Extradition and the Hong Kong Special Administrative Region: Will Hong Kong Remain a Separate and Independent Jurisdiction after 1997

Erik Alexander Rapoport

Follow this and additional works at: http://scholarship.law.berkeley.edu/aalj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z386K46

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Asian American Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Extradition and the Hong Kong Special Administrative Region: Will Hong Kong Remain a Separate and Independent Jurisdiction After 1997?

Erik Alexander Rapoport†

Hong Kong plays a key role in U.S. efforts to fight international criminal activities in Southeast Asia, because of its unique geographical and political position. However, as of July 1, 1997, the People's Republic of China formally regained control of Hong Kong, which raises concerns over the extradition of criminal fugitives to and from Hong Kong. The reason being that, although there is a proposed U.S.-Hong Kong extradition treaty, there is no U.S.-China extradition treaty making continued U.S.-Hong Kong extradition controversial. Moreover, the current extradition framework creates tension between the Judicial and Executive branches of the U.S. government. The author argues that the level and extent of Mainland China government interference with Hong Kong will shift the burden of approving extradition from the Judicial to Executive branch. He concludes that continued extradition is dependent on Hong Kong ensuring that the basic rights of criminal defendants are respected and that the continued willingness of the U.S. to extradite fugitives to Hong Kong after 1997 will depend on Hong Kong's integrity as a separate and independent jurisdiction.

INTRODUCTION

On July 1, 1997, Hong Kong was returned to the People's Republic of China ("PRC") per agreements worked out between Britain and the PRC. At that point, Hong Kong became the Hong Kong Special Administrative Region ("HKSAR"). Although the HKSAR will lack the sovereignty over its territory typically associated with the definition of statehood, an exception exists for international agreements in the areas of foreign and defense affairs. Thus the HKSAR will be able to enter into

© 1997 Asian Law Journal
† B.A., University of California, Berkeley, 1989; J.D./M.A., University of California, Berkeley, 1996. This paper is dedicated to Eugenio Menegon. Without his perseverance and patience, this paper would never have been completed. I would also like to thank Professors Bob Berring, Marina Hsieh, and Frederick Wakeman for their support. In addition, I would like to thank my wife Liu Wei and my parents Judith and Stanley Rapoport for their support as well.
international agreements as if it were an independent state. One important area of concern to the United States relates to the extradition of criminal fugitives to and from Hong Kong. Because of Hong Kong’s unique geographical and political position, she plays a key role in U.S. efforts to fight international criminal activities in Southeast Asia. If extradition with Hong Kong is restricted after 1997, the ability of the U.S. to fight international crime will be hampered.

The HKSAR is poised to become party to an extradition treaty with the U.S. However, since the HKSAR is under the sovereign control of China, which has no extradition agreements with the U.S., extradition from the U.S. to the HKSAR will be controversial. The U.S. does not have an extradition treaty with the PRC because of the PRC’s human rights record, the lack of protections afforded suspects under its criminal justice system, and its claim of extraterritorial jurisdiction over crimes committed by Chinese nationals anywhere in the world. Extradition from the U.S. to the HKSAR will be especially sensitive to PRC governmental interference with the HKSAR government because extradition involves the rights of individual criminal defendants. Extradition cases between the U.S. and the HKSAR thus have the potential of becoming flash points in debates about China’s human rights record if Hong Kong’s criminal justice system becomes too integrated with the criminal justice system of the PRC.

If the PRC government radically interferes with the HKSAR government after 1997, extradition treaties will be but some of the many international agreements that the HKSAR may not be able to maintain. Since the PRC dissolved Hong Kong’s popularly-elected Legislative Counsel on July 1, 1997, having already installed a Beijing-appointed Provisional Legislative Council (PLC) to replace it, HKSAR independence has become extremely tenuous. Radical interference with the HKSAR may cause the U.S. Judicial or Executive Branch to block extradition from the U.S. to the HKSAR. If this happens, the HKSAR may not be willing to extradite suspects from the HKSAR to the U.S. because of the lack of reciprocity. This will restrict the ability of the U.S. to fight international criminal activity in Southeast Asia.

It is well documented that Hong Kong is a central location for international criminal activity. Many of Asia’s criminal syndicates are active in Hong Kong. International drug smugglers in Hong Kong have been identified as key organizers and financiers of heroin shipments from the Golden Triangle, as well as being involved in shipping methamphetamine.

---

from China to consumers in Asia and the West.\textsuperscript{4} Hong Kong-based cartels supply up to eighty percent of the estimated five hundred and fifty pounds of methamphetamine that flood the Philippines each month.\textsuperscript{5} For example, in 1993, Canadian authorities estimated that more than seventy-five percent of heroin intercepted in Canada came through Hong Kong.\textsuperscript{6} There is also growing evidence that the active kidnapping industry in the Philippines has strong ties to Hong Kong criminal syndicates,\textsuperscript{7} which are also engaged in money laundering and auto theft.\textsuperscript{8}

With the opening of China to the outside world in the early 1980's, criminal groups known as triads have begun to reemerge in Chinese society. China is reluctant to admit that organized crime exists because this would undermine Communist Party authority and demonstrate that socialist ideals are far from becoming a reality in China. As a result, criminals who flee to the Mainland after committing crimes in Hong Kong have been known to hide out with the help of corrupt officials.\textsuperscript{9} In other cases, triad members have even received open support from Chinese officials.\textsuperscript{10} Moreover, local officials have a personal interest in demonstrating to the central authorities that crime is not a problem in their county or province. Thus, when a criminal with powerful connections flees from Hong Kong to the Mainland, informal rendition efforts may not be successful, especially if the suspect flees to distant locations on the Mainland where Hong Kong police have not established relationships with local police officials.

The U.S. recently signed a new extradition treaty with Hong Kong, which is awaiting Senate approval.\textsuperscript{11} Hong Kong had previously been conducting extradition proceedings under the British Commonwealth Scheme for the Rendition of Fugitive Offenders.\textsuperscript{12} Under the British Scheme, Hong Kong had extradition arrangements with ninety-five coun-

\begin{itemize}
\item \textsuperscript{4} Id. Jones also reports that in recent years, there has been a dramatic increase in the quantity of heroin seized in Hong Kong. \textit{id.}
\item \textsuperscript{6} Jones, supra note 4, at 37.
\item \textsuperscript{7} Id.
\item \textsuperscript{8} Jan Wong, \textit{Well-Armed Robbers Shoot up Hong Kong}, CHI. TRIBUNE, Mar. 19, 1993, at 24.
\item \textsuperscript{9} See Catherine Chan, \textit{Triad Remarks"Give Territory Wrong Image"}, SOUTH CHINA MORNING POST, Apr. 14, 1993, at 5.
\item \textsuperscript{10} See id. (Tao Siju, China's public security minister, meeting with head of a triad and saying that its members were "patriotic").
\item \textsuperscript{11} Agreement for the Surrender of Fugitive Offenders, Dec. 20, 1996, U.S.-H.K., S. TREATY DOC. No. 3, 105th Cong., 1st Sess. (1997), reproduced infra Appendix A (hereinafter Extradition Treaty). While this document is entitled an agreement and not a treaty due to Hong Kong’s non-state status, the Executive Branch has treated it as a treaty for the purposes of U.S. law and has thus submitted it to the Senate for its assent. See id. (letter of submission by Secretary of State Madeleine Albright outlining the reasons why it is not called a treaty and why it is nevertheless submitted to the Senate). Throughout this comment, I will refer to the document as a treaty since that is how it will be interpreted under U.S. law.
\item \textsuperscript{12} L.M.M. 32 (1990).
\end{itemize}
These treaties are now ineffective because Hong Kong is no longer a part of the British Commonwealth. Hong Kong is now in the process of concluding bilateral extradition treaties with approximately twenty countries in addition to the U.S. After Hong Kong signs an extradition treaty with a foreign state and the Sino-British Joint Liaison Group (JLG) approves it, the treaty must go through a process of localization in the Hong Kong legislature to become law. None of the extradition treaties Hong Kong has signed has completed this process, although they have been approved by the JLG.13

This paper provides a framework for considering how PRC government interference with the HKSAR may cause the U.S. Judiciary to block extradition from the U.S. to the HKSAR. In the first section, I discuss the current state of extradition practices between Hong Kong and the U.S. as under the pre-July 1997 agreement. In the second section, I discuss the transfer of Hong Kong back to the PRC in 1997 and Hong Kong’s post-1997 legal system. I also discuss extradition relations between: (1) the Mainland government and Hong Kong; and (2) the PRC government and the United States; so as to analyze (3) extradition from the U.S. to the HKSAR in this larger triangular framework. In the third section, I discuss the ability of the United States to maintain extradition relations with Hong Kong after 1997 in light of probable Mainland interference with the HKSAR. Specifically, I focus on the possibility that the Judiciary will block extradition from the U.S. to the HKSAR against the wishes of the Executive Branch.

I

EXTRADITION WITH HONG KONG UP TO JULY 1, 1997

An understanding of how extradition between the U.S. and Hong Kong currently takes place is necessary in order to gauge the changes that will take place after the PRC takeover. Presently, there is no organized international system for law enforcement against international criminal activity. Rather, the current system is a patchwork of bilateral agreements supported by the willingness of states to cooperate in prosecuting fugitives.

A. Methods of Rendition.

Rendition is a broad term covering several different methods by

13. The JLG had to approve all treaties signed before July 1, 1997, but after the handover on that date, the treaty would be first approved directly by Mainland China, as the new sovereign over Hong Kong, before Hong Kong legislature votes on it.

14. See Stella Lee, Britain Set to Sign Extradition Treaty, SOUTH CHINA MORNING POST, Mar. 2, 1997, at 1 (other than the agreement with the United Kingdom in question in the article, the JLG has approved treaties with Australia, Canada, Malaysia, the Netherlands, the Philippines, and the United States).
which fugitives are returned from one state to another to face criminal proceedings. Extradition is one of several different types of rendition.\(^{15}\) It is important to understand the scope of rendition practices because non-extradition methods indirectly impact the extradition process.

1. **Extradition**

Extradition is a formal method of rendition usually based on bilateral or multilateral treaties which are implemented through domestic legislation in each of the parties in the treaty. An extradition is the surrender by one state to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.\(^{16}\)

Extradition does not always take place under a treaty. Some states permit extradition pursuant to an extradition statute even if no extradition treaty exists.\(^{17}\) In other states, extradition takes place as an act of grace in accordance with municipal statutes operating in the absence of treaties.\(^{18}\) For example, *brevi manu* extradition is the procedure followed by the military under "status of forces" agreements.\(^{19}\) This is a summary procedure conducted by the military.

2. **Quasi-Formal Rendition and the Extra-Legal Recovery of Fugitives**

Quasi-formal methods of rendition and extra-legal methods of recovering fugitives are relevant to the extradition process because they demonstrate that fugitives can be apprehended and returned to the requesting country even if there is no extradition treaty. The significant point about quasi-formal rendition is that it is used more than the formal extradition process itself.\(^{20}\) Quasi-formal methods of rendition produce the *de facto* result of returning fugitives to states that wish to prosecute them. Quasi-formal methods of rendition do not provide the protections guaranteed in extradition treaties. They allow states to handle the return of fugitives in a quick and relatively inexpensive manner without independent oversight.

