the fundamental human rights protections currently vested in the UK's extradition courts. The FOO does not contain any provision such as Section 87 of the UK's 2003 Extradition Act that requires the judge to decide whether extraditing an individual would expose him or her to human rights violations.<sup>196</sup> The political offense exception in Section 5(1)(a) of the FOO which is missing in the UK's 2003 Extradition Act is also widely recognized to be controversial.<sup>197</sup> Not only is the concept of "political offense" ill-defined, with states disagreeing on what constitutes one,<sup>198</sup> but "there are also practical difficulties with regard to putting appropriate evidence before a court to establish

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they have been given by a Contracting State"; (7) "the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances"; (8) "whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers"; (9) "whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible"; (10) "whether the applicant has previously been ill-treated in the receiving State"; and (11) "whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State."

193. *Shmatko v. The Russian Federation* [2018] EWHC (Admin) 3534 [55] (Eng.).

194. *Id.* [39].

195. *Id.* [32].

196. See generally Fugitive Offenders Ordinance, *supra* note 23.

197. See David M. Lieberman, *Sorting the Revolutionary from the Terrorist: The Delicate Application of the "Political Offense" Exception in US Extradition Cases*, 59 STAN. L. REV. 181, 185 (2006).

198. Lynette Long, *Political Offenses in Extradition Law and the Case of Edward Snowden*, DARTMOUTH L.J. (Oct. 20, 2017), <https://dartmouthlawjournal.org/dljonline/?p=56>.

such an exception.”<sup>199</sup> Trials in absentia protection in Section 5(1)(b) of the FOO is also noticeably less robust than Section 85(8) of the UK’s 2003 Extradition Act. Section 85(8) of the UK’s 2003 Extradition Act stipulates that if the original conviction was delivered in absentia and the court orders a re-trial, then the individual must be guaranteed the right to adequately defend himself—including the right to adequate legal counsel<sup>200</sup> and the right to examine all witnesses against him.<sup>201</sup> Such language guaranteeing fundamental human rights is essentially missing in the FOO.<sup>202</sup>

#### *F. Proposed Solution to the Extradition Problem*

Under the international human rights regimes and its domestic law, the HKSAR government is obligated to ensure certain fundamental human rights to individuals. Article 2 of the ICCPR<sup>203</sup> stipulates that the HKSAR government must “respect and ensure” the rights recognized in the ICCPR to “all individuals within its territory and subject to its jurisdiction . . . .”<sup>204</sup> Such fundamental rights protected under the ICCPR include, among others, freedom from “torture [and] inhuman or degrading treatment or punishment”<sup>205</sup> and a right to “a fair and public hearing by a competent, independent and impartial” judiciary.<sup>206</sup> These important rights were also incorporated in the Hong Kong Bill of Rights Ordinance<sup>207</sup> and maintained by the Basic Law.<sup>208</sup> Furthermore, under Article 28 of the Basic Law, “no Hong Kong resident shall be subjected to arbitrary or

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199. Gavan Griffith & Claire Harris, *Recent Developments in the Law of Extradition*, 6 MELB. J. INT’L. L. 33, 42–43 (2005).

200. Extradition Act 2003, *supra* note 110, § 85(8).

201. *Id.* § 85(8)(b).

202. For comparisons, see Fugitive Offenders Ordinance, *supra* note 23, § 5(1)(b)(ii).

203. International Covenant on Civil and Political Rights, art. 2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

204. *Id.*

205. *Id.* art. 7.

206. *Id.* art. 14.

207. The Hong Kong Bill of Rights Ordinance, *supra* note 155, art. 3, 10 & 11.

208. Basic Law, *supra* note 1, art. 87.

unlawful arrest, detention or imprisonment.”<sup>209</sup> Most importantly, the *Soering v. United Kingdom* decision established that a state may incur liability if it extradites an individual to a third state where he or she will face a real risk of being subjected to human rights violations.<sup>210</sup>

Given the fundamental differences between Hong Kong and mainland China’s legal and judicial systems, reaching a general agreement on judicial cooperation in criminal matters proved to be difficult.<sup>211</sup> As a result of these differences, particularly mainland China’s lack of recognition of fundamental human rights such as the right to a fair and public trial, the two sides were unable to reach an agreement despite more than a decade of negotiations.<sup>212</sup> To resolve this problem, the two sides should cooperate together to create a special court to provide extradited fugitives with the right to a fair and open trial, and other fundamental rights guaranteed under the ICCPR and the Hong Kong Bill of Rights Ordinance. The special court should invite distinguished foreign judges as well as domestic judges selected by members of the public, and its decisions rendered should also be published online for the public’s viewing to ensure judicial transparency. The recruitment of judges and judicial officers from other common law jurisdictions is permitted under Article 92 of the Basic Law.<sup>213</sup> Furthermore, the Hong Kong judiciary is staffed by both foreign and Chinese judges and judicial officers.<sup>214</sup> The panel of Non-Permanent Judges in the Hong Kong Court of Final Appeal is comprised of current and retired judges of the supreme courts of the UK, Canada, Australia and New Zealand.<sup>215</sup> To ensure that it conforms to the generally accepted standards of the

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209. *Id.* art. 28.

210. *See generally* *Soering v. United Kingdom*, 161 Eur. Ct. H.R (ser. A) (1989).

211. Miguel Manero de Lemos & Teresa Lancry Robalo, *Judicial Cooperation in Criminal Matters in the Special Administrative Regions of Hong Kong and Macau Through the Lens of “One Country, Two Systems” and the Surrender of Fugitives to Mainland China*, 5 REV. BRAS. DE DIREITO PROCESSUAL PENAL 737, 757 (2019).

212. MARK S. GAYLORD, DANNY GITTINGS & HAROLD TRAVER, INTRODUCTION TO CRIME, LAW AND JUSTICE IN HONG KONG 9–10 (2009).

213. Basic Law, *supra* note 1, art. 92.

214. *See* P.Y. Lo, *Twilight of the Idolised: Backsliding in Hong Kong’s Legal and Judicial Cultures*, U. H.K. 1, 6 (2019).

215. *Id.*

common law and be viewed as reputable among common law jurisdictions, the CFA often invites one foreign judge from this panel to join the five-judge bench to hear final appeals.<sup>216</sup>

#### CONCLUSION

The proposed extradition bill fueled massive protests and deeper distrust of the HKSAR government headed by CE Carrie Lam despite its recent suspension and withdrawal. Given the frequent incidents of arbitrary detention, enforced disappearances and various forms of human rights abuses, profound change in mainland China's deeply flawed judicial system is unlikely to occur. The most one can hope for is for the HKSAR government to seek judicial cooperation with the PRC government to establish a competent, independent and impartial court free from political influence to resolve extradition disputes.

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216. *Id.* at 6–7.

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