There are three types of quasi-formal renditions. The first is expulsion, a means by which a state rids itself of an illegal alien. Expulsion is an executive-dominated civil process designed for immigration control.\(^{21}\) The ultimate destination of the alien is secondary to its basic purpose. The

---

21. Shearer, *supra* note 18, at 76.
second is exclusion, which consists of deporting aliens into sure criminal proceedings. Exclusion occurs at the border where an alien has been declared inadmissible upon arrival. The third quasi-formal method of extradition consists of other miscellaneous arrangements for the return of fugitives. These arrangements are usually based on some understanding of reciprocity.

In addition to quasi-formal methods of rendition, there are extra-legal methods of rendition which range from kidnapping to blackmail to other methods of pressuring the accused to return to the country where he/she is wanted on criminal charges. Although this type of rendition occurs infrequently, when it does occur, it tends to be dramatic.

Having briefly outlined the different methods of rendition, I will now discuss extradition procedures in the U.S..

B. Extradition Procedures in the United States

In general, U.S. extradition law is based on bilateral or multilateral treaties where states agree to surrender fugitives charged with offenses covered by the treaty. When a fugitive flees to the U.S. after committing a crime in a foreign state, that state can request the U.S. government to commence extradition proceedings under the Extradition Act of 1848 ("Extradition Act"). Then, the State Department and the Justice Department move to apprehend the fugitive and bring her before a federal court for certification. After 1997, a fugitive may attempt to use the Extradition Act and the basic procedural protections in the U.S.-HKSAR extradition treaty to block her extradition.

I. The Extradition Act of 1848

The Extradition Act of 1848 provides the framework for extraditions. An extradition treaty with the requesting state is an "express condition precedent" to extradition under the Act.
Under the Extradition Act, the court is required to play a role that is more administrative than judicial. Under the Act, a court’s certification of a suspect for extradition can be reviewed by the Executive Branch. The Executive Branch is given ultimate discretion in deciding whether to extradite. Furthermore, if a court refuses to certify a suspect for extradition, the Executive Branch may go to another judge or magistrate and repeat its attempts at certification.

To certify an individual as extraditable, a court must find that: (1) the offense charged is extraditable under the applicable treaty; (2) the offense satisfies the dual criminality requirement as being unlawful in both the requesting country and in the United States; and (3) there is probable cause to believe that the accused has committed the crime. If the court concludes that each of the three requirements has been met, it certifies this finding to the Secretary of State “that warrant may issue.” Otherwise, the suspect is not certified.

After a court certifies a suspect for extradition, the suspect can file a petition for habeas corpus to have the extradition certification reviewed in federal court. Under habeas corpus review, the judge is restricted to considering: (1) whether the court had jurisdiction; (2) whether the offense charged was within the scope of the extradition treaty; and (3) whether evidence supported a finding of probable cause. If the federal court judge affirms the extradition certification, the Secretary of State then decides whether the suspect should be extradited. Once the Secretary of State approves the extradition, the suspect is sent back to the requesting state to face trial.

2. The Safeguards Built into the Extradition Process

Whereas the Extradition Act provides the procedural framework for extradition cases, extradition treaties provide specific protections for fugitives. Extradition agreements try to achieve a balance between preventing fugitives from fleeing to other countries with impunity and safeguarding suspects from oppressive punishment for political or religious crimes.


There are four central safeguards to most extradition treaties: the Double Criminality Rule, which requires that the act committed be an offense in both jurisdictions; the Specialty Rule, which prevents a fugitive from being tried for offenses other than those for which she has been extradited; the Prima Facie Case Requirement, which requires that the requesting country make a *prima facie* case demonstrating that the suspect has committed the offense(s) in question; and the Political Offenses Rule, under which extradition can be refused if the requested country determines that the offense is political.

Although the U.S.-Hong Kong extradition treaty has not yet been assented to by the Senate, it should provide a reasonable framework in analyzing the form U.S.-Hong Kong extraditions will take. It contains provisions regarding: (1) obligations to surrender fugitives; (2) offenses covered by the treaty; (3) surrender of nationals; (4) basis for surrender; (5) grounds for refusal of surrender; (6) procedures for initiating an extradition request; and (7) procedures for provisional arrest. It also incorporates the Double Criminality Rule, the Specialty Rule, the Prima Facie Case Requirement, and the Political Offenses Rule, all of which I will now discuss in more detail.

3. The Double Criminality Rule

The Double Criminality Rule requires that for an offense to be included in an extradition treaty it must constitute a crime under the laws of both the requesting and requested states. In general, the Double Criminality Rule is not an obstacle to extradition because crimes such as homicide, embezzlement, and drug trafficking, are usually crimes in both the states. Many bilateral treaties, including the U.S.-HKSAR treaty, expressly list extraditable offenses in the treaty whereas others allow extradition for any offense common to both countries.

Although no state requires the names of the offense in both states to be identical, the traditional test requires that the elements of the offense in the requested state correspond to the elements of the offense in the request-
The United States Supreme Court interprets the Double Criminality Rule loosely:

The general principal of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties . . . . It is enough if the particular variety was criminal in both jurisdictions.\textsuperscript{48}

Under this standard, the "conduct must simply be criminal in both jurisdiction; no parallel offense is required."\textsuperscript{49}

4. The Specialty Rule

The Specialty Rule requires that "a fugitive shall only be tried in the requesting state for offenses for which he was surrendered."\textsuperscript{50} The Supreme Court first recognized the doctrine of Specialty in\textit{United States v. Rauscher}.\textsuperscript{51} The doctrine guarantees the rights of the asylum state, not the rights of the defendant. Thus an asylum nation may waive its right to limit any post-extradition prosecutions, or it may "consent to extradite the defendant for [specific] offenses other than those expressly enumerated in the treaty," and the defendant will be unable to claim the protection of the doctrine of Specialty.\textsuperscript{52}

Recent extradition cases demonstrate that nations are more willing to interpret the Specialty Rule and Double Criminality Rule loosely in fighting international crime.\textsuperscript{53} A broad interpretation of the Specialty Rule and the Double Criminality Rule was applied in\textit{United States v. Levy}, where a suspected leader of an international drug ring was extradited from Hong Kong to the United States.\textsuperscript{54} In\textit{Levy}, the Tenth Circuit focused not "on how the crime is defined in the particular statutes the defendant is accused of violating, . . . [but] on the underlying criminality of the defendant's alleged conduct."\textsuperscript{55} Levy was indicted in 1985 on nineteen federal charges involving the sale of cocaine.\textsuperscript{56} The court allowed the suspect to be tried under the Continuing Criminal Enterprise Act ("CCE") even though the

\begin{flushright}
\textsuperscript{47} GEOFF, supra note 17, at 48. \\
\textsuperscript{48} Wright v. Henkel, 190 U.S. 40, 58, 60-1 (1903). \\
\textsuperscript{50} GEOFF, supra note 17, at 106. See Extradition Treaty, art. 16. \\
\textsuperscript{51} 119 U. S. 407, 423-4 (1886). \\
\textsuperscript{53} McDonough, supra note 52, at 144. \\
\textsuperscript{54} 905 F. 2d 326 (10th Cir. 1990). \\
\textsuperscript{55} \textit{Id.} at 328. \\
\textsuperscript{56} McDonough, supra note 52, at 129.
\end{flushright}
extradition order did not mention the CCE charge by analogizing the CCE to Hong Kong’s drug trafficking offenses.\textsuperscript{57} Loose interpretation of the Specialty and Double Criminality rules means that suspects may be tried for more serious offenses than those actually considered by the requested state at the pre-trial extradition hearing. Ultimately, a loose interpretation of the Specialty Rule in combination with the Double Criminality Rule allows a fugitive to be tried for any offense, common to both countries, based on facts alleged by the requesting state at the extradition hearing.

5. \textit{The Prima Facie Case Requirement}

The \textit{Prima Facie} Case Requirement requires the requesting state to make an initial evidentiary showing that there are reasonable grounds to believe the accused is guilty of the offense charged.\textsuperscript{58} The \textit{Prima Facie} Case Requirement is designed to protect a fugitive from arbitrary removal to the requesting state. However, it is important to note that a pre-trial extradition hearing is considered a preliminary hearing and therefore does not require the evidentiary protections provided at trial. In a pre-trial extradition hearing, witnesses are not required to testify in person, the defendant has no opportunity for cross examination, and the judge has no opportunity to evaluate demeanor evidence. In addition, the requesting state is allowed to present hearsay evidence in making its \textit{prima facie} case.\textsuperscript{59} Ultimate questions of admissibility are determined at trial.

If Extradition Act requirements are all met and certified as such by the court, the fugitive can be extradited. If the State Department fails to obtain an extradition, it is allowed to repeat its requests. There appears to be no limit on the number of times extradition proceedings may be brought against the same individual on the same charges.\textsuperscript{60}

6. \textit{The Political Offenses Rule}

The Political Offenses Rule allows the requested state to refuse to extradite a suspect if the offense she committed is political.\textsuperscript{61} The Political Offenses Rule is a relatively recent phenomena in extradition history.\textsuperscript{62} The definition of what constitutes a political offense and what branch of government makes this determination is usually not explicitly spelled out in extradition treaties.

\textsuperscript{57} Levy, 905 F.2d at 329.
\textsuperscript{59} GEOFF, \textit{supra} note 17, at 64.
\textsuperscript{60} LAW AND PRACTICE, \textit{supra} note 29, at 608. \textit{See} Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978), \textit{cert. denied} 439 U.S. 932 (1978); Reed v. Colpoys, 99 F.2d 396 (D.C. Cir. 1938), \textit{cert. denied} 305 U.S. 598 (1938).
\textsuperscript{61} \textit{See} Extradition Treaty, art. 6.
\textsuperscript{62} France introduced the political offenders exception into treaties after 1834 and by the late 19th century the idea became widely accepted. SHEARER, \textit{supra} note 18, at 166.
Under U.S. extradition law there are two distinct categories of political offenses: "pure political offenses" and "relative political offenses." Pure political offenses, which include treason, sedition, and espionage, are not extraditable and are usually specifically excluded from extradition treaties. Relative political offenses are subject to a two fold requirement before a fugitive is considered non-extraditable: (1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense; and (2) a charged offense that is "incidental to," "in the course of," or "in furtherance of" an uprising.

For example, in *Giletti v. Commissioner*, a fugitive was not returned to Italy because the shooting of another Italian in a "political brawl between Fascists and anti-Fascists" constituted a political offense. However, in *Eain v. Wilkes*, the fugitive failed to show that a bombing was incidental to the political conflict between the Palestinian Liberation Organization and the Israeli government. The court held that the random bombing of civilians could not be linked to the suspect's political goals.

Under U.S. law, a fugitive can plead to both the Executive and Judicial Branches that she is a political offender. This overlapping jurisdiction was recently challenged in *Lobue v. Christopher*.

C. Tensions Between the Judiciary and Executive Branch Under the Extradition Act of 1848

In *Lobue v. Christopher*, Canada requested the return of two suspects wanted for kidnapping under the Extradition Act. The court held that the Extradition Act violates the separation-of-powers doctrine and is void upon its face. Under the Extradition Act, the court must submit a copy of the testimony to the Secretary of State. The court in *Lobue* held that the review of a judicial certification by the Secretary of State constitutes an impermissible Executive review of the Judiciary.

*Lobue* held that, under the Extradition Act, the extradition judge's certification of individuals is in effect an advisory opinion because it is
neither binding nor final.\textsuperscript{74} It is not binding because the extradition judge's determination has no \textit{res judicata} effect.\textsuperscript{75} It is not final because the Secretary of State has ultimate discretion. A basis for the court's decision is that the Act allows the Secretary of State to avoid taking responsibility for the political decision of whether to extradite.\textsuperscript{76} Under the current Extradition Act, the Secretary of State can tell a requesting state that the evidence is insufficient, or that there is some other legal impediment, when in fact political considerations underlie his decision.

\textit{Lobue} strictly limits legal determinations to the Judiciary, reserving political decisions to the Executive Branch. If \textit{Lobue} is followed by higher federal courts on the separation-of-powers rationale, the Extradition Act will have to be amended to limit the Secretary of State's right to block extradition for political or non-legal grounds.\textsuperscript{77} The Executive Branch must then voice any political, human rights, or foreign policy concerns it has instead of using legal arguments as a foil to avoid international tension between the U.S. and the requesting state. In the context of U.S.-HKSAR extradition, this may further politicize a process that is bound to come under increased scrutiny as suspects publicize their cases.

If \textit{Lobue} is followed on the basis of the impermissibility of advisory opinions, the Extradition Act may have to be amended to prevent multiple motions for certification. The State Department could no longer repeat attempts for certification to get around unfavorable rulings.

In addition to the constitutional issues outlined in \textit{Lobue}, there is the possibility that other tensions between the Judicial and the Executive Branches may arise in extradition cases from the U.S. to the HKSAR. Under the Extradition Act, the Executive Branch and Judiciary have different responsibilities and concerns. A court has a duty to protect the rights of the suspect and to make sure treaty provisions are not being violated, whereas the State Department is more concerned with the diplomatic relationship and the prevention of international criminal activity. After discussing the 1997 transition and Hong Kong's new legal system, I will discuss how Mainland interference with the HKSAR may cause the Judiciary to block extraditions to the HKSAR even if the Executive Branch wants to extradite.

\textsuperscript{74} Id. at 71.
\textsuperscript{76} Lobue, 893 F. Supp. at 76.
\textsuperscript{77} Since \textit{Lobue} has been vacated on other grounds, the case might not ever be decided on the merits, but there should be similar cases in the future that would test the \textit{Lobue} theories.
II

THE 1997 TRANSITION AND HONG KONG'S NEW LEGAL SYSTEM

On July 1, 1997, Hong Kong was returned to the PRC. Agreements between the United Kingdom and the PRC authorize the creation of a legal system separate from the PRC legal system. I will discuss how the system is designed to operate.

A. Hong Kong's Legal Foundations

Hong Kong's legal foundations are derived from its historical relationship with Great Britain. After the Opium War of 1839-42, China and Great Britain entered a series of treaties ceding Hong Kong, Stonecutters Island, and Kowloon Peninsula to Great Britain, and leasing the New Territories to Great Britain for 99 years, ending in 1997. Great Britain had thus exercised sovereignty over Hong Kong despite PRC claims that sovereignty was never transferred because the treaties were unequal.

Faced with the prospect of having to return the New Territories, on which the rest of the colony is dependent for water and other vital resources, Great Britain formally commenced negotiations with China on the status of Hong Kong in 1982. At first, Great Britain wanted to extend the territorial leases past 1997, but it soon became clear that the PRC would not accept any British control over any part of the colony after 1997. Great Britain was forced to accept Chinese wishes that the entire colony be returned, since Hong Kong is reliant on both the New Territories and China for its food and water needs. The parties then began negotiations for returning the entire colony to Chinese rule. These negotiations culminated in the 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 (Joint Declaration), signed on December 19, 1984, which announced the manner in which Hong Kong will be returned to China in 1997. The Joint Declaration was designed to assure the Hong Kong residents that their interests

would be respected. However, the Joint Declaration was presented to the Hong Kong citizens as a fiat to be accepted in its entirety. There was no referendum on whether to accept the Joint Declaration or not. The Hong Kong people were only invited to express their views to a government run assessment office.\footnote{85} Amending the Joint Declaration was not an option.

**B. The Joint Declaration and the Basic Law of the Hong Kong Special Autonomous Region**

After 1997, the HKSAR will derive its legal authority from the Joint Declaration and the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Basic Law).\footnote{86} Suspects being extradited from the U.S. to the HKSAR may attempt to introduce evidence of Mainland interference with the HKSAR government to justify blocking their extradition, thus demonstrating a violation of the HKSAR legal framework. It is thus necessary to understand legal limitations on such interference set out in the Joint Declaration and Basic Law.

**1. The Joint Declaration**

The Joint Declaration sets out the basis on which Hong Kong will be returned to China in 1997. The Joint Declaration promises that Hong Kong’s capitalist system and lifestyle shall remain unchanged for 50 years after 1997.\footnote{87} The HKSAR government would be vested with “executive, legislative and independent judicial power.”\footnote{88} Under the Joint Declaration, “laws currently in force in Hong Kong will remain basically unchanged.”\footnote{89}

Specifically relevant is the Joint Declaration guarantee that the HKSAR would have an independent criminal justice system. The “judicial system previously practiced in Hong Kong shall be maintained [and] the courts shall exercise judicial power independently and free from any interference.”\footnote{90} The “laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region Legislature.”\footnote{91} The Hong Kong police are to remain largely intact along with other members of the judiciary.\footnote{92} The HKSAR is given the power to issue HKSAR passports and “unless restrained by law, holders of

\footnote{85. SCOTT, supra note 81, at 173.}
\footnote{86. The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, 29 I.L.M. 1511 (1990).}
\footnote{87. Joint Declaration, art. 3, § 12, 23 I.L.M. at 1372.}
\footnote{88. Id., art. 3, § 3, 23 I.L.M. at 1371.}
\footnote{89. Id.}
\footnote{90. Id., Annex I, § III, 23 I.L.M. at 1373–4.}
\footnote{91. Id., Annex I, § II, 23 I.L.M. at 1373.}
\footnote{92. Id., Annex I, § IV, 23 I.L.M. at 1374.}
valid travel documents shall be free to leave the Hong Kong Special Administrative Region without special authorization.”

2. The Basic Law

Whereas the Joint Declaration provides an overall framework for the handover of Hong Kong from Great Britain to the PRC, the Basic Law sets out the legal framework under which Hong Kong will become a “special administrative region” of the PRC, enabling the “one country, two systems” formula to operate. The Basic Law was adopted by the National People’s Congress on April 4, 1990, and will go into effect on July 1, 1997. It is basically a codification of the promises made in the Joint Declaration.

Under the Basic Law, Hong Kong will enjoy a “high degree of autonomy” and “executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.” The Basic Law provides that “with the assistance or authorization of the Central People’s Government, the government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance.” This includes the power to enter into extradition treaties with foreign states. Extradition agreements must first be approved by the Executive Council before being handed over to Chinese officials in the Joint Liaison Group (“JLG”) for approval. Chinese approval through the JLG is required after an agreement has been reached.

Having introduced the legal framework under which the HKSAR will operate, I will now discuss extradition relations among the PRC, Hong Kong and the U.S. so that extradition from the U.S. to the HKSAR can be placed in context. Then, I will discuss the specific obstacles that may arise in extradition cases after 1997.

C. Extradition Relations Among the People’s Republic of China, Hong Kong and the United States

A U.S.-HKSAR treaty would be unique because the U.S. would have an extradition treaty with HKSAR, but not with its sovereign. The lack of formal extradition agreements between the Mainland government and Hong Kong, and between the PRC and the U.S. will present special diffi-

95. The supreme legislative body of the PRC.
96. Id., chp. 1, art. 2; 29 I.L.M. at 1521.
97. Id., chp. 1, art. 96; 29 I.L.M. at 1535.
culties in the execution of the U.S.-HKSAR extradition treaty. I will discuss these issues below.

1. The People’s Republic of China Lacks an Extradition Treaty with the United States

The United States does not have an extradition treaty with the PRC. Major reasons include the lack of due process provided by the Mainland criminal justice system and the poor human rights record in general. Further, the differences in legal values between the Mainland and the United States may make it impossible for an extradition treaty to exist in any case. Although not an extradition case, *Wang Zong Xiao v. Reno* demonstrates how U.S. courts may be unwilling to send individuals back to the Mainland if they are likely to face criminal proceedings even if the Executive Branch has entered into an agreement for their return. The court in *Wang Zong Xiao* prevented a Chinese witness from being returned to the PRC because of the lack of protections afforded criminal defendants. The court reasoned that the PRC’s criminal justice system exists to vindicate the State’s interests, not to guarantee the individual’s rights.

In short, there is no independent judiciary in China. Public security authorities in China can circumvent trials altogether by using administrative detention procedures such as “reeducation through labor.” Political crimes such as counter-revolution and criminal statutes restricting the freedom of religion, freedom of expression and the right to assemble have no equivalent counterparts in Hong Kong or the U.S. China’s legal values in this regard can be summed up in a phrase found on the walls of many of China’s courts and prisons: “Leniency to those who confess, harshness to those who resist.” These legal values have prevented China from entering into an extradition treaty with any western nation. The U.S. extra-

---

101. 837 F.Supp. 1506 (N.D. Cal. 1993), aff’d, 81 F.3d 808 (9th Cir. 1996).
103. Id. at 1541.
104. LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS (1993). See also Hong Kong People Said Held Without Trial in China, The Reuter Library Report Jul. 12, 1992, available in LEXIS, News Library, Non-US File (after crackdown on prostitution in Shenzhen, hundreds of Hong Kong residents were held without trial or access to counsel, and sent to re-education camps designed to make them comply with China’s moral laws).
105. “Tanbai congkuan, kangjiu congyan.”
106. An unfortunate consequence of China’s human rights violations is that it hampers international cooperation in fighting crime. The reluctance of the international community to cooperate with China’s security forces means that violent and non-violent criminal offenders who escape to the United States are able to avoid prosecution. This is increasingly becoming an issue with regard to
Extradition regime with Hong Kong after 1997 will be controversial because the HKSAR judicial system, under the ultimate sovereign control of the PRC government, may be tainted in American eyes by association with the PRC's judicial system and human rights record.

2. Hong Kong’s Current Rendition Agreements with the Mainland

There are no formal rendition agreements between Hong Kong and the PRC government. China has thus far refused to negotiate formal rendition agreements between Hong Kong and China because China regards its relationship with Hong Kong as an internal matter to be negotiated after 1997. However, Hong Kong and the PRC police have developed informal rendition agreements in spite of their different legal systems because of their physical proximity and the large amount of cross-border crime. Although the Hong Kong-Mainland relationship is not without friction, informal rendition arrangements have allowed cooperation to grow relatively without interference from the political arena.

Hong Kong Interpol, the international criminal police organization, is currently in charge of coordinating the fight against cross border crime. Informal ties have developed among Hong Kong Interpol, Beijing Interpol, and local police officials in Guangdong province. Indeed, Hong Kong Interpol and Beijing Interpol now exchange information regularly through Interpol’s new computer database. To a lesser extent, ties have also developed between Hong Kong Interpol and police officials in other parts of China.

It is important to understand the existing informal rendition agreements between the Hong Kong and Mainland police forces in order to gauge: (1) the likelihood that a suspect extradited from the U.S. to the HKSAR will be turned over to Mainland police following the reversion to Chinese rule; and (2) the extent to which the PRC’s Public Security Bureau penetrates into HKSAR’s law enforcement, thus possibly affecting the impartiality and professionalism of the HKSAR police. In general, rendition arrangements between Hong Kong and the Mainland are unbalanced because of the differences between the two legal systems.

Hong Kong has been reluctant to return criminals to the Mainland due to economic crimes where PRC have stolen money in China and fled to the United States. In addition, Chinese suspects who commit violent crimes in the U.S. have been known to flee to the PRC.


108. Personal off-the-record interview with Interpol official in Hong Kong on Aug. 1, 1995; Many suspects are returned to the Mainland through the normal process of returning illegal immigrants.

109. Mainland-HK Police Join Hands, BEIJING REVIEW, Jan. 17-24, 1993 (police officers of the two sides of the border held their 18th bilateral meeting in Hong Kong).

110. These computer systems will allow the transmission of pictures and generally facilitate the ability of member countries to retrieve information over short periods of time. Personal off-the-record interview with Interpol officials in Hong Kong on August 1, 1995.
to one major difference in the criminal justice system—there is no death penalty in Hong Kong. Hong Kong is extremely reluctant to return fugitives to the Mainland if they face possible death sentences. However, in non-death penalty cases, Hong Kong often expells Chinese nationals to the Mainland with the knowledge that they will face criminal proceedings upon their return.

On the other hand, Mainland police have been willing to return Hong Kong citizens who flee to the Mainland after committing crimes in Hong Kong. However, in a number of cases, the PRC government has refused to return Chinese nationals suspected of committing crimes in Hong Kong. China maintains the right to try its own nationals for offenses committed by them anywhere in the world. For example, in 1990, at the request of the Hong Kong police, Chinese police arrested two Chinese nationals wanted in connection with a robbery in Hong Kong. However, Chinese officials decided to try the suspects themselves and refused to return the suspects to Hong Kong even though they were also Hong Kong citizens.

The nature of the relationship between the Mainland Public Security Bureau, in charge of overseeing police operations in the whole country, and the Hong Kong police force is important to determining HKSAR’s status as a separate and independent jurisdiction. There are three general features to this relationship, which is still at an infant stage. First, there is friction over criminal jurisdiction in fighting international crime resulting from the inherent differences between the Hong Kong and Mainland criminal justice systems. Second, there is increasing cooperation between the two police forces growing out of political and geographic necessity. Finally, there is the possible infiltration by the Mainland Public Security Bureau into the Hong Kong police force. At this point, there is minimal evidence that actual infiltration has taken place. However, after 1997, the Bureau may feel that it is entitled to extend its control into the operational aspects of HKSAR police activity. If the Bureau seriously interferes with the operation of HKSAR police, fugitives may assert in extradition proceedings that the HKSAR is no longer able to carry out its obligations under the extradition treaty and invite the courts to block their extradition.

III
POSSIBLE OBSTRUCTIONS TO EXTRADITION BETWEEN THE UNITED STATES AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION AFTER 1997

The ability of the U.S. to maintain extradition relations with the

111. Personal off-the-record interview with Interpol officials in Hong Kong on August 1, 1995.
112. Id.
EXTRADITION AND HONG KONG

HKSAR will depend on the level of interference by the PRC government with the HKSAR government. That the PRC government will interfere with the HKSAR government after 1997 is not in dispute. The only question is to what degree. Beijing's interference with the HKSAR government will impact the extradition process because it will blur jurisdictional boundaries between the HKSAR and Mainland China. The greater the level of interference, the greater the concern that accused individuals extradited to the HKSAR will face the death penalty or be exposed to substandard criminal procedures.

There are three possible scenarios for the future of Hong Kong. These three scenarios run on a continuum from minimal interference by the PRC government at one end, to complete re-absorption of HKSAR jurisdiction into PRC jurisdiction at the other end. The middle of the continuum represents a slow reassertion of control over HKSAR sovereignty by the PRC government.

If PRC government interference in the HKSAR is minimal and something resembling the status quo is maintained, then it is likely that extradition will continue as it has up till now. As long as the State Department makes the determination that the HKSAR is capable of maintaining extradition relations with the U.S., U.S. courts are not likely to block extradition to the HKSAR under a U.S.-HKSAR extradition treaty.

At the other extreme, if the PRC government radically interferes with HKSAR sovereignty after 1997, then it is likely that all of HKSAR's international agreements will collapse. If the 1989 Tiananmen Square massacre demonstrates anything at all, it is that international pressure and a concern for the rule of law plays a surprisingly small role in Beijing's decision making process. Post-1997 demonstrations in Hong Kong may cause Beijing to step in and crack down on Hong Kong's budding democracy movement. If the PRC government exerts full control over the HKSAR, then Hong Kong will effectively be absorbed into the PRC jurisdiction. HKSAR relations with the international community will become identical to those of the Mainland. Because the PRC government currently has no extradition agreements with western countries, those countries may refuse to extradite fugitive criminals back to Hong Kong.

Between the two extremes of radical interference with HKSAR government and maintaining the status quo is a large middle ground. Reassertion of control over the HKSAR may take place gradually if the PRC does not interfere too much with the HKSAR. Reassertion may take the form of full control over the HKSAR and its relations with the international community.

---

115. PRC government control over the Court of Final Appeal (the court of last resort in Hong Kong), the Provisional Legislature, and the appointment of top officials to the HKSAR government under the Basic Law makes this a foregone conclusion.

116. Edward Iwata, *Hong Kong's new leader stresses democracy He cites city-state's constitutionalguarantee of freedom, elections* S.F. EXAMINER, July 2, 1997, at A14 ("Tung would not say what future laws might be considered. But he cautioned: "Some organizations may have to sacrifice their own interests for the bigger interests of the community . . . and for the country (China) as a whole").
government attempts to work within the legal framework and spirit of the Joint Declaration and Basic Law. There are two reasons why a slow reassertion of control is likely. First, it is in the economic interests of the PRC to maintain stability in Hong Kong in order to continue this growth. Hong Kong has been the engine of economic growth for Guangdong province and is also a source of foreign currency for the PRC. Second, Beijing will need to demonstrate it is capable of peacefully reuniting with Hong Kong if it hopes to one day peacefully re-unite with Taiwan.

If Beijing chooses to reassert control slowly, there may reach a point where the status of the HKSAR as a separate and independent jurisdiction is threatened. Suspects may use evidence of PRC government interference with the HKSAR government to block their extradition from the U.S. to the HKSAR. Recent U.S.-Hong Kong extradition cases have rejected arguments that resumption of the exercise of sovereignty by the PRC over Hong Kong in 1997 means that: (1) suspects are being extradited to China instead of Hong Kong; (2) China might abuse its position after 1997 and prosecute for offenses other than those for which the suspect was extradited; or (3) China is in a position to impose the death penalty in Hong Kong in contravention of extradition treaties.117 U.S. courts have concluded that these concerns surrounding the transfer of sovereignty are "too speculative and too remote to justify any action ..."118 However, after 1997, this will not be the case. After 1997, U.S. courts will be in a better position to evaluate the extent and nature of PRC interference with the HKSAR.

If a suspect commits a crime in the HKSAR and flees to the U.S., the HKSAR government could request her extradition back to the HKSAR under the not-yet-ratified U.S.-HKSAR extradition treaty. After receiving the request and determining that the HKSAR's complaint is valid under the Extradition Act and the U.S.-HKSAR extradition treaty, the State Department could then issue a warrant "for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered."119 After apprehending the suspect, the State Department in coordination with the Department of Justice would bring him or her before a magistrate or judge for certification.120 Once the extradition judge has certified the suspect as extraditable, the Extradition Act commits to the Secretary of State's sole discretion the decision of whether to complete the

120. Id.
extradition process by signing a warrant of surrender.\textsuperscript{121}

Under the Extradition Act, responsibility for different aspects of the extradition process are divided between the Judiciary and the Executive Branch. The division of extradition responsibilities between the Judicial and the Executive Branches means that a fugitive being extradited from the U.S. to the HKSAR must address her legal arguments to the Judiciary and her political arguments to the Executive. Because a suspect is brought before a magistrate or judge for certification before the Secretary of State makes the ultimate decision whether to surrender the suspect or not, she would likely wind up first making her legal arguments to the Judiciary before making her political arguments to the Executive.

Of course, a suspect could address both branches of government at the same time. However, the fact that the State Department chooses to proceed with an HKSAR extradition request by bringing the suspect before a magistrate or judge for certification means that the suspect may have a difficult time convincing the State Department to change its mind. Under the present law, a suspect can make her legal arguments to the Executive Branch in addition to the Judiciary. If \textit{Lobue v. Christopher} is followed by other courts on constitutional separation-of-powers grounds, a suspect will no longer be able to do this. The Executive Branch will be barred from reviewing the legal determinations made by the Judicial Branch. Regardless of whether \textit{Lobue}'s rationale is followed or not, the legal determinations made by a judge or magistrate in the extradition process are likely to remain the same.

\section*{A. Judiciary Responsibilities in the Extradition Process}

The responsibilities of the Judiciary in the extradition process are limited to: (1) making legal determinations as required by the Extradition Act and (2) ensuring compliance with the terms of the extradition treaty. The court must then determine if the three-prong test for extradition, as outlined in Section I, is met. In addition, a court has basic powers of treaty interpretation under the U.S. Constitution.\textsuperscript{122} For example, the court must determine whether the extradition of the suspect in question violates the political offenses clause, the death penalty provision, or the resurrender article of the treaty.

If the Mainland interference with the HKSAR causes the HKSAR to violate the terms of a U.S.-HKSAR extradition treaty, then a court may refuse to certify a suspect for extradition to the HKSAR, on the grounds that: (1) extradition to the HKSAR violates the extradition treaty resurrender provision because the suspect is likely to be sent to Mainland or because

\textsuperscript{121} \textit{Id.}

the PRC government has asserted full jurisdiction over the HKSAR, rendering the HKSAR not a separate judicial entity; (2) the suspect will be tried for political crimes in violation of the political offenses doctrine; or (3) the suspect will be subject to the death penalty in violation of the extradition treaty death penalty clause. These arguments are not mutually exclusive, and suspects can make multiple assertions.

1. **Extradition to the HKSAR Violates Treaty Resurrender Provisions**

   Suspects may argue that extradition to the HKSAR violates the resurrender provisions of the U.S.-HKSAR extradition Treaty. Resurrender provisions prevent the requesting state from resurrendering a suspect to another jurisdiction without first obtaining permission from the requested state. Under the Joint Declaration and Basic Law, Mainland China and the HKSAR are separate jurisdictions.

   To claim that the resurrender clause is violated, a suspect will have to introduce evidence demonstrating that:

   (1) the probability that she would be sent back to the Mainland after extradition to the HKSAR is so great that extradition should be blocked; or

   (2) Mainland China has extended its jurisdiction to cover the HKSAR so that an extradition to the HKSAR is in fact an extradition to Mainland China.

   The not-yet-ratified U.S.-HKSAR extradition treaty contains a provision that prohibits the resurrendering of fugitives to third parties without either the consent of the requested party or the person having been given a reasonable chance to leave the requesting party’s jurisdiction freely:

   (2) A person surrendered under this Agreement may not be surrendered or transferred beyond the jurisdiction of the requesting Party for the offense for which his surrender was granted, or for an offense committed prior to his original surrender, unless the requested Party consents.

   (3) Paragraphs (1) and (2) of this Article shall not prevent a person being proceeded against, sentenced or detained, or surrendered to another jurisdiction, if he has had an opportunity to leave the jurisdiction of the Party to which he has been surrendered and has not done so within thirty days or has voluntarily to that jurisdiction having left it.

   Extensive interference with the HKSAR by the PRC government could violate the resurrender provision. For example, if a suspect could show that the previous suspects extradited back to the HKSAR had been resurrendered back to the Mainland to face trial on other charges, she

---

124. Extradition Treaty, art. 16.
might be able to convince the court that it is more likely than not that she will be turned over to the PRC judiciary.\footnote{125}

It is uncertain how a claim that the HKSAR is no longer an independent jurisdiction will be treated by the American courts. The issue of another country extending its jurisdiction over a party to a U.S. extradition treaty has never been litigated before, since in many ways, Hong Kong’s situation is unique; it is trying to maintain an international personality while becoming a part of China. I will now outline the shape that such a jurisdictional attack on the HKSAR might take.

\textit{a. The Jurisdictional Attack on the HKSAR}

A straightforward attack on the HKSAR’s status as a separate jurisdiction will depend on a showing that the PRC has violated the Basic Law. However, it will be difficult to show that PRC involvement constitutes a violation of the Basic Law because the Basic Law gives the PRC government so much control over the HKSAR. First, the Chief Executive and the “principal executive officials” of the HKSAR are appointed by the Central People’s Government.\footnote{126} Second, the Chief Executive “shall be accountable to the Central People’s Government.”\footnote{127} Third, the Chief Executive is given the power to dissolve the Legislative Council.\footnote{128} Fourth, the Standing Committee of the National People’s Congress may revoke any laws enacted by the HKSAR legislature.\footnote{129} Fifth, the power of interpretation of the Basic Law is vested in the Standing Committee of the National People’s Congress.\footnote{130} Sixth, the PRC government may “issue an order applying the relevant national laws in the Region” if in a state of war or if by reason of turmoil, a state of emergency exists.\footnote{131}

Alternatively, a suspect might argue that under the terms of the Basic Law itself, the HKSAR is not a separate and independent jurisdiction and therefore should be jurisdictionally considered a part of the PRC. However, despite these features, she will probably not be able to block her extradition solely by pointing to the flexibility provided in the Basic Law.

\footnote{125. Further, if the suspect can also show that she is likely to be charged with additional crimes (a violation of the Specialty Clause), to be executed (a violation of the Death Penalty Clause, see Section III.A.3), or that the offense she is charged with is a political offense (a violation of the Political Offences Clause, see Section III.A.2), then she may be able to persuade the court to block the extradition as well.}


\footnote{127. \textit{Id.}, chp. 4, § 1, art. 43, 29 I.L.M. at 1527.}

\footnote{128. \textit{Id.}, chp. 4, § 1, art. 50, 29 I.L.M. at 1529.}

\footnote{129. \textit{Id.}, chp. 2, art. 17, 29 I.L.M. at 1523.}

\footnote{130. \textit{Id.}, chp. 9, art. 158, 29 I.L.M. at 1545.}

\footnote{131. \textit{Id.}, chp. 2, art. 18, 29 I.L.M. at 1523.}
By entering into an extradition treaty with the Hong Kong government, the U.S. government implicitly recognizes that the Basic Law provides enough guarantees to allow the HKSAR to be a party to the extradition treaty. If a judge or magistrate were to accept a purely legal argument that the resuspend provisions were being violated based on the porous nature of the Basic Law, she would, in effect, be overturning the extradition treaty. This determination of whether to terminate an international treaty is committed to the Executive Branch under the Political Question Doctrine (See Section III.B.1). In short, while the Basic Law may provide the standards by which an extradition judge evaluates the nature and extent of Mainland interference with the HKSAR, a suspect being extradited from the U.S. to the HKSAR will have to introduce evidence of PRC government interference with the HKSAR to block her extradition.

Although this is highly speculative, the PRC government might engage in actions which could cause a U.S. judge to block extradition from the U.S. to the HKSAR. The PRC government might force the HKSAR government to return suspects extradited by the U.S. back to the Mainland in violation of the resuspend provisions in a U.S.-HKSAR extradition treaty. Suspects may also “disappear” from HKSAR jails after being extradited to the HKSAR. If a suspect could demonstrate a pattern of previous violations, a U.S. court might be willing to block her extradition back to the HKSAR.

Further, under the resuspend and specialty clauses, a suspect must be allowed to leave the requesting state after her release. Based on past Chinese domestic practices, however, one can easily imagine a situation where the Mainland Government refuses to issue a Chinese national, who was previously extradited from the U.S. to the HKSAR, a new passport after her old one expires. The ability of a Chinese national to fight her resuspend to China would be limited if China decides to exert full control over HKSAR’s borders. The HKSAR will be put in an awkward position if its obligations under a resuspend clause of an extradition treaty run counter to Mainland policy.

It is possible that certain actions taken by the PRC government may place the State Department at odds with the Judiciary over whether to pro-

---

132. China has often used entry and exit visas as tools of controlling dissident movements in the past. See Chinese Dissident Wang Xizhe Enters US, Goes into Hiding, Agence France Presse, Oct. 16, 1996, available in LEXIS, News library, Curnws file (Wang not allowed to leave the country until recently). See also Joice Pang and Quinton Chan, Mainland Bars Activist, SOUTH CHINA MORNING POST, Apr. 20, 1997, at 1 (Hou Xiaotian not being permitted into China even though she is a Chinese national due to her “activities against the Chinese government.”).

133. Under extreme circumstances, if the PRC government declare a state of emergency under Article 18 of the Basic Law and start enforcing martial law based on that declaration, a suspect being extradited back to the HKSAR could argue that the PRC has extended its jurisdiction over the HKSAR. Of course, if the PRC government does something so radical, it is highly likely that the State Department would not allow the extradition to occur in the first place.
ceed with an extradition case. While one can only speculate as to exactly what the PRC’s intentions are at this point, the PRC’s statements that it will dismiss LEGCO after July 1997 and its appointment of an unelected Provisional Legislative Council demonstrates that the PRC is not especially concerned about maintaining HKSAR independence. This might be permissible under the Joint Declaration because the democratic reforms that led to the current LEGCO composition were made after the Joint Declaration was signed in 1984. While the PRC government may be legally entitled to act in this manner, a U.S. court may feel that this constitutes an undue extension of PRC jurisdiction over the HKSAR, rendering any jurisdictional distinctions between Mainland and the HKSAR meaningless.

Not only has China dismissed Hong Kong’s elected legislature, but it has also issued statements threatening to scrap the Basic Law and not honor any governmental contracts signed by the current British Hong Kong government. In addition, the PRC wants to control the Court of Final Appeals (CFA), the HKSAR’s supreme judicial body. If the CFA is controlled by Beijing, the status of the HKSAR as a separate and independent jurisdiction will be undermined. Ultimately, whether a court would block a suspect’s extradition may depend on evidence showing that PRC governmental interference with the HKSAR has caused violations in the resurrender provisions of a U.S.-HKSAR extradition treaty by endangering the HKSAR’s jurisdictional integrity.

b. Basis For Evaluating The HKSAR As An Entity Party To A U.S. Extradition Treaty

Further, a suspect can challenge the validity of the extradition treaty on the ground that Hong Kong’s international personality has been lost. According to Roda Mushkat, there are four grounds by which Hong Kong can claim to be an international legal person: “(1) from its legal proximity to states; (2) by analogy to special treaty-created international regimes; (3) as an entity sui generis; and (4) by virtue of the right to self-determination.” Mushkat believes that a functional test should be used

134. Undermining Hong Kong, ECONOMIST, Mar. 30, 1996, at 38.
135. Personal interview with a State Department official, Jan. 26, 1996.
137. Robin Fitzsimons, Is Hong Kong Facing a Legal Sell-Out?, TIMES, Aug. 1, 1995, at Features. In a 1991 agreement Great Britain and the PRC included only one external judge on the five member court. The new judges will be chosen by a commission, whose members will include nominees of the Chief-Executive, Tung Chee-hwa.
138. Basic Law, Chapter 4, Section 4, Article 81; 29 I.L.M. at 1533-4.
139. Roda Mushkat, Hong Kong as an International Legal Person, 6 EMORY INT’L L. REV. 106
to determine an entity's capacity to operate as a member of the international community.

While there are no general rules of international law directly governing the international responsibility of nonstate actors, it may be observed that contemporary discussion of "state responsibility" has not sought to attach international responsibility to the sovereign or exclusive status of the state in international law. Conversely, lack of sovereignty is not considered a bar to the attribution of international responsibility. Rather, responsibility is ascribed by virtue of jurisdictional competence, i.e., the competence to make and apply law and effective control over territory.\(^{140}\)

As an entity with the similar rights and obligations of a sovereign state, Hong Kong may satisfy the Montevideo Convention's definition of statehood. The Montevideo Convention set out four criteria for statehood, which are, "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."\(^{141}\) The HKSAR clearly has a permanent population and defined territory. In addition, its government and capacity to enter into relations with other states are provided for in the Joint Declaration.

There is an indication that the federal courts are likely to use the Montevideo criteria to define statehood. For example, in *Klinghoffer v. Achille Lauro*,\(^ {142}\) the Court of Appeals adopted the Montevideo Convention criteria of statehood to reject the Palestinian Liberation Organization's argument that it was a sovereign state immune from suit:

> This court has limited the definition of "state" to entities that have a defined territory and permanent population, [that are] under the control of [their] own governments, and that engage in, or ha[ve] the capacity to engage in formal relations with other such entities.\(^ {143}\)

At that time the PLO had no defined territory. Without a defined territory the PLO was unable to demonstrate that the State of Palestine was under the control of its own government. This case indicates that the Montevideo Convention definition is likely to be used to determine statehood under U.S. law.

A court may find the HKSAR to be a non-state entity but with valid powers to enter the extradition treaty nonetheless. For example, the PLO has concluded the Gaza-Jericho Agreement which provides the PLO with a certain degree of autonomy. The court could also compare Hong Kong

(Spring 1992).

---

140. *Id.* at 168
142. 937 F.2d 44 (2d Cir. 1991).
143. *Id.* at 47.
with past entities such as Danzig which, as an international city with some
Polish control, entered into many international agreements. The PLO
and Danzig provide some possible analogies that would allow a court to
uphold Hong Kong's powers to enter into treaties.

Hong Kong's historical, political and economic position in the inter-
national community also provide support for its legal authority to enter
into treaties. As the third largest banking center, the world's eleventh
largest trading entity, and the world's busiest container port, Hong Kong
can claim that it has existed as a "semi-autonomous political entity for
approximately 150 years." A court can use Hong Kong's historical posi-
tion in the international community and China's degree of adherence to the
Joint Declaration and the Basic Law as gauges of the HKSAR's ability to
continue to act as a political entity capable of maintaining an international
treaties.

The court can also effectively defer to findings made by the Executive
and Legislative Branches. Extradition cases might serve as triggering
devices by which the State Department is forced to voice its reasons for
affirming the HKSAR's ability to maintain its extradition treaty commit-
ments. In addition, an extradition judge would give weight to The United
States - Hong Kong Policy Act of 1992 (Hong Kong Policy Act) which
affirms the Joint Declaration and the U.S. foreign policy position toward the
status of Hong Kong. The Hong Kong Policy Act states that U.S. policy
is to maintain Hong Kong's status as an "international financial center,
[to] actively seek to establish and expand bilateral ties and agreements
with Hong Kong in economic, trade, financial, monetary, aviation, shipping . . .
and other appropriate areas." Although extradition treaties are
not specifically mentioned in the Hong Kong Policy Act, the terms 'and
other appropriate areas' can reasonably be construed to include extradition
treaties. The fact that the U.S. has signed an extradition treaty with Hong
Kong supports this interpretation.

By enacting the Hong Kong Policy Act, Congress built a framework
for the interpretation of United States treaties with the HKSAR after 1997
by implicitly recognizing Hong Kong's international character. A court is
thus likely to at least pay partial deference to the Hong Kong Policy Act in

144. See Daniel Berman, "But the Alternative is Despair:" European Nationalism and the Mod-
145. Mushkat, supra note 139, at 111.
146. See Factor v. Laubenheimer, 290 U.S. 276 (1933); National City Bank v. Rep. of China,
149. Hong Kong Security Branch officials are now negotiating with at least 12 other nations in-
cluding the Germany, Italy, Singapore and New Zealand; Darren Goodsir, Interpol Takes
determining the integrity of the HKSAR as a separate and independent jurisdiction.

2. Political Offenses

Because the PRC routinely prosecutes people for political crimes, some suspects may argue that they are going to be subject to persecution based on their political or religious beliefs. The U.S.-HKSAR treaty contains a provision that allows the requested party to refuse extradition in these cases.\(^\text{150}\)

To consider the political offense exception, a court must make a narrow inquiry focusing on the offense charged rather than a broad inquiry into possible human rights violations in the requesting country. For a suspect to invoke the exception, she will have to show: (1) that the request is in fact being made for political reasons; (2) that the offense charged was committed incident to an uprising; or (3) that political persecution awaits the suspect on the Mainland because the possibility of resurrender from the HKSAR to the Mainland is very high.

If, after 1997, there are demonstrations in Hong Kong and the PRC government responds in the same way it responded to the student demonstrations in Tiananmen Square in 1989, offenses committed in response to Mainland oppression might qualify for the political offenses doctrine. Suspects may also argue that the HKSAR is requesting their extradition as a pretense to punish the suspect for political activities such as speaking out against the government or engaging in “counter-revolutionary” activities. However, that determination must be made by the Executive Branch.\(^\text{151}\)

---

\(^{150}\) Extradition Treaty, art. 6:

1. A fugitive offender shall not be surrendered if the offense of which that person is accused or was convicted is an offense of a political character.

2. For the purposes of this Article, the following offenses shall not be considered to be offenses of a political character:

   a. Murder or other willful crime against the person of the Head of State of the United States, or, in the case of Hong Kong, the Head of State whose government is responsible for its foreign affairs, or in either case of a member of the Head of State’s immediate family;

   b. An offense for which both Parties have an obligation pursuant to a multilateral international agreement to surrender the person sought or to submit the case to their competent authorities for decision as to prosecution;

   c. A conspiracy or attempt to commit any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses.

3. Notwithstanding the terms of paragraph (2) of this Article, surrender shall not be granted if the competent authority of the requested Party, which for the United States shall be the executive authority, determines:

   a. That the request was politically motivated;

   b. That the request for surrender, though purporting to be made on account of an offense for which surrender may be granted, was in fact made for the primary purpose of prosecuting or punishing the person sought on account of his race, religion, nationality or political opinion; or

   c. That the person sought is likely to be denied a fair trial or punished on account of his race, religion, nationality, or political opinions.

Suspects may also combine their arguments that the political offenses clause of a U.S.-HKSAR extradition treaty will be violated with the argument that the resurrender provisions will be violated as well, that they would be returned to Mainland.

3. **Death Penalty Offenses**

A court may also block the extradition of a suspect if the HKSAR refuses to guarantee that she would not be executed. The U.S.-HKSAR extradition treaty contains a provision that allows the requested party to block the extradition in certain death penalty cases. Given that the PRC routinely executes prisoners for what American law considers minor offenses, it seems likely that the provision may be invoked by many fugitives in U.S. courts. The provision is as follows:

1. When the offense for which surrender is sought is punishable by death under the laws of the requesting Party and is not punishable by death under the laws of the requested Party, the requested Party may refuse surrender unless the requesting Party provides assurances that the death penalty will not be imposed or, if imposed, will not be carried out.
2. In instances in which a requesting Party has provided an assurance that the death penalty will not be carried out, the death penalty, if imposed by the courts of the requesting Party, shall not be carried out.

Under this provision, if an offense listed in the extradition treaty is punishable by death in both the U.S. and the HKSAR, the extradition can proceed. However, if the offense is not punishable by death in the requested state and is punishable by death in the requesting state, then the requested state can refuse to extradite the suspect if there are no guarantees that she would not be executed. The key words "may be refused" imply that the decision is up to the discretion of the requested state and that the provision does not automatically block extradition for death penalty offenses.

Hong Kong currently does not have the death penalty, so that this issue is not likely to arise in extradition from the U.S. to the HKSAR.

---


153. Extradition Treaty, art. 4.

However, even given this, a suspect may argue that they do in fact face the death penalty because the potential for her resurrender to the Mainland is so great. Furthermore, there is also the possibility that the HKSAR government may adopt the death penalty after 1997. If this happens, courts would have to make additional inquiries into whether the offenses in question would lead to the death penalty.

B. Executive Responsibilities In The Extradition Process

In addition to the possible appeals that she might make to the Judicial Branch as outlined above, a suspect wishing to prevent her extradition from the U.S. to the HKSAR could make the following arguments to the Executive Branch: (1) the HKSAR is no longer a separate and independent jurisdiction and is therefore no longer a party to the treaty or (2) the HKSAR criminal justice system has deteriorated and become integrated with the PRC criminal justice system. Under the Extradition Act, the Secretary of State has complete discretion in deciding whether to extradite a suspect who has been certified for extradition. It is the responsibility of the Secretary of State to decide whether conditions in foreign jails, due process concerns, human rights issues, or other political problems warrant blocking the extradition of a fugitive certified for extradition.

1. Extradition Treaty Invalid Because the HKSAR No Longer Exists as a Party to the Extradition Treaty

After Hong Kong’s reversion to Chinese rule, suspects may argue that the U.S.-HKSAR treaty, even if ratified, is invalid because the HKSAR no longer exists as a separate and independent jurisdiction, that it has been absorbed into the jurisdiction of the PRC and therefore can not continue to be a party to a U.S.-HKSAR extradition treaty. Under U.S. law, the determination of whether an entity is legally entitled to enter into a treaty with the U.S. is reserved for the Executive Branch and Senate under the U.S. Constitution as a political question. There are several factors that go into the determination of what constitutes a political question:

---

155. And, if there is a high likelihood that she would be resurrendered, then the resurrender and specialty clauses, in addition to the death penalty clause, are violated.

156. See Andrew Scobell, Strung up or shot down?: The Death Penalty in Hong Kong and China and Implications for Post-1997, 20 CASE W. RES. J. INT’L L. 147 (Winter 1988).

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the pressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made.\textsuperscript{158}

The central case involving political question doctrine and the treaty making power under the U.S. Constitution is \textit{Goldwater v. Carter}.\textsuperscript{159} In \textit{Goldwater}, the Court held that the question of whether the President's action in terminating a mutual defense treaty with Taiwan deprived Congress "of its constitutional role with respect to a change in the supreme law of the land."\textsuperscript{160} The Court refused to get involved in a dispute between the President and Congress. \textit{Goldwater} demonstrates the reluctance of U.S. courts to involve themselves in a foreign policy decision concerning the termination of a U.S. treaty.

If a suspect were to argue that the HKSAR was no longer a valid party to an extradition treaty, the courts would be extremely reluctant to override a determination by the State Department to the contrary. However, U.S. courts could wind up being the triggering mechanism whereby the State Department is forced to articulate its policy toward the HKSAR. Considering it a political question, U.S. courts would defer to the Executive Branch's position about the HKSAR's ability to maintain its extradition treaty responsibilities. Therefore, the argument that the HKSAR is no longer a party to a U.S.-HKSAR extradition treaty would ultimately have to be presented to the Executive Branch.

2. \textit{Decline in HKSAR Standards of Justice}

One possible impact of PRC government interference with the HKSAR is a decline in the standard of justice. A suspect may argue that the decline would cause her not to receive a fair trial. However, unless the standards of justice decline so much as to approach those of the Mainland, it is unlikely that these arguments alone will cause a court to block extradition from the U.S. to the HKSAR. The federal courts have thus far refused to consider human rights conditions and the standards of due process accorded suspects in the requesting country, leaving that determination to the Executive Branch. This limitation on the scope of judicial review is known as the rule of non-inquiry. The rule of non-inquiry has been justi-

\textsuperscript{159} 444 U.S. 996 (1979).
\textsuperscript{160} \textit{Id.} at 997-8.
ried on four general grounds. First, judicial inquiry into conditions in other countries force U.S. courts to involve themselves into U.S. foreign affairs, contrary to the political question doctrine announced in *Marbury v. Madison*. Second, courts lack the administrative resources to investigate claims of human rights abuses in other states. Third, courts are reluctant to pass judgment on foreign justice systems out of a respect for the principles of comity underlying most international treaties. Finally, judicial inquiry into conditions overseas prevents criminals from being brought to justice contrary to the intentions of both states as provided for in an extradition treaty.

Two recent cases have reaffirmed the rule of non-inquiry under U.S. extradition law. In *Ahmad v. Wigen*, Israel sought extradition of a Palestinian suspected of bombing a bus. The court held that Ahmad failed to carry his burden of showing that he would face unfair treatment in Israel. The Second Circuit affirmed this decision sharply criticizing the underlying procedures:

A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge .... Indeed, there is substantial authority for the proposition that this is not a proper matter for consideration by the certifying judicial officer.

The also court noted that:

So far as we know, the Secretary [of State] never has directed extradition in the face of proof that the extraditee would be subjected to procedures or punishment antipathetic to a federal court’s sense of decency. Indeed, it is difficult to conceive of a situation in which a Secretary of State would do so.

In *Gill v. Imundi*, fugitive Sikhs accused of murder in India sought a writ of habeas corpus in the United States to block their extradition claiming that they would face biased legal proceedings, torture, and even death if extradited to India. In spite of a “substantial, chilling proffer from sources with at least surface credibility [that] had convinced this court of the justification for further judicial inquiry,” the court considered

162. 5 U.S. (1 Cranch) 1307 (1803).
163. These two cases are discussed in more detail in Shea, *supra* note 154, at 119-125.
166. Ahmad, 910 F.2d at 1066 (citation omitted).
167. Id. at 1067.
168. 747 F. Supp 1028 (S.D.N.Y. 1990)
itself restricted from considering these arguments based on the Second Circuit's ruling in Ahmad.\textsuperscript{169}

Both Ahmad and Gill demonstrate that a suspect being extradited from the U.S. to the HKSAR will have to present their human rights and due process concerns to the Executive Branch. Of course, if the criminal justice system in the HKSAR deteriorated to a point where international fugitives were being sent back to Mainland China or being subject to the death penalty, U.S. courts would have jurisdiction to determine whether the resurrender or death penalty provisions of a U.S.-HKSAR extradition treaty were being violated.

CONCLUSION

This paper provides a framework for considering how PRC government interference with the HKSAR government may cause the U.S. Judiciary to block extradition from the U.S. to the HKSAR. If the PRC government radically interferes with the HKSAR, then the Executive Branch will block extradition from the U.S. to the HKSAR and the Judiciary will not have to confront the issue of whether to certify a suspect for extradition. However, if Mainland government interference with the HKSAR slowly increases after 1997, the pressure on the U.S. Judiciary to block extradition from the U.S. to the HKSAR will increase as well. Of course, if the U.S. fails to enact a new extradition treaty with the HKSAR, no extradition between the U.S. and the HKSAR may be possible.

Under current U.S. extradition law, the Judiciary is limited to nonpolitical grounds for blocking extradition. The Judiciary will not make political determinations about the status of the HKSAR as a entity party to a U.S. extradition treaty. Assuming a \textit{prima facie} case has been shown and the crime is covered under the extradition treaty, magistrates and judges will have to find actual violations of treaty provisions in order to block extradition. A fugitive, being extradited from the U.S. to the HKSAR, may be able to demonstrate that provisions regarding political offenses, the death penalty, and resurrender are going to be violated upon her extradition back to the HKSAR based on prior violations in past cases. Although I have not been able to find any cases where the Judiciary has refused to certify a suspect for extradition against the wishes of the Executive Branch, the political volatility surrounding the PRC human rights debate, the PRC criminal justice system and Hong Kong's right to limited self-determination may push a magistrate or judge to refuse to defer to the Executive Branch wishes.

Even if the U.S. State Department decides that PRC's dismissal of LEGCO is not an impediment to extradition from the U.S. to the HKSAR, it is still conceivable that a U.S. court might refuse to certify a suspect for

\textsuperscript{169} Id.
extradition. However, under the Extradition Act, the State Department is free to take the suspect to another magistrate or judge until it gets the results it desires. The ability of the Executive Branch to make repeated attempts to certify suspects for extradition before different judges or magistrates makes it highly unlikely that extradition will not take place if the State Department is intent on sending a suspect back to the HKSAR.\textsuperscript{170}

Even if evidence about Mainland interference with the HKSAR is not enough to convince a magistrate or judge to block the extradition from the U.S. to the HKSAR, extradition cases may serve as triggering mechanisms forcing the U.S. Executive Branch to voice policy grounds for continuing or discontinuing extradition relations with the HKSAR at a time when it would not otherwise do so. If *Lobue v. Christopher*\textsuperscript{171} is upheld, extradition cases may force the Executive Branch to voice its political position about the HKSAR as a separate and independent entity at a time when it would prefer to use legal grounds to block extradition and avoid political tension. This could lead to political tension between the U.S. and the PRC if the Executive Branch blocks extradition, or alternatively, political tension in the U.S. if extradition is upheld in the face of Mainland interference with the HKSAR.

In order for extradition to continue after 1997, the HKSAR government will need to ensure that the basic rights of criminal defendants are respected and that fugitives will not be resurrendered to the Mainland after being extradited back to the HKSAR. Whether they are able to do this is depends to a large extent on the political climate in Beijing. The willingness of the U.S. to extradite fugitives to the HKSAR after 1997 will very much depend on the integrity of the HKSAR as a separate and independent jurisdiction.

\textsuperscript{170} Of course, if *Lobue v. Christopher*, 893 F. Supp. 65, 68 (D.D.C. 1995), vacated and remanded on other grounds, 82 F.3d 1081 (D.C. Cir. 1996), is followed on the grounds that judges would be merely issuing advisory opinions, the ability of the State Department to make repeated attempts at certification could be curtailed.

\textsuperscript{171} Lobue, 893 F.Supp. at 65.
APPENDIX A:
AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF HONG KONG FOR THE SURRENDER OF FUGITIVE OFFENDERS

Table of Contents
Preamble
Article 1 Obligation to Surrender
Article 2 Description of Offenses
Article 3 Surrender of Nationals
Article 4 Capital Punishment
Article 5 Prior Proceedings
Article 6 Political Offenses
Article 7 Humanitarian Considerations
Article 8 Required Documents
Article 9 Admissibility and Authentication
Article 10 Provisional Arrest
Article 11 Concurrent Requests
Article 12 Representation and Expenses
Article 13 Standard of Proof
Article 14 Terms of Surrender
Article 15 Transfer of Property
Article 16 Specialty
Article 17 Temporary and Deferred Surrender
Article 18 Surrender by Consent
Article 19 Transit
Article 20 Entry into Force, Termination and Application

---

The Government of the United States of America and the Government of Hong Kong, having been duly authorized to conclude this Agreement by the sovereign government which is responsible for its foreign affairs (hereinafter called "the Parties");

Desiring to make provision for effective cooperation in the suppression of crime and for the reciprocal surrender of fugitive offenders;

Have agreed as follows:

ARTICLE 1

Obligation to Surrender

The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the requested Party and who is wanted by the requesting Party for prosecution or for the imposition or enforcement of a sentence in respect of an offense described in Article 2.

ARTICLE 2

Description of Offenses

(1) Surrender of fugitive offenders shall be granted for an offense coming within any of the following descriptions of offenses in so far as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty:

(i) Murder, manslaughter, assault with intent to commit murder;
(ii) Aiding, abetting, counseling or procuring suicide;
(iii) Maliciously wounding; maiming; inflicting grievous bodily harm; assault occasioning actual bodily harm;
(iv) Offenses of a sexual nature, including rape, sexual assault, indecent assault, unlawful sexual acts upon children or persons with mental disabilities;
(v) Kidnapping; abduction; false imprisonment; dealing or trafficking in slaves or other persons; taking a hostage;
(vi) Criminal intimidation; blackmail; extortion;
(vii) Offenses against the laws relating to drugs, including narcotics and psychotropic substances and precursors and essential chemicals used in the illegal manufacture of narcotic drugs and psychotropic substances, and offenses relating to the proceeds of drug trafficking;
(viii) Offenses relating to possession or laundering of proceeds obtained from the commission of any offense for which surrender may be granted under this Agreement;
(ix) Criminal exploitation of children, whether for sexual or other purposes (including commercial dealing in child pornography);
(x) Obtaining property or pecuniary advantage by deception; theft; robbery; burglary, housebreaking, or similar offenses; unlawful handling or receiving of property; false accounting; embezzlement; any other offense in respect of property involving fraud;
(xi) Offenses involving the unlawful use of computers;
(xii) Offenses against bankruptcy laws;
(xiii) Offenses against the laws relating to corporations or companies, including offenses committed by officers, directors and promoters;
(xiv) Offenses relating to securities and futures trading;
(xv) Any offense relating to counterfeiting; any offense against the laws relating to forgery or uttering what is forged;
(xvi) Any offense against the law relating to bribery of persons, including public officials, as well as unlawful payments connected with public contracting or other expenditures of public funds;
(xvii) Perjury and subornation of perjury; false statements; attempting to pervert or obstruct the course of justice;
(xviii) Criminal damage, including arson;
(xix) Any offense against the law relating to firearms, weapons, or explosives;
(xx) An offense relating to the protection of public health or the environment;
(xxi) An offense against the laws relating to protection of intellectual property, copyrights, patents, or trademarks;
(xxii) Offenses relating to fiscal matters, taxes or duties, notwithstanding that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, or customs regulation of the same kind as the law of the requesting Party;
(xxiii) An offense against the laws relating to the control of exportation or importation of goods of any type, or the international transfer of funds;
(xxiv) Smuggling; offenses against laws relating to the import or export of prohibited items, including historical and archaeological as well as other items;
(xxv) Immigration offenses including fraudulent acquisition or use of a passport or visa;
(xxvi) Arranging, for financial gain, the illegal entry of persons into the jurisdiction of the requesting Party;
(xxvii) An offense relating to gambling or lotteries;
(xxviii) Mutiny or other mutinous acts committed on board a vessel at sea;
(xxix) Piracy;
(xxx) Unlawful use, destruction, possession, control, seizure or hijacking of aircraft, vessels or other means of transportation;
(xxxi) Genocide or direct and public incitement to commit genocide;
(xxxii) Offenses under multilateral international conventions, binding on the Parties, for which fugitive offenders may be surrendered;
(xxxiii) Impeding the arrest, detection or prosecution of a person who has or is believed to have committed an offense for which surrender may
be granted under this Agreement;

(xxxiv) Offenses related to unlawful escape from custody, or flight to avoid prosecution;

(xxxv) Aiding, abetting, counseling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting or conspiring to commit any offense for which surrender may be granted under this Agreement;

(xxxvi) Any other offense which is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year, or by a more severe penalty, unless surrender for such offense is prohibited by the laws of the requested Party.

(2) Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence, a further requirement shall be that, in the case of a period of imprisonment or detention, at least six months remain to be served.

(3) For the purpose of this Article, in determining whether an offense is an offense against the law of the requested Party, the conduct of the person shall be examined by reference to the totality of the acts or omissions alleged against the person without reference to the elements of the offense prescribed by the law of the requesting Party.

(4) An offense shall fall within the description of the offenses in this Article:

(a) whether or not the laws of the Parties place the offense within the same category of offenses or describe the offense by the same terminology; or

(b) whether or not the offense is one for which United States federal law requiring the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.

(5) For the avoidance of doubt, an offense under military law, which is not an offense under ordinary criminal law, shall be considered to be an offense for the purposes of paragraph (1) of this article.

ARTICLE 3
Surrender of Nationals

(1) Except as provided in paragraphs (2) and (3) of this Article, surrender shall not be refused on grounds relating to the nationality of the person sought.

(2) The executive authority of the Government of the United States of America reserves the right to refuse the surrender of nationals of the United States of America in cases in which the requested surrender relates to the defense, foreign affairs or essential public interest or policy of the United States of America.

(3) The executive authority of the Government of Hong Kong reserves
the right to surrender the nationals of the State whose government is responsible for the foreign affairs relating to Hong Kong in cases which:

(a) The requested surrender relates to the defense, foreign affairs or essential public interest or policy of the States whose government is responsible for the foreign affairs relating to Hong Kong, or

(b) The person sought neither has the right of abode in Hong Kong nor has entered Hong Kong for the purpose of settlement, and the State whose government is responsible for the foreign affairs relating to Hong Kong has jurisdiction over the offense relating to the requested surrender and has commenced or completed proceeding for the prosecution of that person.

(4) In cases in which the person sought by the United States of America neither has the right of abode in Hong Kong nor has entered Hong Kong for the purpose of settlement and the State whose government is responsible for the foreign affairs relating to Hong Kong has jurisdiction over the offense and is investigating the offense, action on the request may be deferred until such time as the investigation has been expeditiously concluded.

(5) Where the right to refuse surrender is exercised in accordance with paragraph (2) or paragraph (3)(a) of this Article, the requesting Party may request that the case be submitted to the competent authorities of the requested Party in order that proceedings for prosecution may be considered.

ARTICLE 4
Capital Punishment
(1) When the offense for which surrender is sought is punishable by death under the laws of the requesting Party and is not punishable by death under the laws of the requested Party, the requested Party may refuse surrender unless the requesting Party provides assurances that the death penalty will not be imposed or, if imposed, will not be carried out.

(2) In instances in which a requesting Party has provided an assurance that the death penalty will not be carried out, the death penalty, if imposed by the courts of the requesting Party, shall not be carried out.

ARTICLE 5
Prior Proceedings
(1) Surrender shall not be granted when the person sought has been convicted or acquitted in the requested Party for the offense for which surrender is requested.

(2) Surrender shall not be precluded by the fact that the authorities in the requested Party have decided not to prosecute the person sought for the acts for which surrender is requested or to discontinue any criminal proceedings which have been instituted against the person sought for those acts.

ARTICLE 6
Political Offenses
(1) A fugitive offender shall not be surrendered if the offense of which
that person is accused or was convicted is an offense of a political character.

(2) For the purposes of this Article, the following offenses shall not be considered to be offenses of a political character:

(a) murder or other willful crime against the person of the Head of State of the United States, or, in the case of Hong Kong, the Head of State whose government is responsible for its foreign affairs, or in either case of a member of the Head of State’s immediate family;

(b) an offense for which both Parties have an obligation pursuant to a multilateral international agreement to surrender the person sought or to submit the case to their competent authorities for decision as to prosecution;

(c) a conspiracy or attempt to commit any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses.

(3) Notwithstanding the terms of paragraph (2) of this Article, surrender shall not be granted if the competent authority of the requested Party, which for the United States shall be the executive authority, determines:

(a) that the request was politically motivated;

(b) that the request for surrender, though purporting to be made on account of an offense for which surrender may be granted, was in fact made for the primary purpose of prosecuting or punishing the person sought on account of his race, religion, nationality or political opinion; or

(c) that the person sought is likely to be denied a fair trial or punished on account of his race, religion, nationality, or political opinions.

ARTICLE 7
Humanitarian Considerations

The competent authority of the requested Party, which for the United States shall be the executive authority, may refuse the surrender of a fugitive when such surrender is likely to entail exceptionally serious consequences related to age or health.

ARTICLE 8
Required Documents

(1) Requested for the surrender of a fugitive offender shall be made in writing by and to the appropriate authorities of the Parties as may be notified between them from time to time.

(2) All requests shall be accompanied by:

(a) a description of the person sought, together with any other information which would help to establish his identity and nationality including, if known, his whereabouts;

(b) information describing the facts of the offense and the procedural history of the case; and

(c) a statement of the provisions of the law describing the offense for which surrender is requested and a statement of the punishment which can
be imposed therefor and a specification of any time limit which is imposed on the institution of proceedings.

(3) If the request relates to a person wanted for prosecution, it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the requesting Party and by such evidence as, according to the law of the requested Party, would justify his committal for trial if the offense had been committed within the jurisdiction of the requested Party.

(4) If the request relates to a person found guilty, convicted or sentenced, it shall also be accompanied by:

(a) a copy of any certificate or record in relation to the finding of guilt, the conviction or the sentence; and

(b) if the person was found guilty or convicted but not sentenced, a statement or record to that effect by the appropriate court and a copy of the warrant of arrest; or

(c) if the person was sentenced, a statement that the sentence is enforceable and indicating how much of the sentence has still to be served.

(5) All documents submitted by the requested Party in accordance with this Agreement shall be in or translated into an official language of the requested Party, or any other language agreed upon by the Parties.

ARTICLE 9

Admissibility and Authentication

Documents accompanying a request for surrender shall be received and admitted as evidence if:

(a) in the case of a request from the United States of America, they are:

(i) signed or certified by a state or federal judge, magistrate or official of the United States of America, and

(ii) sealed with the official seal of the competent authority of the United States of America;

(b) in the case of a request from Hong Kong, they are certified by the principal consular officer of the United States resident there; or

(c) they are certified or authenticated in any other manner accepted by the law of the requested Party.

ARTICLE 10

Provisional Arrest

(1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on the application of the requesting Party.

(2) The application shall contain a description of the person sought, information as to his whereabouts, an indication of intention to request his surrender, a statement of the existence and terms of a warrant of arrest or that the person has been found guilty, convicted or sentenced, a statement of the maximum punishment that can be imposed or the punishment that
has been imposed for the offense, and a statement of the acts or omissions (including time and place) alleged to constitute the offense.

(3) The requesting Party shall be notified without delay of the disposition of its application and the reasons for any refusal.

(4) An application for provisional arrest shall be in writing and shall be forwarded through the same channels as a request for surrender or through the International Criminal Police Organization (Interpol).

(5) The provisional arrest of the person sought shall be terminated upon the expiration of sixty days from the date of his arrest if the request for his surrender supported, as required, by the documents referred to in paragraphs (2) to (4) of Article 8 have not been received by the requested Party. This provision shall not prevent his re-arrest or surrender if the request for his surrender is received subsequently.

ARTICLE 11
Concurrent Requests

If the surrender of a fugitive offender is requested concurrently by one of the Parties and a State or States with which the United States of America or Hong Kong, whichever is being requested, has arrangements for the surrender of fugitive offenders, the executive authority of the requested Party shall make its decision having regard to all the circumstances, including the relevant provisions of such arrangements, the place of commission of the offenses, their relative seriousness, the respective dates of the requests, the nationality of the fugitive offender, the nationality of the victim, and the possibility of subsequent surrender to another jurisdiction.

ARTICLE 12
Representation and Expenses

(1) The requested Party shall at its own expense make the necessary arrangements for the requesting Party’s legal representation and assistance in any proceedings arising out of a request for the surrender of a fugitive offender. In the even that the requesting Party arranges its own additional legal representation and assistance, it shall bear any additional expenses incurred.

(2) The requesting Party shall bear the expenses related to the translation of documents and the international transportation of the person surrendered from the jurisdiction of the requested Party. The requested Party shall bear all other expenses incurred in its jurisdiction.

(3) Neither Party shall make any pecuniary claim against the other Party arising out of the arrest, detention, examination, or surrender of persons sought under this Agreement.

ARTICLE 13
Standard of Proof

A fugitive offender shall be surrendered only if the evidence be found sufficient according to the law of the requested Party either to justify the
committal for trial of the person sought if the offense of which he is ac-
cused had been committed in the territory of the requested Party or to es-
tablish that he is the person found guilty, convicted or sentenced by
the courts of the requesting Party.

ARTICLE 14
Terms of Surrender
(1) If a fugitive offender is to be surrendered, the person sought shall
be sent by the authorities of the requested Party to such convenient place
of departure within that Party's jurisdiction as agreed upon by the Parties.
(2) The requested Party shall promptly notify the requesting Party of
its decision on the request for surrender. If the request is denied in whole
or in part, the requested Party, to the extent permitted under its law, shall
provide an explanation of the reasons for the denial. The requested Party
shall provide copies of the pertinent judicial decisions upon request.
(3) Subject to the provisions of paragraph (4) of this Article, if the re-
questing Party does not take custody of the person claimed on the date
agreed by the two Parties, he may be released from custody, and the ex-
ecutive authority of the requested Party may subsequently refuse to sur-
render him for the same offense.
(4) If circumstances beyond its control prevent a Party from surren-
dering or taking over the person to be surrendered, it shall notify the other
Party. In such case, except to the extent inconsistent with the law of the
requested Party, the two Parties shall agree on a new date for surrender and
the provisions of paragraph (3) of this Article shall apply.

ARTICLE 15
Transfer of Property
When a person is surrendered pursuant to Article 1 or 18 of this
Agreement, the requested Party shall, so far as its law allows and subject to
such conditions as it may impose having regard to the rights of other
claimants, furnish the requesting Party with all sums of money and other
articles:
(a) which may serve as proof of the offenses to which the request re-
lates; or
(b) which may have been acquired by the person sought as a result of
the offense and are in his possession.

ARTICLE 16
Specialty
(1) A fugitive offender who has been surrendered shall not be pro-
ceeded against, sentenced or detained with a view to the carrying out of a
sentence for any offense committed prior to his surrender other than:
(a) the offense in respect of which his return is ordered;
(b) any lesser offense, however described, disclosed by the facts in re-
spect of which his return was ordered, provided such an offense is an of-
fense for which he can be returned under this Agreement
(c) any other offense for which surrender may be granted under this Agreement in respect of which the requested Party consents to his so being proceeded against, sentenced or detained. For the purpose of this subparagraph:

(i) the requested Party may require the submission of the documents called for in Article 8; and

(ii) the person surrendered may be detained by the requesting Party for up to ninety days while the request is being processed.

(2) A person surrendered under this Agreement may not be surrendered or transferred beyond the jurisdiction of the requesting Party for the offense for which his surrender was granted, or for an offense committed prior to his original surrender, unless the requested Party consents.

(3) Paragraphs (1) and (2) of this Article shall not prevent a person being proceeded against, sentenced or detained, or surrendered to another jurisdiction, if he has had an opportunity to leave the jurisdiction of the Party to which he has been surrendered and has not done so within thirty days or has voluntarily to that jurisdiction having left it.

ARTICLE 17
Temporary and Deferred Surrender

(1) If a request for surrender is made in respect of a person who is serving a sentence in accordance with the laws of the requested Party, that Party may temporarily surrender such person to the requesting Party for the purpose of prosecution.

(2) If a request for surrender is made in respect of a person who is being proceeded against by the requested Party, the requested Party:

(a) shall proceed with the proceedings for surrender after the prosecution against such person has been concluded and he is acquitted; or

(b) may, if such person is convicted and sentenced to imprisonment, proceed with the proceedings for surrender and, upon his committal, temporarily surrender that person to the requesting Party for the purpose of prosecution.

(3) Where a person is temporarily surrendered, he shall be kept in custody by the requesting Party and be returned to the requested Party after the conclusion of the proceedings against him, in accordance with conditions to be determined by agreement of the Parties.

ARTICLE 18
Surrender by Consent

(1) If the person sought consents to surrender to the requesting Party, the requested Party may surrender the person as expeditiously as possible without further proceedings.

(2) To the extent required under the law of the requested Party, the provisions of Article 16 shall apply to a person surrendered pursuant to this article.
ARTICLE 19

Transit

(1) Either Party may authorize transportation through its jurisdiction of a person surrendered to the other Party by a third State. A request for transit shall be made in writing and shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit may be detained in custody during the period of transit.

(2) No authorization is required where air transportation is used and no landing is scheduled in the jurisdiction of the Party. If an unscheduled landing occurs in the jurisdiction of the other Party, the other Party may require the request for transit as provided in paragraph (1). That Party shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within ninety-six hours of the unscheduled landing.

ARTICLE 20

Entry into Force, Termination and Application

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

(2) Either Party may terminate the Agreement at any time by giving notice to the other in writing. In that event, the Agreement shall cease to have effect six months after the receipt of the notice.

(3) This Agreement shall apply to requests for surrender made after its entry into force. It shall also apply to requests for surrender pending at the date of its entry into force. Articles 4 and 16 of this Agreement shall apply to fugitive offenders who have been surrendered between the Parties prior to the entry into force of this Agreement.

(4) This Agreement shall apply to offenses committed before as well as after it enters into force provided that, at the time of making the request, the offense is an offense under the laws of both Parties.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective governments, have signed this Agreement.

DONE at Hong Kong, in duplicate, this twentieth day of December one thousand nine hundred and ninety six in the English and Chinese languages, both texts being equally authentic.

(Signature) 
FOR THE GOVERNMENT
OF THE UNITED STATES
OF AMERICA:

(Signature) 
FOR THE GOVERNMENT
OF HONG KONG: